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Committee Secretary
Parliamentary Joint Committee on Human Rights

By electronic submission

Economic Justice Australia: Submission to the Inquiry into Australia's Human Rights Framework

Introduction

1. Economic Justice Australia (EJA) welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Human Rights' (PJCHR) inquiry into Australia's Human Rights Framework.
2. EJA is the peak organisation for community legal centres that provide specialist advice to people on their social security issues and rights. Our members across Australia have provided people with free and independent information, advice, education and representation in the area of social security for over 30 years.
3. EJA also provides expert advice to government on social security reform to make it more effective and accessible. Our law and policy reform work:
 - Strengthens the effectiveness and integrity of our social security system;
 - Educates the community; and
 - Improves people's lives by reducing poverty and inequality.
4. Our submission primarily focuses on the inadequacies of Australia's current human rights framework, and makes the case for a federal Human Rights Act (HRA). In our submission we:
 - provide examples of current failures to realise human rights in the social security context;
 - outline the need for specific human rights protections relevant to the social security system – including the right to social security and other social, cultural and economic rights; and
 - recommend that a federal HRA be adopted based on the Australian Human Rights Commission's (AHRC) proposed model, ideally in the context of an updated, overarching, national Human Rights Framework.

Executive Summary

5. In the absence of comprehensive legal protections of human rights, there is a significant gap at the heart of Australia's legal and political framework. This can lead to:

- A lack of due consideration of human rights implications by Government and public servants when making laws, policy and administrative decisions, which leads to preventable rights breaches.
 - Vulnerable and disadvantaged people and groups falling through the cracks.
 - A lack of safeguards and domestic remedies for individuals when human rights breaches occur.
 - Insufficient realisation of democratic and rule of law principles, including transparency, accountability and participation, in law, policy and decision-making processes.
6. An HRA would create a legislative duty binding Government and public servants to act compatibly with the human rights expressed in the HRA, and to give proper consideration to human rights when making decisions. This would prevent human rights breaches from occurring in the first place, due to an emphasis on early consideration of rights in decision-making. It would also ensure that when breaches do occur, access to complaints and judicial pathways, and remedies, are available to individuals.
7. The social security context, an area of federal responsibility, highlights the need for an HRA – one that encompasses protections for economic, cultural and social rights, inclusive of the right to social security. A number of systemic human rights issues have arisen in the social security context. Case studies include:
- Robodebt – an unlawful program that resulted in significant human and financial cost;
 - Compulsory income management – which implicates rights to non-discrimination, self-determination, social security and private life – and lacks a sufficient evidence base.
 - The newly arrived residents waiting period – an arbitrary restriction on access to social security that impacts upon vulnerable new migrants.
 - Arbitrary payment suspensions for non-compliance with ‘mutual obligations’ (for activity-tested payments) that do not meet procedural fairness standards.
 - The ParentsNext program that until recently placed onerous and punitive obligations on the primary carers of young children as a condition on access to social security;
 - Payment rates that fall short of meeting the right to an adequate standard of living, as illustrated by COVID-19 payment wind-backs;
 - Access and eligibility complexities and restrictions for vulnerable groups – particularly with respect to the Disability Support Pension.
8. The right to social security is expressed in Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). It is also reflected in other core treaties, and intersects with other economic, social and cultural rights, as well as civil and political rights. The scope of the right encompasses minimum core standards, including access to schemes that provide enough to ensure basic living standards, non-discriminatory application, and procedural fairness in social security decision-making. It also encompasses progressive realisation measures that realise the right over time, and proscribes against retrogressive backwards steps.
9. An HRA would enable a rights-based approach to social security law, policy development and administration, with social security recipients treated as rights-holders having certain legal

entitlements. It would preclude discriminatory programs and arbitrary eligibility exclusions; ensure accessibility measures are built into the system; provide for procedurally fair, transparent and accountable decisions; enable decisions that do not meet human rights standards to be challenged and redressed; require justification for any limitations on the right – including steps to reduce access or payment rates; and set the foundations for monitoring and accountability measures to assess progressive realisation over time.

10. A federal HRA should be implemented based on the AHRC’s model. Any national human rights framework or action plan should centre an HRA, with complementary legislative and policy measures. The HRA should include the right to social security as well as other ICESCR rights, with a direct cause of action.

Recommendations:

1. **That the Federal Government legislate a federal Human Rights Act. The Human Rights Act should be based on the Australian Human Rights Commission’s model, and include the elements outlined in its Human Rights Act Position Paper.**
2. **That all ICESCR rights be implemented through the Human Rights Act, including the right to social security. The formulation of the right to social security should reflect its articulation in international law. There should be a direct cause of action, that *at least* encompasses the minimum core elements of the right, alongside measures to ensure progressive realisation of the right, including through ongoing monitoring and reporting against set human rights indicators.**
3. **That the Australian Human Rights Commission’s broader recommendations for a national Human Rights Framework be endorsed by the Committee and implemented by Government.**

Need for a Human Rights Act in Australia

Need for legal human rights protections

11. Australia is a robust democracy that generally respects human rights. However, in the absence of comprehensive legal protections of human rights, there is a significant gap at the heart of our legal and political framework.
12. Currently, there is no requirement for executive decision-makers to take into account human rights, such as the right to social security, non-discrimination and the right to private life, when making overarching policies, and administrative decisions that affect individuals. This is an essential safeguard that is missing from our system.
13. In the absence of such an obligation, the human rights implications of policies and decisions are often missed or ignored. Individuals who are then subject to decisions that breach their rights have no recourse to challenge them. This is a significant injustice, that falls short of the right to remedy and access to justice standards that are a given in comparable democracies.
14. At worst, this gap can result in systemic human rights violations, affecting large cohorts of people, that are only exposed years later, after much suffering has already been inflicted. Royal

Commissions have uncovered the consequences of people not having their human rights respected, and not being able to take effective action when they are violated, in areas of federal responsibility – such as the Robodebt Royal Commission (discussed further below).

15. An HRA would create a legislative duty binding Government and public servants to both act compatibly with the human rights expressed in the HRA, and to give proper consideration to human rights when making decisions. This would prevent human rights breaches from occurring in the first place, as Government and public servants would be legally required to consider human rights at an early stage in the policy development process. Experience from the ACT, Victoria, Queensland and the UK shows that the biggest impact of their human rights acts is in the ‘upstream’ effect on law/policy development processes as well as in service delivery (rather than through court actions).¹
16. In cases where human rights breaches do occur, on the basis of the legal duty on Government in the HRA, individuals would have access to domestic legal pathways to make complaints, seek review through courts on human rights grounds, and obtain remedies.

Vulnerable and disadvantaged people bear the brunt of the lack of human rights protections

17. Historically and presently, those who suffer the most significant human rights breaches in Australia are vulnerable, disadvantaged and marginalised people. EJA’s membership works with vulnerable cohorts that make up social security recipients and people in need of social security support, including people who are homeless, people with disability, older people, First Nations people from remote communities, refugees and new migrants, and victim-survivors of family violence. Our members see the barriers faced by these cohorts to accessing Government services, and the ease with which individuals can fall through the cracks in our laws and administrative systems when there are insufficient safeguards protecting human rights.
18. Vulnerable and disadvantaged people interact more frequently with Government services than the general population and are routinely the subject of administrative decisions that directly affect their lives. For example, a person in poverty may deal regularly with:
 - Centrelink
 - Employment services providers
 - Medicare and NDIS providers
 - Care homes.
19. As a result, they are more likely to encounter Government decisions in their daily lives and directly experience injustices, due to poorly considered and unfairly administered laws and policies. Such decisions can have life-changing implications for social security recipients, and other vulnerable cohorts. As articulated by the AHRC:

The impacts of these administrative decisions can be the difference between being housed and being homeless; being able to afford basic necessities and being destitute; being free

¹ See discussion in Australian Human Rights Commission, *Free & Equal: Human Rights Act Position Paper* (March 2023) 139.
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and being locked up; being provided with supports to engage in life and being shut away from society; living with family and being taken away from home.²

20. A federal HRA would benefit anyone who relies upon or deals with federal Government services or agencies by ensuring fairer decision-making that respects individual rights. This group includes *all* Australians; however, an HRA is especially crucial to protect vulnerable people who regularly encounter Government decision-making that directly impacts their human rights.

21. Vulnerable and disadvantaged people are also often not prioritised by Parliament in the law-making process or during Parliamentary debates. Parliamentarians can tend to be primarily concerned with the ‘mainstream’ voting public. As a result,

the rights of socially excluded members of the population, minority groups, or those excluded from participating in the electoral system (such as children and migrants), may not be properly considered by Parliament. Leaving human rights entirely to the domain of Parliament means that those who most need human rights protections may be overlooked – or even scapegoated – by parliamentarians and the general voting public.³

22. EJA and its members see the manner in which social security recipients are subjected to politicised rhetoric and demonisation, including by politicians who cynically exploit existing ignorance or prejudice within the community to achieve political gains. Legal protections are needed to ensure that the fundamental rights of vulnerable people are protected even when it is politically unpopular to do so. This is a key requirement within a liberal democracy – it is necessary to avoid the ‘tyranny of the majority’.

Need for accountability, transparency and participation measures

23. The lack of human rights protections also compromises principles of transparency, accountability, and limits participation in law-making and policy development processes. In the social security context, an HRA is needed to ensure that laws, policies and decisions that affect the rights of social security recipients are publicly justified and subject to scrutiny and debate. An HRA would require Parliamentarians and Ministers to rationally explain laws, policies and decisions that limit human rights, or that constitute a backwards step for human rights protections.⁴ Amongst other things, an HRA would require Parliamentary Statements of Compatibility to reference domestic law rather than solely international materials, which would provide stronger grounding for the human rights Parliamentary scrutiny process.

24. Decisions that directly affect the rights of certain population groups are often made without their participation (as the case studies below illustrate). A federal HRA would encourage consideration and consultation of vulnerable groups in the policy and law development stage, including in respect of social security, which would lead to better laws with stronger legitimacy and trust behind them. This would in turn lead to improved experiences of Government and public services for all people in Australia.

Consequences of a lack of human rights protections at the federal level: The social security context

² Australian Human Rights Commission, *Free & Equal: Human Rights Act Position Paper* (March 2023) 97.

³ Australian Human Rights Commission, *Free & Equal: Human Rights Act Position Paper* (March 2023) 96.

⁴ Australian Human Rights Commission, *Free & Equal: Human Rights Act Position Paper* (March 2023) 15.

25. Social security is a federal responsibility, that should come under the remit of a federal HRA. The right to social security should be protected along with all other rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR), and in the International Covenant on Civil and Political Rights (ICCPR). The right to social security is protected in article 9 of ICESCR (discussed further below), and is considered fundamental to the realisation of human dignity, and the fulfilment of interrelated rights—in particular the right to an adequate standard of living.
26. Australia has a functioning social security system, and access to social security is provided by law through the *Social Security Act 1991* (Cth), and related legislation. However, Australia’s social security system does not centre human rights. Policies, administrative decisions and services often fail to recognise and accommodate the vulnerability of many in the social security cohort and the particular needs and supports they require. The system as a whole has a disproportionate focus on punitive compliance measures, and complex eligibility hoops that lead to exclusion. Rather than being viewed as a necessary and permanent social good, social security is often seen as ripe for cost-cutting, both through reductions in services, and policies that make it onerous for people to access their legal entitlements. Social security recipients are often treated with suspicion by Government officials and politicians, purely for experiencing poverty and hardship, and being in need of support. Without sufficient human rights protections in place, this can lead to laws, policies and administrative practices that do not respect the human rights of social security recipients, resulting in avoidable harms to individuals and communities.
27. The following case-studies illustrate systemic human rights issues that arise within the social security context, and make the case for a federal HRA that includes the right to social security. They illustrate the need for a legal obligation for Government and public servants to consider the right to social security and related rights when making decisions, and to act compatibly with those rights; and the need for legal pathways to address human rights breaches affecting individuals.

Robodebt

28. The Robodebt scheme,⁵ implemented from 2017 to late 2019, resulted in thousands of welfare recipients being sent inaccurate Centrelink debt notices, following the introduction of a new online compliance intervention (OCI) system by the Department of Human Services.
29. The debt notices were subsequently found to be unlawful under the Social Security Act,⁶ and caused extreme stress for many vulnerable and disadvantaged recipients, some of whom subsequently committed suicide. It led to a class action resulting in a record \$1.8 billion settlement, as well as an ongoing Royal Commission.⁷
30. Evidence to the Royal Commission highlighted the profound disregard that particular senior public servants and Ministers had to toward the application of the rule of law, human rights

⁵ For further discussion of the legal and human rights issues with Robodebt, see Economic Justice Australia’s submission to the Robodebt Royal Commission: https://www.ejaustralia.org.au/wp-content/uploads/Economic-Justice-Australia-submission-_Robodebt-Royal-Commission_.pdf.

⁶ *Deanna Amato v the Commonwealth of Australia*, Federal Court of Australia, VID611/2019, 11 November 2019.

⁷ Luke Henriques-Gomes, ‘Robodebt: court approves \$1.8bn settlement for victims of government’s “shameful” failure’, *The Guardian* (Online) 11 June 2021 <<https://www.theguardian.com/australianews/2021/jun/11/robodebt-court-approves-18bn-settlement-for-victims-of-governments-shameful-failure>>.

standards, and the humanity of the vulnerable people affected. Despite mounting evidence of the inaccuracy of the system, and unfairness to Robodebt recipients, the scheme continued for several years. This significant policy failure has damaged the legitimacy of the social security system as a whole.

31. The Robodebt example shows that our current legal frameworks and ‘business as usual’ approaches to public administration are insufficient to prevent systemic human rights abuses – particularly where they impact upon a vulnerable population. The decision to implement the OCI was made purely based on budgetary factors that did not take into consideration the broader range of relevant concerns through a human rights lens.
32. Had a Human Rights Act been in place, the following factors could have mitigated or avoided the harms caused:
 - Government officials would have been *required* to consider human rights implications of the OCI system *before* implementing it. This analysis would have included consideration of:
 - Whether the OCI was lawful
 - Whether the OCI was likely to adversely impact the rights of social security recipients, in light of the potential for inaccuracies and procedural fairness concerns, including with respect to the use of technology to make administrative decisions.
 - Whether the OCI was likely to adversely impact vulnerable population groups, such as people with disability and mental health issues, First Nations people and non-English speakers.
 - Whether consultations with those affected and advocacy organisations should be undertaken in light of the potential for rights infringements. We note that the Commonwealth Ombudsman found that, among other factors, a lack of consultation was key to the resulting failure.⁸
 - The culture within the public service, influenced by obligations to respect human rights, would have been more proactive in addressing systemic issues that arose, and better trained to spot concerns through a human rights lens.
 - There would have been better support for individuals to seek review of decisions. We note that relatively few applications were made to the AAT given the scale of inaccurate debt notices.⁹
33. Consideration of human rights leads to better quality laws and policies that properly consider affected stakeholders, which has broader benefits for Government and the public. It is ironic that Robodebt ended up being much more costly for Government due to the lack of human rights consideration, despite it being designed as a cost-cutting tool. Proactive consideration and investment in human rights can prevent immense downstream financial costs.
34. EJA notes that the issues identified in respect of the Robodebt scheme are far from concluded. Our ongoing research has highlighted problems with the rapid automation of administrative decision-making and the digitisation of service provision in the social security context, leading

⁸ Commonwealth Ombudsman, Centrelink’s automated debt raising and recovery system (April 2017) 3.

⁹ Economic Justice Australia submission to the Robodebt Royal Commission (February 2023) https://www.ejaustralia.org.au/wp-content/uploads/Economic-Justice-Australia-submission-_Robodebt-Royal-Commission_.pdf.

to exclusion, and risking unfair or even discriminatory decision-making.¹⁰ In 2019, the Special Rapporteur on Extreme Poverty warned of the risks of States ‘stumbling zombie like into a digital welfare dystopia’ where technology is used to ‘surveil, target and punish’ social security recipients.¹¹ A number of examples from Australia’s social security system was raised in his report. We note that the AHRC’s HRA report recommends an explicit provision that includes technological decision-making within the remit of a federal HRA.¹² We emphasise the need for an HRA to extend to automated decision-making within public administrative systems.

Case study

Brianna was 28 years of age when she was first contacted as part of an OCI system review. At the time she had been diagnosed with PTSD as a result of a serious sexual assault the previous year and was in the middle of the court process which ultimately resulted in the conviction of the offender. Brianna was highly distressed and suicidal at the time. In response to a compliance officer’s request, Brianna provided her payslips but was told that the payslips she had provided did not cover the correct period.

Over the following months Centrelink sent Brianna multiple debt notices totalling nearly \$10,000, each notice informing her she was required to repay the debt immediately. Brianna firmly believed that the debt was not right and made multiple attempts to appeal Centrelink’s decision. Centrelink finally conducted a review by an Authorised Review Officer. The review failed to correct the unlawful calculation of Brianna’s debt, even though the review officer had evidence to show the debt calculation was incorrect. An interest charge was later applied to Brianna’s debt as she did not agree to repay the amount Centrelink was demanding. Centrelink then garnisheed Brianna’s tax return. Brianna was only notified of the garnishee after the fact. At the time, she was unemployed and unable to pay her rent.

Brianna sought assistance from the Welfare Rights Centre NSW, which represented her in an appeal to the AAT. The Tribunal set aside the debt on the basis that it was based on false assumptions about her earnings. This was over eight years after Centrelink had first contacted Brianna as a result of the OCI system compliance review which led to the raising of the debt.

Compulsory Income Management

35. In 2007, the Australian Government suspended the operation of the Racial Discrimination Act in order to pass the Northern Territory Emergency Response (NTER) legislation in clear violation of the human rights of First Nations peoples.¹³ Amongst the NTER measures was the introduction of compulsory income management – which involves quarantining and controlling how individuals spend the bulk of their social security entitlements.

¹⁰ See e.g. Economic Justice Australia, submission to the Workforce Australia Committee, *Inquiry into Workforce Australia and Employment Services* (March 2023).

¹¹ Phillip Alston, ‘Report by of the Special Rapporteur on extreme poverty and human rights’ (2019), UN Doc A/74/493 (1 October 2019).

¹² Australian Human Rights Commission, *Free & Equal: Human Rights Act Position Paper* (March 2023) 222.

¹³ UN Human Rights Committee, Concluding Observations: Australia, 95th sess, UN Doc CCPR/C/AUS/CO/5 April 2009 [14]. See also, Human Rights Council, United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, Observations on Northern Territory Emergency Response in Australia, 15th Sess, UN Doc A/HRC/15/23 February 2010.

36. Compulsory income management affects cohorts on the BasicsCard, the Cashless Debit Card (recently abolished) and now extends to ‘enhanced’ income management, which is effectively the same program as the Cashless Debit Card, under a new name and with an updated cashless card.¹⁴ Compulsory income management has been found, by both domestic and international bodies,¹⁵ to be contrary to Australia’s human rights obligations. Concerns have been raised that compulsory income management:¹⁶

- Infringes on autonomy and respect for private life, as it restricts what a person can and cannot do with the majority of their social security payments without being given a choice in the matter. It also subjects individuals to ongoing, intrusive behavioural monitoring.
- Indirectly discriminates against First Nations people and communities. The application of the scheme and the geography of where it has been rolled out affects First Nations people disproportionately.
- Implicates the right to social security and an adequate standard of living by placing unnecessary conditions on access to payments, and restricting access to cash, that has affected people’s ability to pay for essentials and contingencies.
- Engages principles of self-determination as it has been deployed as a top-down initiative on communities without adequate consultations taking place. The AHRC notes that it ‘has identified that a common factor with laws and policies that breach human rights is that they were developed without the participation of groups most impacted by those policies.’¹⁷ We agree with the AHRC’s assessment.

37. Compulsory income management has been implemented through various pieces of legislation, without adequate justifications being provided for human rights breaches at any stage. The absence of a human rights culture within Parliament, and the lack of legal human rights protections, has enabled compulsory income management to continue since 2007, without any evidence-base that it achieves its intended purposes, and despite ongoing harms to communities.¹⁸ The implementation of the right to social security would prevent the provision of social security being made with different, harsher conditions in application to certain communities, as compared to the broader population’s access.

Newly Arrived Residents Waiting Period (NARWP)

¹⁴ See Economic Justice Australia’s submission to the Senate Community Affairs Committee, *Social Security (Administration) Amendment (Income Management Reform Bill 2023)* (April 2023).

¹⁵ Parliamentary Joint Committee on Human Rights, *Report 6 of 2018* (June 2018), 38; Australian Human Rights Commission, submission to the Senate Community Affairs Legislation Committee, *Inquiry into Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019*, October 2019; United Nations Committee on the Elimination of Racial Discrimination, *Concluding Observations on the eighteenth to twentieth periodic reports of Australia* (2017) [23]; Committee on Economic, Cultural and Social Rights, *Concluding Observations on Australia* (July 2017) [31]-[32].

¹⁶ See full discussion of human rights and sources in Economic Justice Australia’s submission to the Senate Community Affairs Committee, *Social Security (Administration) Amendment (Income Management Reform Bill 2023)* (April 2023).

¹⁷ Australian Human Rights Commission, *Free & Equal: Human Rights Act Position Paper* (March 2023) 162.

¹⁸ See e.g. Greg Marston et al, *Hidden Costs: An independent study into income management in Australia* (February 2020)

<https://espace.library.uq.edu.au/data/UQ_6863639/HiddenCostsReportFinal.pdf?>; Phillip Mendes, ‘Top-down paternalism versus bottom-up community development: A case study of compulsory income management programmes in Australia’ *The International Journal of Community and Social Development* (2019) 1(1) 42 – 57.

38. Recent migrants to Australia generally face a four-year waiting period before they can access most social security income support payments.¹⁹
39. The waiting period is inclusive of Special Benefit, which is the safety net' payment of 'last resort' intended to cover situations of severe financial hardship when a person is not eligible for other income support payments. A person must have less than \$5000 in their account in order to access it (amongst other eligibility criteria).²⁰ While the NAWRP can be waived for Special Benefit if a person can show a substantial change in their circumstances beyond their control, this is very difficult to show in practice.
40. The application of the NARWP to Special Benefit is particularly concerning because it can leave people destitute without *any* means of support. New arrivals, including people with permanent visas, may be forced to rely on charitable support with no means to return to their own country. They may be pushed into exploitative working arrangements, or be rendered homeless and completely fall through the cracks.
41. Applying an arbitrary four-year waiting period for accessing income support for new arrivals, particularly to the payment of 'last resort', runs contrary to Australia's obligations to provide access to social security, to ensure an adequate standard of living (adequate food, water, clothing and shelter), and rights to equality and non-discrimination. The NARWP also undermines the rights of family and children to special protection and assistance, by removing access to payments intended to assist with the cost of raising children. These rights apply *regardless* of a person's immigration status. Australia's restrictive approach to income support for new arrivals and asylum seekers has been criticised by UN Treaty bodies.²¹
42. Newly arrived migrants cannot vote. They are at the mercy of public opinion and political trends, and rights violations affecting them may go unnoticed and unaddressed, even as they worsen over time. The NARWP has been gradually extended from 6 months when it was first introduced to four years, and initially did not apply to Special Benefit.²² These incremental backwards steps constitute 'retrogressive measures' under human rights law. A retrogressive measure is 'one taken without adequate justification that had the effect of reducing existing levels of social security benefits, or of denying benefits to persons or groups who were previously entitled to them.'²³ No sufficient public justification on a human rights basis was provided when these backwards shifts occurred – they were quietly implemented through largely administrative measures. Without *legal* human rights protections, newly arrived migrants are not adequately protected under Australia's current framework.

Case study

¹⁹ For exemptions, see Australian Government, Social Security Guide (January 2023) [3.1.2.43] <<https://guides.dss.gov.au/social-security-guide/3/1/2/43>>.

²⁰ Services Australia, 'Special Benefit' (Web Page) <<https://www.servicesaustralia.gov.au/special-benefit>>; Department of Social Services, 'Social Security Payments – Residence Criteria' (Web Page) <<https://www.dss.gov.au/about-the-department/international/policy/social-security-payments-residence-criteria>>.

²¹ See, eg, *Committee on Economic, Cultural and Social Rights, Concluding Observations on Australia* (July 2017) [38].

²² Economic Justice Australia, Submission to Senate Community Affairs Legislation Committee, *Inquiry into the Social Services Legislation Amendment (Consistent Waiting Periods for New Migrants) Bill 2021* (July 2021); Don Arthur and Michael Klapdoor, 'Social Services Legislation Amendment (Consistent Waiting Periods for New Migrants) Bill 2021' (Bills Digest No. 17, 2021–22).

²³ Attorney General's Department, 'Right to Social Security – Public Sector Guidance Sheet' (Web Page) <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-social-security>>.

A migrant single mother was denied access to income support payments due to her visa status, despite her Australian ex-partner being jailed for violence against her and the fact she had no income or savings.

The woman was later granted a Special Benefit payment as she was able to get a waiver of the NAWRP— but this was cancelled when she was granted permanent residency.

She was then knocked back from parenting payment due to the NAWRP applying to that payment for a four-year period.

The woman was eventually re-granted Special Benefit – paid at a lower rate than the parenting payment.

Arbitrary payment suspensions

43. Aspects of the legislative and administrative framework underpinning the social security system leads to arbitrary decision-making and the absence of procedural fairness with respect to social security rights.
44. For example, the Targeted Compliance Framework (TCF), is a system of automated suspensions, that places social security recipients under the constant threat of financial penalties.²⁴ The most vulnerable and disadvantaged people bear the brunt of TCF decisions that are inflexible, opaque and often inaccurate. The TCF effectively threatens a person's ability to pay for food, power bills, medicine and rent, for the 'crime' of failing to meet one of their myriad and onerous mutual obligations. These individuals are already in financial stress, because they are on the lowest rate of social security payments. Suspensions disproportionately affect First Nations people, people with disability and homeless people, amongst other vulnerable cohorts.²⁵
45. The right to social security requires that any 'withdrawal, reduction or suspension' of social security benefits should be circumscribed and 'based on grounds that are reasonable [and] subject to due process'.²⁶ Decision-making that results in the automated suspension or cancellation of payments lacks sufficient safeguards and does not provide the requisite due process for individuals subject to these decisions. An HRA would help to ensure that decisions made affecting the entitlements of social security recipients are procedurally fair and in line with human rights standards, including by requiring decision-makers to take into account human rights and the circumstances of the individual when making any such decision.

Case study

Anne's JobSeeker Payment was automatically suspended because she was ill and unable to attend job interview. She called up her employment services provider to explain, but they refused to lift her suspension or accept her medical certificate for non-attendance. Anne advised that she desperately needed to have her suspension

²⁴ See Economic Justice Australia, submission to the Workforce Australia Committee, *Inquiry into Workforce Australia and Employment Services* (March 2023).

²⁵ See e.g., ACOSS, 'Mutual obligation Snapshot – Payment suspensions and cancellations' (Web Page) <<https://www.acoss.org.au/mutual-obligation-snapshot-payment-suspension/>>.

²⁶ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The right to social security* (Art 9 of the Covenant), 39th session, UN Doc E/C.12/GC/19 (4 February 2008), [24].

lifted as it was the end of her payment fortnight and she had no money left for food or other essentials, so she decided to go by train to her employment service's office to sort it out. She didn't have any money to top up her public transport card, but was desperate so decided to catch the train anyway. Anne was apprehended at the train station and issued with a fine for over \$400. Upon arrival at the employment service they initially refused to see her, and told her to come back the next day. Anne knew that if she left, she risked getting another fine and she wouldn't be able to buy any food until her payments were reinstated.

With the help of one of our member centre's lawyers Anne's suspension was lifted that afternoon. However, the money was not credited to her account in time for her to add credit to her public transport card, and she received a further \$200 fine on the way home. Anne now had a \$600 debt, with no savings to draw from, so she decided to cut back from 2 meals a day to just 1 meal a day for the next few months in order to pay it off.

ParentsNext

46. Economic Justice Australia welcomed the recent decision of the Government to end ParentsNext. ParentsNext was a mandatory program applied to targeted recipients of the Parenting Payment. The ParentsNext program required primary carers of young children to engage in certain activities. Non-compliance could result in the suspension, reduction or permanent cancellation of a person's Parenting Payment. Human rights engaged by this program include the right to social security, the right to equality and non-discrimination and children's rights.²⁷ These human rights concerns were not adequately considered before the introduction of ParentsNext, and the program caused significant harms and distress to parents on the program (disproportionately women) and their children, before it was ended.

Case study

A member centre in Queensland provided assistance to Elina, a single mother caring for her son who has severe disabilities. Elina's Parenting Payment had been suspended due to non-compliance with a ParentsNext requirement. Elina's payments were reinstated but Elina advised that the experience made her feel that her Parenting Payment was insecure. This insecurity caused her to feel significant stress; she feared that she would not be able to meet the cost of her son's medical treatment if her payments ceased again, so she turned to a community financing organisation to obtain a \$4000 loan to ensure she had funds on hand if her Parenting Payment were suspended. Elina said that once she realised that her Parenting Payment could stop at any time, she felt 'beyond desperate and in survival mode.'

Payment rate inadequacy and COVID-19

47. Despite recent improvements announced in the budget, social security working age income support rates, including JobSeeker, continue to be inadequate to meet living costs, especially for vulnerable people without assets or substantial savings. Australia has some of the lowest

²⁷ Australian Human Rights Commission, Submission to the Senate Community Affairs References Committee, *ParentsNext, including its trial and subsequent broader rollout*, February 2019

[14]; Economic Justice Australia, Submission to the Workforce Australia Committee, *ParentsNext*, November 2022.

welfare payments in the OECD, with Jobseeker payments well below the Henderson poverty line.²⁸ Australia's low payment rates have been criticised by the UN Committee on Economic Social and Cultural Rights.²⁹ Our members have many examples illustrating how low working-age payments undermine the right to an adequate standard of living and human dignity for individuals and families struggling to survive.

48. The inadequacy of income support rates was implicitly acknowledged by the Government when it increased payments during the COVID-19 pandemic. Lives were transformed by the effective doubling of non-pension payment rates from April 2020 with the addition of the Coronavirus Supplement. The COVID measures show that it is entirely possible for Australia to raise income support rates to adequate levels. It gave us a glimpse of what a rights-based approach to the social security system *could* look like, with waiting periods waived, eligibility criteria expanded, and the application process made more accessible, in addition to the increases in payment rates.
49. Research reports produced by the Australian Council of Social Services and other peak organisations show that the complete removal of the Coronavirus Supplement payment from April 2021 plunged many social security recipients back to unacceptably low rates, entrenching extreme poverty for vulnerable cohorts.³⁰
50. An HRA would not prevent Government from reducing income support rates – but it would require that a rigorous public justification be provided for backwards steps such as this one. An HRA would also provide a foundation to enable indicators, benchmarks and reporting regarding current payment rates, to measure the extent to which payments are sufficient to guarantee an adequate standard of living, improving accountability over such policy decisions.

Case study

Christian was in his early 60s and had been struggling with poorly controlled diabetes on JobSeeker Payment for 2 years when he approached our member centre. He regularly split his diabetes tablets in half to make them last longer, as he couldn't afford to buy them every few weeks. He advised that his doctor had told him not to do this, that he needed to take the full dose or risk having serious complications, but Christian was convinced that this was the only way he could ensure he had enough left over to buy his weekly groceries. He said he knew he should listen to his doctor but didn't see the point in taking medication if he was not going to have anything to eat.

Case study

Michaelia was 59 years old and facing eviction from her Canberra home when she approached our member centre. She had been solely dependent on JobSeeker Payment since her husband left her 6 months previously, and this was not enough to cover the rent for her small apartment. For a time, she had managed by not paying her

²⁸ Stephanie Covery 'More than 8,000 single parents to be moved on to jobseeker before Labor's welfare reform begins' *The Guardian* (Online) 3 June 2023 < <https://www.theguardian.com/australia-news/2023/jun/03/labor-urged-to-bring-forward-single-parenting-payment-changes-or-have-kids-going-hungry>>.

²⁹ Committee on Economic, Social and Cultural Rights, *Concluding Observations on the fifth periodic report of Australia* (July 2017) [31] [32]

³⁰ See ACOSS and UNSW, *Australian experiences of poverty: risk precarity & uncertainty during COVID-19* (December 2022) < <https://povertyandinequality.acoss.org.au/australian-experiences-of-poverty/>>.

utility bills, but on contacting the centre she was in significant rental arrears and facing homelessness due to limited affordable housing options for people her age

Access and eligibility barriers

51. There are a number of significant access barriers in the social security system, including due to overly restrictive and complex eligibility criteria and a lack of accessible services, particularly in remote areas. These barriers predominantly affect cohorts with intersecting vulnerabilities, such as people with disability and First Nations peoples in remote communities.
52. In particular we note that the current Disability Support Pension (DSP) legislative framework and system for assessing DSP eligibility imposes fundamental systemic barriers to accessing DSP for particular cohorts of people with disability.³¹ Over the years, DSP qualification criteria has been tightened, particularly through changes to assessment processes implemented from 2016. This has led to a reduction in new grants of DSP – and has had the effect of leaving vulnerable groups sidelined.
53. Many people with disability who are prima facie eligible for DSP, are effectively consigned to JobSeeker indefinitely. They then struggle to comply with onerous mutual obligations due to a lack of capacity to comply. These individuals may face punitive actions such as suspensions of payment for failing to comply with mutual obligations or may not be on any payment at all – and left destitute.
54. A key reason for this is that the application for DSP involves an onerous and burdensome process of proving one’s disability, including by meeting an arbitrary number of ‘points’ in administrative Impairment Tables to show severe impairment. These tables disadvantage certain cohorts of people with (severe) disability, including people with multiple conditions, who are relegated to Jobseeker.
55. Specific reasons for DSP rejections are also often not adequately communicated to applicants, which makes seeking review of these decisions particularly difficult.
56. Many people with disabilities also face unsurmountable challenges understanding the DSP application process, obtaining relevant medical evidence, and navigating the highly complex and inaccessible system – and give up on the application process altogether.

Case study

Harriet is a trained registered nurse with intermittent work history due to crippling and increasingly frequent bouts of depression. When she was referred to the member centre by her support worker, Harriet clearly satisfied the ‘severe impairment’ rating for Impairment Table 5 (the Table for assessing psychiatric impairment), as she was unable to complete daily tasks such as meal preparation, washing and cleaning without support from mental health workers.

³¹ See Economic Justice Australia, submission to the Senate Community Affairs References Committee, *Inquiry into the purpose, intent and adequacy of the Disability Support Pension* (July 2021).

However, Harriet's condition would fluctuate and there were periods where she could undertake the kinds of activities that would give her an assessment of 10 points under the same Table. Given these fluctuations, throughout the prior 10 years Harriet was unable to sustain employment due to regular, severe episodes of depression. Harriet's applications for DSP had been rejected based on assessments of short periods when she was well.

Case study

Warren is an Aboriginal man with a cognitive impairment from a remote community. He has limited English and literacy skills. On contact with our member centre's outreach service, his previous DSP claims had been rejected due to lack of medical evidence. It was only when our member centre assisted Warren with the claim process that DSP was granted. Centrelink and Warren's Employment Services Provider had been aware of Warren's cognitive impairment, and the significant language and cultural barriers he faced in navigating the DSP process, for many years; however, Centrelink did not have medical evidence in their possession to support this and repeatedly placed the onus on Warren to obtain and provide such evidence. Warren struggled to understand what was required of him and failed to provide the requisite evidence. Warren's inability to provide the medical evidence and navigate the process is related directly to his cognitive impairment, together with his status as an Aboriginal man living in a remote Aboriginal community whose first three languages are not English.

Case study

Paul has an intellectual disability and cannot read or write. He lives independently. He received DSP before the 2015 changes but his DSP was cancelled, and when he contacted our member centre he was unable to explain why. He had been on Newstart for the past two years and was not able to understand letters he was being sent by Centrelink, or the form he was given to make a new DSP claim. Our member assisted Paul to claim DSP, wrote to Centrelink asking for the records for previous DSP claims, and arranged for Paul to see specialists in clinical psychology and cognitive impairment. Paul had great difficulty attending appointments and the service's social worker supported him to do this. After five months, Paul faced a final obstacle: he could not afford to see the specialist. Three weeks later Centrelink decided to schedule an appointment with their own doctor, for an assessment. Our member then wrote to Centrelink summarising all Paul's evidence, and submitted that he was eligible for DSP. After eight months, Paul was finally re-granted DSP.

57. People with disability have a specific right to social security outlined in article 28 of the Convention on the Rights of Persons with Disability (CRPD), which provides that they have the right to 'an adequate standard of living' and to 'social protection' and States must 'ensure access by persons with disability...to social protection programs.'³² We consider that the restrictive eligibility criteria for DSP leads to this standard not being met in Australia. Again, human rights need to be considered when laws, policy and decisions affect the rights of individuals and groups in the social security system. Administrative eligibility restrictions that unjustifiably infringe upon human rights, such as the right to access social security, should be challengeable on human rights grounds.

³² *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, A/RES/61/106 (entered into force 3 May 2008).

58. We also note that the AHRC’s HRA model proposes a ‘participation duty’, which would require public authorities to ensure the participation of certain groups and individuals in relation to policies and decisions that directly or disproportionately affect their rights, applying to First Nations peoples (in light of United Nations Declaration on the Rights of Indigenous Peoples), people with disability (in light of CRPD obligations) and children (in light of Convention on the Rights of the Child obligations). In relation to disability, this entails that:

Individual persons with disability should be supported to make their own decisions in all aspects of their lives, and public authorities should have processes in place to facilitate supported decision making. When decisions have an impact upon people with disabilities as a group, persons with disability, including through their representative organisations, should be consulted as part of the process.³³

59. A participation duty of this nature would greatly improve policy-making and decision-making in the social security context, as well as the overall accessibility of the system.

The right to social security

The international right to social security

60. Article 9 of the ICESCR recognises the right of everyone to social security, and the contents of this right has been thoroughly articulated in international law. A federal HRA should include the right to social security based on article 9, alongside other ICESCR rights, which together guarantee human dignity for all people.

Source of rights

61. In addition to article 9 of the ICESCR, the right to social security is also reflected in other core treaties and instruments that Australia has ratified, including:

- Article 5(e)(iv) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- Articles 11(1)(e) and 14(2)(c) of the Convention on the Elimination of All Forms of Discrimination Against Women
- Article 26 of the Convention on the Rights of the Child (CRC)
- Article 28 of the Convention on the Rights of people with disability (CRPD).
- Articles 21 and 39 of the Declaration on the Rights of Indigenous Peoples (UNDRIP)

Scope and nature of the right to social security under Article 9 of ICESCR

62. The Committee on Economic, Social and Cultural Rights (CESCR) has defined the nature, scope and content of the right to social security.³⁴ States must ensure:

The right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection from

³³ Australian Human Rights Commission, *Free & Equal: Human Rights Act Position Paper* (March 2023) 195.

³⁴ See CESCR General Comment No 19, *The right to social security* (2007) UN Doc. E/C.12/GC/19; in addition to: CESCR General Comment No. 5: *Persons with Disabilities* (1994) UN Doc E/1995/22; CESCR General Comment No. 6: *The Economic, Social and Cultural Rights of Older Persons* (1996) UN Doc E/1996/22.

- *a lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member*
- *unaffordable access to health care*
- *insufficient family support, particularly for children and adult dependents.*

Overall, social security should be:

- **Available:** A social security system must be available and in place to ensure that benefits are provided. It must be established under domestic law and administered effectively by public authorities.³⁵
- **Adequate:** Benefits must be adequate in amount and duration, including to realise the right to an adequate standard of living. The adequacy criteria must be underpinned by non-discrimination and the principle of human dignity, and must be regularly monitored to ensure recipients are able to afford goods and services they require to realise their rights.³⁶
- **Accessible:** There should be provision for universal coverage. Eligibility criteria must be reasonable, proportionate and transparent. People should not be subject to arbitrary or unreasonable restrictions of existing social security coverage. Recipients should be able to seek and receive information on social security entitlements and have opportunities to participate. Recipients should have physical access to social security services to access benefits and information – with particular attention paid to people with disabilities, migrants and those in remote or disaster-prone areas, to ensure that they have access.³⁷

Minimum core standards

63. Under ICESCR, States must meet ‘a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights.’³⁸ These obligations have immediate effect. States must prioritise core obligations and introduce low-cost and targeted efforts to assist those most in need.³⁹ The CESCR Committee has noted that ‘if the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*.’⁴⁰

64. The minimum core standards developed by the CESCR Committee in relation to the right to social security include requirements that States:

- ensure access to a social security scheme that provides a minimum essential level health care, basic shelter and housing, water and sanitation, food, and basic education;
- guarantee that the right can be enjoyed without discrimination of any kind;
- respect existing social security schemes and protect them from unreasonable interference.⁴¹

³⁵ CESCR, General Comment No 19, *The right to social security* (2007) UN Doc. E/C.12/GC/19 [11].

³⁶ CESCR, General Comment No 19, *The right to social security* (2007) UN Doc. E/C.12/GC/19 [22].

³⁷ CESCR, General Comment No 19, *The right to social security* (2007) UN Doc. E/C.12/GC/19 [23]-[27].

³⁸ CESCR, Committee, *General Comment No 3: The Nature of States Parties Obligations* (1990) UN Doc E/1991/23 [10].

³⁹ OHCHR, Frequently asked questions on economic, social and cultural rights (Fact sheet no 33, 2008) 16
<<https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet33en.pdf>>.

⁴⁰ CESCR, *General Comment No 3: The Nature of States Parties Obligations* (1990) UN Doc E/1991/23 [11].

⁴¹ CESCR, General Comment No 19, *The right to social security* (2007) UN Doc. E/C.12/GC/19 [59], [32], [78].

Procedural fairness

65. Procedural fairness is a key aspect of the right. The right to social security also provides that ‘any withdrawal, reduction or suspension of benefits should be circumscribed, based on grounds that are reasonable, subject to due process and provided for by law’.⁴² There must be procedural safeguards in place to ensure that an individual’s rights are not arbitrarily denied.

Non-Discrimination

66. Non-discrimination is an immediate obligation in both the ICESCR and the ICCPR that applies across all ICESCR and ICCPR rights.⁴³ States must not discriminate with respect to all laws, policies and programs. There should be no discrimination in the provision of social security, on grounds such as race, age, disability, religion, sex, gender, sexuality or national origin. For example, a person’s immigration status should not affect their access to social security.

67. Steps to address discrimination should go beyond formalistic measures to address substantive discrimination experienced by vulnerable groups. Per the CESCR Committee:

*Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination.*⁴⁴

68. As the AHRC has observed, fulfilling this obligation requires that:

*Proactive steps...be taken to address existing inequality, even if it is pervasive, entrenched and complex — as is the case, for example, with First Nations disadvantage in Australia. In this manner, ICESCR rights are essential to protecting marginalised groups that may suffer or have historically suffered systemic discrimination, particularly in the context of government service provision; and/or are liable to fall through the cracks in government systems.*⁴⁵

69. The CESCR Committee has stated that while everyone has the right to social security, special attention should be given to groups who may face difficulties in exercising the right to social security. Those groups include women, the unemployed, sick or injured workers, people with disabilities, older persons, children and adult dependents and minority groups.⁴⁶ It also specifies that particular care should be taken to ensure that Indigenous peoples and ethnic and linguistic minorities are not excluded from access to social security, particularly through the imposition of unreasonable eligibility conditions or lack of adequate access to information.⁴⁷

Retrogressive measures

70. There is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under ICESCR. A retrogressive measure would be ‘one taken without adequate justification that had the effect of reducing existing levels of social security

⁴² CESCR, General Comment No 19, *The right to social security* (2007) UN Doc. E/C.12/GC/19 [24].

⁴³ CESCR, *General comment No 20 Non-discrimination in economic, social and cultural rights* (2009) UN Doc E/C.12/GC/20 [7].

⁴⁴ CESCR, *General comment No 20: Non-discrimination in economic, social and cultural rights* (2009) UN Doc E/C.12/GC/20 [8].

⁴⁵ Australian Human Rights Commission, *Free & Equal: Human Rights Act Position Paper* (March 2023) 116.

⁴⁶ CESCR, General Comment No 19, *The right to social security* (2007) UN Doc. E/C.12/GC/19 [31]

⁴⁷ CESCR, General Comment No 19, *The right to social security* (2007) UN Doc. E/C.12/GC/19 [35].

benefits, or of denying benefits to persons or groups who were previously entitled to them.¹⁴⁸ Where any retrogressive measures are taken, the State must justify the decision, showing that there has been careful consideration of alternatives, in the context of the full use of the maximum available resources of the country.⁴⁹

Progressive realisation

71. Regarding elements of the right to social security, beyond the minimum core, that require more time and resourcing, ICESCR recognises that full implementation of the right may not be immediately realisable. It therefore prescribes a further type of obligation to take steps 'to the maximum of its available resources, with a view to achieving progressively the full realisation' of the rights recognised in ICESCR.⁵⁰ The CESCR Committee has stated that this provision is 'a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights'.⁵¹ This enables 'government discretion in relation to resourcing priorities and policy choices, within a rights-framework.'⁵² However it 'imposes an obligation to move as expeditiously and effectively as possible towards that goal'.⁵³
72. Some states enable progressive realisation obligations to be reviewed through the courts. Progressive realisation can also be monitored through other accountability measures, such as through national indicators and benchmarks within a policy framework, Parliamentary scrutiny measures, public sector oversight, and annual departmental reporting.⁵⁴

Limitations on the right

73. Like all other ICESCR rights, the right to social security may be limited, where the limitation is lawful, reasonable and proportionate to the achievement of a legitimate aim.⁵⁵ Even where limitations are permitted, they should be of limited duration and subject to review.

Relationship with other rights

74. It is a core principle of human rights law, that all rights are 'universal, indivisible, interdependent and interrelated'.⁵⁶ There is no hierarchy of human rights, and the fulfilment of one right is often dependent on the fulfilment of another. The realisation of *all* human rights is required to ensure the realisation of human dignity, equality and autonomy. ICESCR and ICCPR rights are closely interlinked, and the right to social security is itself linked with both ICESCR and ICCPR rights.
75. In addition to non-discrimination and procedural fairness rights discussed above, these include:
- The right to adequate standard of living under article 11 of ICESCR
 - The right to work under article 6 of ICESCR

⁴⁸ Attorney General's Department, 'Right to Social Security – Public Sector Guidance Sheet' (Web Page) <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-social-security>>.

⁴⁹ CESCR, General Comment No 19, *The right to social security* (2007) UN Doc. E/C.12/GC/19 [42]

⁵⁰ ICESCR art 2(1).

⁵¹ CESCR, Committee, *General Comment No 3: The Nature of States Parties Obligations* (1990) UN Doc E/1991/23 [9].

⁵² Australian Human Rights Commission, *Free & Equal: Human Rights Act Position Paper* (March 2023) 119.

⁵³ CESCR, Committee, *General Comment No 3: The Nature of States Parties Obligations* (1990) UN Doc E/1991/23 [9].

⁵⁴ Australian Human Rights Commission, *Free & Equal: Human Rights Act Position Paper* (March 2023) 132.

⁵⁵ ICESCR, art 4.

⁵⁶ UN General Assembly, *Vienna Declaration and Programme of Action* (1993) UN Doc no A/CONF.157/23 [5].

- The obligation to provide protection and assistance to the family, including the obligation to accord working mothers paid leave or leave with adequate social security benefits during a reasonable period before and after childbirth under article 10 of ICESCR
- The right to health under article 12 of ICESCR
- The protection against cruel, inhuman and degrading treatment under article 7 of the ICCPR.
- The right to private life under article 17 of the ICCPR.

76. The right to social security is necessary to guarantee the conditions for realising other rights. This is because access to social security prevents descent into poverty, with associated health- and life-threatening implications. The right to an adequate standard of living requires access to adequate food, clothing and housing. The right to social security ensures that people have available funds to access basic goods and services that are necessary for their survival and wellbeing. With these basics covered, individuals have the time and capacity to enjoy other rights. They can participate in their community, engage in education, address health issues, care for their children and dependents, and pursue paid work.
77. Without the safety net of social security, a person may be subject to conditions which meet the threshold of cruel, inhuman and degrading treatment, as they are forced into unsafe situations, subjected to starvation, rough sleeping and so on. It can also lead to people who are victims of family violence being unable to leave their circumstances due to a lack of resources.
78. Social security enables people to make choices in their private life for themselves and their family. Access to social security should not entail restrictions on a person's privacy – for example, people should not be subject to intrusive monitoring of their behaviour or restrictions on how they use their entitlements.

What a rights-based approach to Social Security in Australia would look like

79. Economic Justice Australia advocates for a rights-based approach to social security. This would involve explicitly recognising social security recipients as rights-holders with certain legal entitlements, with the social security system oriented around this understanding. A rights-based system would prioritise principles of access and fairness and embed human rights considerations in all relevant laws, policies and decisions.
80. Discriminatory programs and arbitrary eligibility exclusions would be ended in order to ensure equal access. All social security recipients would be able to access necessary social security services, and would be treated with human dignity when navigating the system. Social security decisions would be made in a procedurally fair, transparent and accountable manner. Decisions (for example, a decision to reject an application for income support) that force a person into unsafe, degrading levels of poverty, such as homelessness or hunger, would be challengeable on human rights grounds. There would be accessible pathways to review of decisions on both administrative and human rights grounds, along with access to a flexible range of remedies.
81. There would be recognition that social security recipients are entitled to the full suite of human rights protections available to everyone else – including the right to private life. Retrogressive

measures, like the lengthening of the NARWP and its extension to Special Benefit, would only occur after being rigorously and publicly justified on human rights grounds.

82. There would be sufficient monitoring and reporting on the progressive realisation of the right to social security over time. This would ensure that payments are set at an adequate rate, above recognised poverty lines, and supplementary payments would be sufficient to meet contingencies and emergencies.
83. A federal HRA is needed to prevent human rights abuses in the social security context and set the foundations for a rights-based approach. The right to social security should be included in an HRA. The formulation of the right should reflect its articulation in international law. There should be a direct cause of action (enabling access to complaints mechanisms such as via the AHRC, and federal courts) that at *least* encompasses the minimum core elements of the right. Measures to ensure progressive realisation of the right, including through ongoing monitoring and reporting against set benchmarks, should be instituted as a complementary measure to the HRA.

Elements of a Human Rights Act

84. EJA supports the AHRC's recommended HRA model, namely it should:

- Take the form of a legislative dialogue model;
- Implement all ICCPR and ICESCR rights with a direct cause of action; and reflect the seven core treaties and the UNDRIP, including through interpretive principles and procedural duties;
- Bind public authorities through a positive duty (including core executive bodies, and 'functional' public authorities like contractors exercising public functions on behalf of Government);
- Include a participation duty requiring public authorities to ensure the participation of certain groups and individuals in relation to policies and decisions that directly or disproportionately affect their rights – specifically, First Nations people, children and people with disability;
- Include an equal access to justice duty that requires public authorities to enable equal access to legal services, interpreters and disability support for individuals navigating the justice system;
- Apply to administrative decisions made through technology;
- Protect all people within Australia's territory and subject to Australian jurisdiction;
- Enable the human rights within the HRA to be interpreted in light of the seven core treaties and the UNDRIP;
- Include an interpretive clause that enables courts to interpret federal legislation as far as is reasonably possible, in a manner that is consistent with human rights;
- Include a limitations clause based on the 'proportionality' test established in international law;

- Require the Attorney-General to trigger a process for reviewing a law when a court has found a parliamentary intention to override human rights contained in the HRA with respect to that law;
- Include a direct cause of action for all rights in the HRA, with options to seek administrative review; complain to the AHRC for a conciliated outcome; and proceed to the Federal Court and Family Court;
- Provide courts with discretion over remedies, including administrative remedies and monetary damages;
- Provide standing for individuals who claim that their human rights were breached; and representative standing for organisations or entities acting in the interest of a person, group or class affected by human rights breaches;
- Include protections against adverse cost orders;
- Link with and inform human rights Parliamentary scrutiny processes.

Recommendations

- 1. That the inquiry recommend that the Federal Government legislate a federal Human Rights Act. The Human Rights Act should be based on the Australian Human Rights Commission’s model, and include the elements outlined in its Human Rights Act Position Paper.**
- 2. That all ICESCR rights be implemented through the Human Rights Act, including the right to social security. The formulation of the right to social security should reflect its articulation in international law. There should be a direct cause of action, that *at least encompasses the minimum core elements of the right, alongside measures to ensure progressive realisation of the right, including through ongoing monitoring and reporting against set human rights indicators.***

Human rights framework

85. The PJCHR Inquiry’s Terms of Reference refer to the scope and effectiveness of Australia’s 2010 Human Rights Framework and National Action Plan. The Framework, and the National Action Plan were insufficient because they did not include the main reform necessary to address the gaps in Australia’s human rights framework: a legislative HRA. Any future national framework or action plan must include an HRA as the core reform, with other actions complementing this legislation.

86. Economic Justice Australia endorses the AHRC’s recommended alternative Human Rights Framework,⁵⁷ inclusive of the following limbs:

- An HRA
- Modernised discrimination laws
- Strengthened human rights Parliamentary scrutiny mechanisms
- A national human rights indicator index to measure progress on human rights overtime. We note that such an index should include specific social security indicators.

⁵⁷ See AHRC submission to the PJCHR inquiry into Australia’s Human Rights Framework (May 2023).

- An annual statement to Parliament on human rights priorities made by Government.

Supported by:

- A national human rights education program
- A sustainable AHRC
- Support for civil society organisations to protect human rights.

Recommendation

- 3. That the Australian Human Rights Commission's broader recommendations for a national Human Rights Framework be endorsed by the Committee and implemented by Government.**

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