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**Equal Access to Social and Economic Rights in Australia – the Troubling
Case of ParentsNext**

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Introduction

I first met Andrew Byrnes and Andrea Durbach within days of arriving from South Africa in July 2008. Entirely in character, both were willing to take the time to meet with a stranger about whom they knew little other than via an introduction from Sandra Liebenberg, Professor of Law at Stellenbosch University, who had recently given the Australian Human Rights Centre Annual Lecture at UNSW. This meeting was the beginning of personal and professional relationships that have been profoundly important in creating a welcoming home for me in the human rights community in Australia. Like so many others touched by their generosity and enthusiasm for engaged scholarship I am enduringly grateful and inspired by their work and their example.

Andrea and Andrew have been persistent in their scholarship and advocacy on social and economic rights in Australia, an often neglected terrain of work. They have been similarly determined in their demand for the equal rights of women, alongside other groups facing discrimination and injustice. This reflection considers the slow progress towards domestic recognition of social and economic rights in Australian law and the notable gaps that remain. It focuses on the lack of actionable rights to social security and non-discrimination in relation to a government program called ParentsNext. This legal gap leaves some of the most vulnerable members of our community without protection against policies that impinge on their rights to equality of access to income support.

Social and economic rights in Australia

As a South African human rights scholar and advocate excited by the emerging possibilities of the social and economic rights in South Africa's Constitution (*Constitution of the Republic of South Africa 1996*) I was disappointed to find myself living in a country with no constitutional bill of rights, no Commonwealth human rights legislation (other than anti-discrimination laws) and certainly no actionable social and economic rights despite Australia's participation in most of the international human rights treaties (Byrnes, Charlesworth and McKinnon 2009).¹ I was distressed to find that anti-discrimination legislation, a limited domestic articulation of some of these international obligations, was expendable when it proved inconvenient. This was the case with the suspension of the *Racial Discrimination Act 1975* (Cth) under the 2007 Northern Territory Emergency Response, labelled 'the Intervention', by then Prime Minister Howard as a response to sexual abuse and family violence facing Aboriginal children. The suspension allowed the government to introduce a range of racially targeted measures including 'quarantining' of social security payments to restrict use of this income.

¹ Australia has, however, chosen not to sign the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 2008 which allows individuals to bring complaints against their government to the treaty body.

A few months after that first meeting with Andrew and Andrea my hope for greater rights protections was kindled when the Rudd government established a National Human Rights Consultation Committee (NHRCC) in November 2008. The Committee, chaired by Father Frank Brennan, recommended the adoption of a human rights act that would list a set of rights based on the international treaty commitments, in terms of which new and existing legislation could be examined and redrafted to ensure compliance (National Human Rights Consultation Report 2009). It suggested, however, that should social and economic rights be listed in a human rights act they should not be justiciable and that complaints should instead be directed to the Australian Human Rights Commission (at 366). It proposed that rights to health, education and an adequate standard of living be given priority (at 366).

This distinction between justiciable civil and political rights and non-justiciable social and economic rights is problematic for many reasons (that won't be traversed here), and was arguably based on a lack of appreciation of the extent of social and economic rights in the constitutions of the majority of countries in the world, many of which are justiciable (Jung, Hirschl and Rosevear 2014). This criticism is however academic, since even these more constrained recommendations for a human rights act were not adopted by the then Labour government. Instead it introduced legislation to assess the compatibility of bills and a scrutiny committee, the Parliamentary Joint Committee on Human Rights (PJCHR) (*Human Rights (Parliamentary Scrutiny) Act 2011* (Cth)). It was with his commitment to the potential of some form of domestic human rights engagement, even if minimal, that Andrew Byrnes became part-time external legal advisor to this Committee from November 2012 until September 2014 (Byrnes 2019).

Andrew was also involved in research (Charlesworth, Byrnes, Thilagaratnam, and Young 2010) that informed the inclusion of social and economic rights in the Australian Capital Territory *Human Rights Act 2004* (ACT). This Act now includes a right to education and a right to work (s 27A and s27B). Queensland introduced rights to education and health services in its *Human Rights Act 2019* (Qld), s 36 and 37). However, the only other state or territory with such legislation, Victoria, does not contain social and economic rights within its *Charter of Human Rights and Responsibilities Act 2006* (Vic).

The two human rights acts which include social and economic rights do not contain a right to social security or an adequate standard of living. This is understandable since while states and territories have responsibility for education and health, the commonwealth is tasked with providing income support. The gap in rights protection at the federal level means that rights violations in this area cannot be challenged domestically.

ParentsNext

The problem of the absence of a right to social security and the lack of a right to non-discrimination in relation to social security are well illustrated in a government program called ParentsNext. Parents who earn below a certain threshold are entitled to receive a government social security payment called Parenting Payment. Many recipients of this payment are sole parents and can remain on the payment until their youngest child turns 8. ParentsNext is a 'pre-employment' program aimed at getting parents to reengage with the workforce. It was first

trialled in 2016, expanded in 2018 and is currently being adjusted somewhat. Program participants are required to develop participation plans with service providers, undertake certain activities in the plan (related to parenting, education or work preparedness), and regularly report on progress. The program is targeted at disadvantaged sole parents – initially based on geographic location to reach Indigenous parents but developed so inclusion is now based on educational attainment and period of time spent in receipt of social security payments. Importantly, the program is compulsory, meaning that failure to comply with the plan or attend meetings can lead to suspension, reduction and even loss of payments in terms of the compliance framework of the *Social Security Act 1991 (Cth)* (s500(2)).

An examination of ParentsNext through a human rights lens points to clear problems with the program in terms of participants' rights to social security, an adequate standard of living and non-discrimination (Goldblatt 2019).² Firstly, in fixing conditions to a right it is by its nature suspect. Former UN Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda, and Carly Nyst have argued that rights should not be conditional on performance of certain actions since they attach inherently to all people (Sepúlveda and Nyst 2012). Social security conditions remove people's agency and assume that the poor are not capable of rational decision-making. Conditions can place unnecessary burdens and may be inappropriately designed. They have suggested that incentives to participate in government services should be used rather than measures that exclude people. This is related to the wider obligation of the state to create services that assist vulnerable members of society. Punitively withholding entitlements cannot be a correct response to poor provision of such services or low uptake of services which may be an indicator of inappropriate or inadequate services. The argument that parents need to be compelled to access supports and services is not based on evidence and is illogical. If people struggle to access services because of their disadvantages, then this raises questions about the design of services and about underlying inequalities and social problems that generate such disadvantages. More broadly, locating the causes of poverty at the individual level with the poor rather than acknowledging the structural determinants within the market and society as a whole leads to inappropriate responses (Devereux and MacGregor 2014, 301-2).

Secondly, the program is problematic in terms of the right to non-discrimination which is central to human rights. The ParentsNext program as it is currently set up is discriminatory in its reach and impact on women, the overwhelming majority of participants. Women make up this majority due to the gender imbalance in child care responsibility in Australia and sole mothers and their households are amongst the poorest and most disadvantaged in our country (Davidson et al, 2020). The policy treats this group as less capable than other parents and subjects them to monitoring and control of their lives and their welfare entitlements. This

² I have made submissions on the human rights concerns with ParentsNext to the Senate Community Affairs References Committee, 'Inquiry into ParentsNext, including its trial and subsequent broader rollout', January 2019; and the Parliamentary Joint Committee on Human Rights, 'Inquiry into ParentsNext: examination of Social Security (Parenting payment participation requirements - class of persons) instrument 2021', May 2021. The 2019 Senate Inquiry recommended that the program should 'not continue in its current form' (Senate Community Affairs References Committee, 2019). See below on the 2021 Parliamentary Joint Committee on Human Rights Inquiry which recommended making the program voluntary to ensure it is compatible with human rights (Parliamentary Joint Committee on Human Rights, 2021).

causes anxiety and distress, deepens disadvantage, and adds to the already considerable burdens facing this group. It also treats some social security recipients differently from others since pensioners are not told how to behave and do not face payment suspension or loss due to non-compliance. The program also disproportionately targets Indigenous people meaning it is discriminatory on the basis of race. It discriminates against the children of poor, sole parent families who may lose out on income support where parents fail to meet participation requirements. Their rights to social security are also at risk. Similarly, disadvantaged parents who are new to Australia and face linguistic and cultural challenges may encounter further disadvantage through having to participate in the program.

The government, despite its argument that the ParentsNext program is aimed at improving human rights, has failed to show that this is the least intrusive way to address the needs of sole parents and their children and has not justified its violations of their rights. The view that vulnerable social security recipients must be coerced into meeting their ‘obligations’ to the society is a significant misunderstanding of social security as a human right; and a failure to value the unpaid work of care performed by this group that reproduces our society. A positive feature of the Covid-induced economic crisis was the suspension of social security conditions and a supplementary Covid payment. Sadly these have now come to an end but as many advocates of the poor have pointed out, they demonstrated that better policies are possible and there are many stories of lives that improved even in the midst of the crisis, albeit temporarily.

In June 2021 the Parliamentary Joint Committee on Human Rights held an Inquiry into the ParentsNext program and a new legislative instrument aimed at altering and effectively expanding the categories of parents brought into the scope of the program. After hearing significant criticism of the program, particularly the compliance elements, the Committee recommended that the program be made voluntary to ensure its compatibility with human rights (Parliamentary Joint Committee on Human Rights, 2021). Days after the release of the Committee’s report in August 2021 the Senate considered a motion (from Labor Senator Pat Dodson) to make the program voluntary, however the Coalition would not support this and, with the vote tied, the legislative instrument passed.

The widespread opposition to the compulsory program, even from Coalition members of the Parliamentary Joint Committee on Human Rights, has not been enough to alter it. This is an illustration of the real limits of the human rights framework in Australia. Opponents of ParentsNext, disappointed that human rights concerns have been dismissed, will have to find other ways of advocating for changes to the program. In the meantime, parents and their children in the most vulnerable households in our country will continue to face the suspension or loss of their already meagre income support payments if they fail to meet the conditions in their parenting plans.

Creative means of advancing rights

In the absence of enabling legal frameworks for social and economic rights, both Andrew and Andrea have explored other means of advancing social and economic rights in Australia and elsewhere, including through National Human Rights Institutions, international bodies like the International Criminal Court, non-state actor forums such as People’s Tribunals (Andrew), and

through public interest litigation and efforts to address harassment and violence in work and education (Andrea). Their broad understanding of human rights has allowed them to persist in finding creative avenues to challenge injustice. Even where strong rights frameworks exist they have their limits as a means of advancing change, particularly where change requires greater distributive fairness. I remain inspired by Andrea and Andrew's example in continuing to search for ways of using and improving rights towards this end.

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