Neoliberal welfare reform and 'rights' compliance under Australian social security law

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Recent neoliberal reforms to Australian social security and labour law privilege individual industrial bargaining and adopt a 'job-first' policy for welfare recipients, which exposes them to greater market pressures. This builds on earlier conservative Howard Government reforms, such as the privatisation of job matching services; insistence on mutual obligation and workfare expectations of social security clients; and intensification of loss of payment penalties for compliance breaches. This article examines the extent to which social security decision-making in Australia is favourably influenced by international treaties that include social security among the social and economic rights sought to be protected. It is argued that rights to social security are of their nature weak and sometimes internally conflicted, but this is compounded by their more limited purchase in Australian law. Consequently, international law has been of less assistance in protecting social security rights within Australia than is the case internationally.

> Everyone, as a member of society, has the right to social security and is entitled to realization … of the economic, social and cultural rights indispensable for … dignity and the free development of … personality. [Article 22, Universal Declaration of Human Rights, 10 December 1948.]

Introduction

On 1 July 2006, the Commonwealth Government's 'Welfare to Work' reforms commenced operation. These reforms are likely to impact significantly on several groups within the Australian community — including parents on income support, people with disabilities on income support, the mature-aged unemployed and the long-term unemployed. The reforms will also change the compliance regime more generally for all recipients of social security benefits.[1]

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1 See the *Workplace Relations Legislation Amendment (Welfare to Work and Other Measures) Act 2005* (Cth) and the *Family and Community Services Legislation Amendment (Welfare to Work) Act 2005* (Cth).

Social security in international law

The amenability of social security to a human rights analysis, rather than a purely 'welfare' or social justice approach, has intrigued and divided commentators over recent years (Bailey 1997; Iding 2003; Koutnatzis 2005; Macklem 2006, 4–5).

Article 22 of the Universal Declaration of Human Rights (UDHR) recognises that everyone has the right to social security, and Art 25(1) recognises the right to a standard of living that is adequate for the health and well-being of a person and his or her family. Among other things, this includes 'the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his [or her] control'.

The right to social security is also amplified in later treaties. In particular, Art 9 of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR, operative 3 January 1976 and 10 March 1976 for Australia) recognises 'the right of everyone to social security, including social insurance'. Article 11(1) (like Art 25 of the UDHR) also supports this right by recognising a right to an adequate standard of living for the individual and his or her family. It notes that this 'includes adequate food, clothing and housing, and … the continuous improvement of living conditions'. However, Art 2(1) makes it clear that states are only required to 'take steps' towards the progressive realisation of these rights.

The 1966 International Covenant on Civil and Political Rights (ICCPR, operative 23 March 1976 and 13 August 1980 for Australia) contains a number of rights that support a right to social security. For example, Art 6 recognises that every human being has the inherent right to life; Art 23 recognises the right to protection of the family; and Art 27 recognises that minorities will not be denied the right 'to enjoy their own culture, to profess and practise their own religion, or to use their own language'.

Finally, several International Labour Organization (ILO) conventions place duties on state parties to provide social security protection. In particular, the 1952 ILO C102 Social Security (Minimum Standards) Convention makes provision for various forms of social security, including sickness, medical, maternity, employment injury, old-age, invalidity, survivors, unemployment and family benefits.[2]

Although Australia has not implemented either the ICESCR or the ICCPR in

2 Australia has not, however, ratified this convention.

domestic law, it has enacted antidiscrimination and other protections (but not yet a Bill of Rights; Charlesworth 1993) based on aspects of those treaties,[3] and it is bound by treaty obligations to submit periodic reports to relevant UN committees about compliance with each treaty. Individuals who have exhausted domestic avenues can, however, take advantage of the Optional Protocol to the ICCPR to bring complaints about breaches of that treaty to the Human Rights Committee of the UN.[4]

Certain human rights are also recognised as forming part of international customary law. However, while the High Court has 'wavered' about the status of customary law within Australian domestic law, it appears to be generally accepted that customary law acts as a source for the development of the common law (rather than automatically forming a part of it) (Charlesworth 2002, 5–7). So, customary law arguments will not figure further in the present analysis.

In common with other formulations of social and economic rights, the right to social security necessarily suffers from a lack of specificity or standards for enforcement, due to the lack of definition as to the *level* of benefits[5] sought to be protected. So, its impact tends to be more educative than normative.

To some extent, this reflects the traditional 'downplaying' of economic and social rights within the international system and among individual states parties, despite the interdependence and indivisibility of both civil and political, as well as economic, social and cultural rights (Steiner and Alston 1996, 256–57, 267–70).[6]

One of the reasons for the differing treatment of these rights appears to be the resource implications involved in promoting and protecting economic and social rights (Bailey 1997). As these are 'positive rights', they require states to take action to ensure that individuals are able to enjoy them. Depending on the nature of the right,

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3 For example, the *Sex Discrimination Act 1984* (Cth), *Racial Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth), *Age Discrimination Act 2004* (Cth) and *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

4 See the Optional Protocol to the ICCPR (operative 23 March 1976).

5 Indeed, the Canadian Supreme Court ruled in 2002 that neither the Canadian Charter nor treaty obligations impose any minimum floor on levels of benefits (Macklem 2006, 35–37).

6 For example, Art 22 of the UDHR states that everyone is entitled to the economic and social rights 'indispensable for [a person's] dignity, and the free development of his [or her] personality'. The preamble to the ICESCR states that economic, social and cultural rights, as well as civil and political rights, are necessary to achieve the goals and freedoms envisioned by human rights law.

this could involve the allocation of substantial resources to various sectors, such as housing, education, health and employment. It also involves establishing mechanisms to ensure access to these services. By contrast, civil and political rights generally require a state to avoid taking, or permitting, action that would limit their enjoyment. These may be less resource intensive than positive rights, and generally would be consistent with the traditional legal rights already provided within Western legal systems.

Apart from the unavoidable trespassing into *political* issues of resource allocation entailed should social entitlements be expressed as 'rights' that are able to be adjudicated, there is a correlative sense in which political decisions inevitably determine the appropriate balance between the market and the state in social protection (Macklem 2006).

However, this is not to say that economic and social rights do not have any normative influence at all. The Committee on Economic, Social and Cultural Rights (ESCR Committee) reviews states' periodic reports on their implementation of the ICESCR. The committee's guidelines on preparing such reports request that states provide information on, among other things, the forms of social security provided (based on the list outlined in ILO Convention 102); the main features (and comprehensiveness of coverage) of the social security schemes; the amount spent on social security; whether there are any groups that do not enjoy the right at all, or do so to a significantly lesser degree than the majority of the population; and any changes in legislation, court decisions and administrative rules, practices and procedures that affect the right to social security (ESCR Committee 1991).

From time to time, the committee has given particular focus to social security in its consideration of state reports on their compliance with the ICESCR.[7] However, examination of the record demonstrates that its monitoring of countries such as Australia is generally very benign,[8] rising little above requiring a publicly recorded 'dialogue' or communication about such matters and certainly falling well short of

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7 See, for example, its adverse commentary on Hong Kong in its 1996 *Concluding Observations of the Committee on Economic, Social and Cultural Rights (Hong Kong): United Kingdom of Great Britain and Northern Ireland. 06/12/96. E/C.12/1/Add.10.* [Online] Available: <www.unhchr.ch/tbs/doc.nsf/385c2add> [2006, April 13].

8 Thus, Australia lodged its *Third Periodic Report: Australia* in 1998 with extensive (but descriptive) detail of social security provision, including those for people with disabilities: United Nations Economic and Social Council 1998. The fourth report, lodged at the same time, was effectively silent about social security. At the time of writing, the fifth report, which was due in July 2005, has yet to be lodged.

constituting a rigorous accountability process.

More recently, however, the committee has developed specific guidance on the right to social security, in the form of a *draft* General Comment. This outlines the committee's draft view as to the content of the right, and states' obligations for complying with it. It notes that the right 'covers the right to access benefits, through a system of social security, in order to secure adequate income security in times of economic or social distress; access to health care; and family support, particularly for children and adult dependents'. State parties must adopt effective measures, within their maximum available resources, to realise this right without discrimination (ESCR Committee 2006, 2).[9]

The draft Comment also notes that, while the essential elements of the right may vary according to different conditions, several factors (for example, those affecting the availability and accessibility of social security) apply in all circumstances. While the right applies to everyone, state parties should give special attention to individuals and groups that traditionally have had difficulties in exercising the right, including women, the unemployed, marginalised or injured workers, people with disabilities, the aged, children and dependents, minority groups, refugees, asylum seekers, internally displaced people, non-nationals, prisoners and detainees (ESCR Committee 2006, 4–5).

In addition, as Lynch (2005, 543) observes in the citations supporting the quote below, other international treaty pronouncements or standards also seek to give greater specificity to the right to social security:

> Although international human rights law does not prescribe social security payment levels, it does stipulate that benefits must not be reduced below a minimum threshold. Social security must be sufficient to ensure a dignified human existence and to meet people's needs, particularly in relation to housing and health. A person's needs vary based on factors including housing status, age, health, cultural background, and family responsibilities. Social security must be available to cover all the risks involved in the loss of means of subsistence beyond a person's control.

9 The right to social security has also been recognised in a number of other international instruments, including the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (Art 5(e)(iv)); the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (Arts 11.1(e), 14(2)(c)); and the 1989 Convention on the Rights of the Child (Art 26).

However, while statements such as these provide a useful starting point for determining states' responsibilities in relation to the right to social security, they contain little detail as to what such a right would actually entail. Accordingly, even if a state party were to take steps towards the realisation of the right — for example, by legislating a right to social security — it would be necessary for the right to be 'fleshed out' to include details regarding the scope of, and eligibility for, such payments, as well as the payment levels.

Even the 'minimum threshold' sought to be established by the ILO Convention 102 has since been substantially undermined by the rising power and sphere of influence of the World Trade Organization and the consequential sidelining of the role of the ILO (Meng 2004), weakening arguments that its ratification would markedly strengthen the position of Australian social security recipients impacted by greater exposure to market forces under the combination of recent Welfare to Work and labour market deregulation (Carney 2006b).

Of course, this politicisation and fluidity of social rights discourse within human rights frameworks is not confined to the international arena. Indeed, Britain's influential 1911 scheme of unemployment insurance was a compromise of the Liberal Party — then an aristocratic Whig/social democrat party of the left — developed to head off Labour's growing public traction on establishing a 'right to work'. This compromise served to entrench rights to unemployment payments only for *full-time, standard workers,* at the expense of neglecting the position of casual or intermittent workers, such as women or the unskilled (Hanagan 1997). Nearly a century later, this design deficiency has left such workers badly exposed across Europe, as it experiences the cold winds from the combination of the deregulation of labour markets, global economic pressures and the embrace of neoliberal 'small government' forms of governance. The conceptual deficiencies of the 1911 UK model were carried over into Australia's 'needs-oriented' scheme of social security, but their effect is further magnified compared to the European experience by Australia's recent adoption of neoliberal 'market' reforms of *both* the labour market and social security. These reforms culminated in the December 2005 passage of 'Work Choices' and 'Welfare Reform' packages (Carney 2006a; Peetz 2006; Ramia and Wailes 2006), creating a 'pincer-movement' of heightened insecurity for citizens whether in work or on welfare (Carney 2006b).

Australian social security arrangements

The history of Australia's distinctive model of social security has been well-canvassed elsewhere (Castles 1985; 1994; Carney 2006a, ch 2). The claims of older or disabled workers whose labour helped to build national prosperity were recognised

in some states before federation and were extended nationwide in 1908, soon after federation (Carney 2002). Valiant attempts to introduce a contributory model during the early 20th century came to nothing, with Australia retaining its tax-funded, flat-rate, means-tested and 'categorical' scheme of payments. New special purpose payments were introduced as new needs were recognised, but this occurred more slowly than in most other Western countries, because social conditions (such as sick pay) were fairly successfully won as part of the industrial awards for those fortunate enough to have work (Castles 1985; Carney 2006a, ch 2). Together with other elements of what social policy analysts term the 'social settlement' first popularised by books such as that by Paul Kelly (1992) — in particular, the reliance on high tariff protections and restrictive migration controls — this constituted Australia's distinctive policy model of the '"wage earners" welfare state' (Castles 1994; Jamrozik 1994).

Under the guidance of Labor governments, that model was transformed over the course of the 1970s and 1980s into a tightly targeted 'needs' policy (Mendes 1999). Following its election in 1996, the current conservative (Liberal/National Party) government re-moulded social security consistent with the deregulatory embrace of market forces commonly described as 'neoliberalism',[10] as illustrated by the privatisation of services such as job matching for those out of work, and its emphasis on 'mutual obligation', such as in work-fare schemes for the unemployed or equivalent 'participation' obligations placed on sole parents and people with disabilities (Carney 2002). With the passage of extensive 'welfare-reform' legislation in December 2005 (mainly effective from 1 July 2006), Australia embraced a 'job-first' (or an 'employment-at-all-costs') version of the 'active society' and 'mutual obligations' policy agendas (Theodore and Peck 2001, 85–86; Bonoli and Sarfati 2002; Carney 2006a, ch 10).

Australia's human rights provisions

Australia is now alone among Western democracies in not having a Bill of Rights

10 Neoliberal reform models involve 'outsourcing' of services to the private sector (often termed the 'new public management'; see Carpenter 2000; Hartman 2005). Neoliberal governance relegates the state to setting policy goals and providing funding for services which are mainly tendered out to the private sector. Along with greater reliance on personal responsibility and civil society (non-government volunteer services), these measures remove the state from responsibility for service delivery — or, in the well-worn rowing metaphor, it transforms the state from one which did both the 'steering' and the 'rowing', to one which merely 'steers'.

against which its laws might be judged and held accountable (Charlesworth et al 2003, 424).[11]

This may be less significant so far as social rights are concerned than it would be in the case of civil rights, because such rights have not generally been written into domestic Bills of Rights — except for reasonably ambitious (unqualified) statements found in some parts of post-communist Europe (Sadurski 2002) and the more nuanced or qualified formulations, balancing rights against resource or political constraints, as found other parts of the world, such as South Africa (Koutnatzis 2005, 98).[12]

Some federal systems contain examples of limited expressions of such rights, as in Quebec, Canada, where there is limited protection against discrimination on the basis of 'social condition', though the Canadian Charter as such does not recognise economic rights at the national level (Iding 2003, 523). The Quebec provision takes added significance given that — with the exception of the unemployed and pensions for retirement, disability and death — social security (and compliance or otherwise with relevant treaty obligations) is a *provincial* responsibility (Macklem 2006, 9–10).[13]

In any case, while a Bill of Rights may be both a powerful and a highly 'emblematic' way of giving effect to economic, social and cultural rights,[14] this is not the only

11 It is worth noting, however, that an Australian non-governmental organisation has commenced a campaign to introduce a Human Rights Bill into the Commonwealth Parliament. This draft Bill includes certain economic and social rights, including a right to social security. However, like the ICESCR, the Bill provides for the progressive realisation of these rights: see the Human Rights Bill 2006 at <www.newmatilda.com>.

12 Sections 26(1) and 27(1) of South Africa's Final Constitution guarantee rights of access to 'adequate housing', 'health care services …', 'sufficient food and water' and 'social security'. These are rights that the state must 'respect, protect, promote and fulfill', but there are three caveats spelled out in subs (2) of each section — namely, that the state take 'reasonable legislative and other measures' within its 'available resources' aimed to achieve the 'progressive realization' of these rights (Koutnatzis 2005, 99). These rights have been construed very conservatively to date (above, 99–112).

13 On four occasions between 1993 and 1999, relevant UN agencies — such as the Committee on Economic, Social and Cultural Rights; the Committee on the Elimination of Discrimination Against Women; and the UN Human Rights Committee — condemned the welfare cut backs for vulnerable groups, including sole parents (Macklem 2006, 13–14), but without discernable impact on domestic politics (above, 15).

14 The Canadian Charter experience is not auspicious; Patrick Macklem's review of Supreme Court of Canada rulings on social security issues has witnessed a shift from an 'open-minded' towards a 'less accommodating' stance towards having regard to international treaty provisions (Macklem 2006, 35).

means by which such rights might find expression (Otto and Wiseman 2001). Australia does, of course, have its Human Rights and Equal Opportunity Commission, with certain reporting, mediation and advice functions. This is a statutory body whose work is informed by certain international human rights treaties (appended in Sch 2 of its empowering Act), but *not* the ICESCR, a critical omission for the purposes of the present analysis (though some commentators would argue that its complaints-based remedies are less significant than HREOC's educative role within the community). Antidiscrimination laws,[15] loosely modelled on US exemplars but with important structural differences in areas such as disability,[16] apply at Commonwealth and state levels of government (where complementary statutes have generally been enacted and would govern welfare services like housing), but the impact of antidiscrimination protections on social security is minimal, due to the breadth of the statutory exemptions for social security under the federal laws. Thus, otherwise unlawful discrimination on the basis of marital status is permitted by exemptions covering, for example, social security provisions for rates of social security to differ depending on whether people are single or a member of a heterosexual couple relationship (where the combined rate is less than two single rates); lack of qualification of same-sex couples for payments based on relationships (such as partner payments); or provision for 'pooling' the incomes of couples for income and asset tests. All of these discriminatory forms of treatment (and more) are authorised by these specific exemptions,[17] provided the decision is made 'in direct compliance' with the present social security law.[18]

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15 *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth). For a review of state and territory discrimination law, see Ronalds 1998.

16 There is a large literature on this area (generally, see Jones and Basser Marks 1999). For a recent review of the Australian model, in the light of existing treaty provisions and the draft UN Convention on Disability, see the analysis (and policy framework) advanced by Sarah Parker (2006).

17 Thus, s 26(1) of the *Sex Discrimination Act*, which binds the Crown (26(2)), would otherwise make it unlawful for 'a person who performs any function or exercises any power under a Commonwealth law or for the purposes of a Commonwealth program … to discriminate against another person, on the ground of the other person's sex, marital status, pregnancy or potential pregnancy, in the performance of that function, the exercise of that power or the fulfilment of that responsibility'.

18 An exemption stemming from the *Sex Discrimination Act*, s 40(2)(h), referring to the predecessor Act but held to remain operative due to s 10(1) of the *Acts Interpretation Act 1901* (Cth) in *Re Secretary, Department of Social Security and Dagher,* 1997, at [13]–[19], especially [19]. A statement to the Parliament by the Attorney-General on 26 June 1997, dealing with exemptions, reinforced that view (at [17]). See s 51 of the *Disability Discrimination Act 1992* (Cth).

At the most basic level of all, perhaps, is the amenability of social security decisions to judicial or administrative review (or the 'rule of law'). Until the High Court ruled in *Green v Daniels*, 1977, against the government's policy that 'school-leavers' did not qualify for unemployment payments over the summer vacation, judicial review was a theoretical rather than a practical right. Unlike Britain, where merits review had been a longstanding right, Australia lacked that protection until 1975, when 'recommendatory' powers of review were established. Since then (from 1980 on a fully statutory footing), Australia has had a two-level system of merits review of social security (O'Connor 1993) — first to a specialist multidisciplinary Social Security Appeals Tribunal (SSAT), with further rights of review by either party to the generic Administrative Appeals Tribunal (AAT) (Gardner 1995). This is a free service, catering quickly to high volumes of applications by means of informal and 'proactive' forms of hearings (Carney 1994), and it has been independently assessed as one of the exemplars of best practice administrative review (ARC 1995).

Part of the changes wrought by Australia's innovative 'new administrative law' of the 1970s (Maher 1994), merits review remains one of the most important basic guarantors of rights of social security recipients, as is the case overseas (Potter 1992).

International obligations, administrative discretions and aiding statutory construction

Generally, international law will not become part of Australian law until it has been domestically implemented by legislation (Piotrowicz and Kaye 2000, 199–200). However, this principle has been modified by *Minister of State for Immigration and Ethnic Affairs v Teoh*, 1995, in which the High Court held that, where Australia has ratified an international convention but has not yet incorporated it into domestic law, this can nonetheless give rise to a 'legitimate expectation' that an administrative decision-maker will act consistently with it (Allars 1995; Lacey 2001). Despite attempts by successive Commonwealth Governments to overturn the doctrine, it remains part of Australian law (Charlesworth et al 2003, 449–50).[19]

Beyond that, treaties which have not been incorporated into domestic law can still have a part to play in statutory interpretation. For example, Charlesworth notes that it is generally accepted that courts will interpret legislation in a way that accords with Australia's international obligations (both customary law and treaties ratified

19 However, given the critical remarks made by several High Court judges in the more recent case of *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*, 2003, it is possible that the principle could be overturned in the future (Lacey, 2004).

prior to the legislation's enactment).[20] She states that 'courts refer to international law to confirm the meaning of a statutory provision, to construe general words, or to resolve ambiguity or uncertainty'. In addition, courts will not interpret legislation as limiting or overturning fundamental rights or freedoms unless such an intention is clear from the statutory language (Charlesworth, Chiam, Hovell and Williams 2003, 446–47).[21]

Australian social security law once contained many wide discretionary powers, but most of these discretions were long ago converted into rule form, starting in the 1980s (Carney and Hanks 1986, ch 10). Because Australia's social security laws now leave very small spaces for the exercise of discretion, and because statutory ambiguity of expression is comparatively rare in social security due to the prevailing preference (since 1991 especially) for finely detailed (and voluminous) forms of drafting, little scope exists for paying regard to international treaties within social security administration and review.

This has most recently been demonstrated in AAT rulings in cases such as *Re Reine and Secretary, Department of Family and Community Services*, 2005, where the unemployed applicant failed to justify his refusal to negotiate a Newstart Activity Agreement (strictly his 'delay' under s 607(1) of the *Social Security Act 1991* (Cth)) on the basis that compliance with the agreement (and imposition of a penalty for non-compliance) would be unconscionable, unconstitutional, contrary to other federal laws and in breach of treaty obligations. Mr Reine sought to rely on the 'right' to social security for the unemployed as expressed in Art 25 of the UDHR, and the commitment to a policy of full employment found in Art 55 of the UN Charter itself.

Deputy President Forgie rejected these arguments on several grounds, including that Art 25 does not establish an 'unqualified' right to social security, so even if it was part

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20 However, Charlesworth notes that debate remains on the nature of legislation to which the principle applies; the international law principles to which the courts may refer; and the level of uncertainty required. In addition, courts will not have regard to treaties ratified after the legislation was enacted unless the legislation constituted the domestic implementation of that treaty (Charlesworth, Chiam, Hovell and Williams 2003, 447, 457–58).

21 There is a large literature on this issue. For a very accessible introduction, see (Charlesworth 2002, 7–9). The most recent review of the way courts respond to the introduction of a Bill of Rights, especially one which takes the form of an ability for the courts to declare that a provision is not consistent with the human rights charter (rather than strike it down), is by Hilary Charlesworth (2005). Equivalent Canadian principles of statutory construction are discussed by Patrick Macklem (2006, 24–27).

of municipal law, its observance was quite consistent with a requirement that he enter into an agreement. Because she found no statutory ambiguity in these statutory requirements, there was no room for this or other treaty provisions[22] to shape their construction — and, to the extent that administrators exercised discretion about invoking the requirement (or setting the terms of an agreement), the exercise of that discretion in the present case was found to be consistent with taking those principles of international law into account (at [24]–[28]).

Earlier challenges to social security provisions penalising a person who moves to an area which lowers that person's prospects of employment by barring unemployment (Newstart) payments for a period of 26 weeks (Carney 2006a, ch 7), based on the inconsistency of such penalties with the UDHR, were given much shorter shrift on the basis that the UDHR was not part of municipal law (*Re Higgins and Secretary, Department of Social Security,* 1993). Deputy President Johnston had, however, referred to international protections of freedom of movement as an additional reason for giving a narrow reading to this provision when resolving the ambiguity about whether the provision applied only to people in receipt of payment at the time of the move (*Re Secretary, Department of Social Security and Clemson,* 1991, at [28]).

Human rights and discretion: the Special Benefit cases

The discretionary payment for certain emergencies or unforeseen contingencies — Special Benefit — is an exception to this whittling away of discretion within social

22 Mr Reine sought to rely on a very long list of treaties, including the Constitution of the World Health Organization; Convention Concerning Discrimination in Respect of Employment and Occupation; Constitution of the International Labour Organisation; Convention Concerning Employment Promotion and Protection Against Unemployment; International Labour Organisation Forced Labour Convention; Abolition of Forced Labour Convention; Equality of Treatment (Social Security) Convention; Social Security (Minimum Standards) Convention; Protection of Wages Convention; Constitution of the United Nations Education, Scientific and Cultural Organization (UNESCO), UNESCO Convention Against Discrimination in Education; Universal Declaration of Human Rights; Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights; International Covenant on Civil and Procedural Rights; International Covenant on Economic, Social and Cultural Rights; Universal Declaration on the Eradication of Hunger and Malnutrition; Declaration of the United Nations Conference on the Human Environment; Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment; International Covenant on Civil and Political Rights; and UNESCO International Charter of Physical Education and Sport.

security legislation.[23] This leaves open for consideration the 'socio-legal' (or social realist) question of the extent to which human rights principles *are in fact* being taken into account by decision-makers, even if the judicial obligation to do so is a little thinner than might be preferred by those commentators who warmly welcomed *Teoh* as being effectively immune from possible future modification.

In the case of Special Benefit, the law leaves the rate of any payment at the discretion of the delegate, subject to the rate not exceeding payments stipulated for a range of other named payments for various contingencies (where precise 'rate calculators' determine the base rate, any supplements and the operation of income tests).[24]

Ever since cases such as *Re Ezekiel and Director-General of Social Services,* 1984, decided to accept the higher 'independent person' rate of social security as the benchmark for a young person living away from home, it has been accepted that international treaty obligations, such as those regarding an 'adequate' level of social security (or, in other contexts, those owed to children under the 1989 Convention on the Rights of the Child), are germane to exercise of the discretion to set the 'rate' of Special Benefit payments. While this case in fact contained limited discussion of international human rights law, it has been cited in a number of subsequent decisions as an example of taking such an approach.

This line of reasoning, which uses consistency with international law standards as a (partly rhetorical) element of determining where to pitch the rate of payment payable to a given applicant, also finds expression in the early 1990s in *Re Secretary, Department of Social Security and Underwood,* 1991, and again in *Re Secretary, Department of Social Security and Kumar,* 1992, where Justice O'Connor, then the AAT President, ruled in both cases that an otherwise eligible dependent child of a mother prohibited from receiving social security in her own right (due to a two-year 'non-payment' rule for recently arrived migrants (Koller 1997)) was entitled to a rate which approximated that of a 'benchmark group' of other social security payments. And in *Kumar,* involving children of eight and 10 years of age, the applicable

23 The core element is the discretion in s 729(2)(e) of the *Social Security Act* that payment may be granted where the delegate is 'satisfied that the person is unable to earn a sufficient livelihood for the person and the person's dependants (if any) because of age, physical or mental disability or domestic circumstances or for any other reason'.

24 Section 746(1) states that a person's rate of Special Benefit is 'the fortnightly rate determined by the Secretary in his or her discretion' while subs (2) goes on to provide that the 'rate of a person's special benefit is not to exceed the rate at which youth allowance, austudy payment or newstart allowance would be payable to the person …'.

benchmark group was held to be the rate payable to 'a young person in receipt of job-search allowance at the maximum non-independent rate', this being the nearest equivalent to the family payments their mother would otherwise have been entitled to receive (*Kumar,* at [20]).

As was said in *Underwood* (at [20]):

> Although not binding in domestic law, Australia's international obligations do have some relevance to domestic law [citing *Re Ezekiel*] … To deny the respondents the special benefit would be in conflict with articles 26 and 27 of the United Nations Convention on the Rights of the Child (the right to benefit from social security and the right to an adequate standard of living).

More recently, in *Re Secretary, Department of Family and Community Services and Vu,* 2001, a case involving a young infant, the AAT concluded (at [34]) that, in the case of children under the age of five, the discretion was properly exercised to pay the rate normally paid to an *adult* responsible for the *care* of a young child, on the basis that the child's:

> … particular circumstances require that he be provided with a level of income support that recognises his need for a carer and provides for a sufficient livelihood taking that need into account.

While reference was not made to human rights law within this case, the decision accepted the argument that children under that age are entirely dependent on adult care (while over that age a portion of the burden of care is assumed by education authorities). The rate of adult unemployment payment (called 'Newstart allowance'), plus child dependency components payable to a person caring for a dependent child, was selected as the benchmark to give effect to that sentiment. The AAT rejected Centrelink's contention that it should select the much more austere benchmark figure of the rates of 'Youth Allowance' payments made to young people who are either studying or looking for work (based on assumed lower living costs or partial support from parents). It rejected both Centrelink's initial choice of the extremely low 'at home' rate, as well as its later agreement to substitute the still anything but princely 'independent rate' of youth payments.[25]

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25 The subsequent history of this ruling, made with the authority of Justice O'Connor as AAT President, and not taken on appeal to the Federal Court in this or related instances, is, however, illuminating. Because Centrelink did not change the rates policy overruled in *Vu,* it was left to people to (successfully) pursue their claims through the tribunals — a strategy of 'non-acquiescence', as it was rather cutely described in the US two decades earlier (Froehlic 1985; Maranville 1986).

Human rights in aid of construction of statutory ambiguity

Human rights standards have also been invoked from time to time in aid of a particular construction of concepts and phrases used in social security law, but with scant success. In one sense, there is nothing very remarkable about this, given that, as previously explained, Australia (along with Canada: Macklem 2006, 24–27) prefers the 'dualist' view of the relationship between international norms and domestic provisions. That is, in the absence of domestic implementation of those norms in legislation, courts generally may only have regard to *consistency* with those norms when construing otherwise ambiguous provisions (Charlesworth 2002, 7–9; 2005).

In *Re Secretary, Department of Social Security and Chin,* 1998, the AAT paid regard to international treaty obligations, along with the *Disability Discrimination Act 1992* (Cth) (DDA), in concluding that its view of the breadth of meaning of the obligation of a disabled person to accept 'any work' in order to qualify for the adult disability support pension (Carney 1991) was an interpretation which was consistent with both of those sources. The AAT accepted the argument that Chin, who was profoundly deaf, could not be required to accept mundane process work, because there was evidence that this would be unsuitable on the basis that it would undermine her confidence and lead to psychological harm (at [34], [35]), thus placing such work outside the scope of 'suitable work' able to be considered when assessing her capacity for work (further, Carney 2006a, ch 8), just as would be the case if the assessment paid regard to a capacity for unlawful work. The AAT initially accepted this argument on the ground that the DDA continued to be relevant because the s 51 exemption from discrimination, based on the 'direct effects' of legislative provisions regarding how to make the assessment of capacity, was not attracted in these circumstances ([33], [38], [41]). However, both this and the AAT's reference to human rights considerations fell by the wayside when Nicolson J in the Federal Court ruled that there was no evidence of the psychological harms which the AAT postulated as the basis of its findings (*Secretary, Department of Social Security v Chin*, 1999).

Other challenges have fallen on stony ground too. Neaves J in the Federal Court peremptorily dismissed an argument that a provision imposing a (then) 12-week loss of payments penalty on a person who, without adequate excuse, moved to live in an area that reduced their employment prospects, should be given a narrow construction. The argument given such short shrift was that the penalty provision should be read down to render it consistent with the guarantee of freedom of movement contained in Art 12(1) of the ICCPR that 'Everyone … shall have the right to liberty of movement and freedom to choose his [or her] residence' within the state of which they are resident (*Secretary, Department of Social Security v Clemson*, 1993).

Similarly, it was held that the statutory bar to paying Special Benefit to a person engaged in a 'full-time course of education',[26] could not be read down by reference to the Convention on the Rights of the Child, to catch only those students for whom study was a 'voluntary' choice, as distinct from being a statutory responsibility under compulsory school attendance laws.[27]

Nor was there any joy when the 1975 Declaration of the Rights of Disabled Persons, to which Australia is a signatory, was invoked in a dispute about whether child maintenance should be classified more favourably as 'disability expense maintenance'. The maintenance in question was being paid to a parent under the statutory formulae laid down in the *Child Support (Assessment) Act 1989* (Cth), in respect of a child who happened to be disabled. It was argued that it should, without more, be accepted as exempt-from-income-testing 'disability expenses maintenance', as defined in s 10(1) of the *Social Security Act,* rather than treated as 'maintenance income', as defined in the same section (*Re Jonkers and Department of Family and Community Services,* 1999, at [30], [31]). This contention failed because

> … when viewed separately, the terms 'maintenance income' and 'disability expenses maintenance' … are clear and unambiguous. Accordingly, there is no need to favour a construction which accords to Australia's obligations under the United Nations Declaration on the Rights of Disabled Persons (see *Minister for Immigration and Ethnic Affairs v Teoh* [citations omitted]). [At [31].]

So, in short, human rights precepts have acquired little purchase in Australia as a basis for adoption of constructions of the substantive law which would be more favourable to the interests of social security clients.

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26 Section 737(1)(b) provides that Special Benefit is not payable to a person who is under the age of 16 and enrolled in a 'full-time course of education or of vocational training', unless the person is an 'SPB homeless person' as defined in s 739 (effectively, that it is unreasonable to live at home due to domestic violence and similar circumstances).

27 *Re Mokofsi and Secretary, Department of Family and Community Services,* 1999, Handley SM and Barber M at [22], [23]. Here, the applicant was a 12-year-old primary school student, the son of non-resident parents caught by the bar on payment of social security in the first two years after arrival. The Tribunal also rejected an argument that the delegate should issue a matching requirement to undertake full-time study under s 737(3) of the *Social Security Act,* which direction would have had the effect of dissolving the bar on payment: at [24]. Unlike *Underwood* (residing in a refuge) or *Kumar* (residing in a friend's crowded flat, without a key or any legal foundation of security), the son was not homeless here because they lived with their extended family, in a 'stable' home, where the father provided financial support (if at inadequate levels): at [35].

International obligations and substantive law: normative assessments for the disabled and the unemployed

Arguably the largest challenge of human rights law is in adapting its precepts to serve as a basis for making *normative* assessments of substantive law. For example, even if the Australian Government were to legislate to implement the right to social security in Art 9 of the ICESCR into domestic law, the question arises as to what its form and content should be in order to ensure compliance.

While the Committee on Economic, Social and Cultural Rights has recently provided some guidance to the right in the form of a draft General Comment, it cannot be described as prescriptive, or sufficiently detailed to ensure that its domestic implementation would provide the minimum standards that those who seek to rely on it may expect. In short, as with other human rights norms, there would be significant scope for interpretation in the domestic implementation process.

Certainly, valiant attempts have been made to tackle similar difficulties in other contexts, such as Australia's domestic endeavours to measure compliance of mental health legislation with applicable human rights benchmarks (Watchirs and Heesom 1996; Watchirs 2000; but see Rees 2002), but the challenge largely remains.

Social security standards arguably are too fuzzy to hold governments to account through UN reports

Even a cursory reading of Australia's *Third Periodic Report* (United Nations Economic and Social Council 1998) on its implementation of the ICESCR demonstrates the room for slippage.

Over half of the 40 paragraphs (paras 126–48) devoted to social security can fairly be characterised as lauding the government's then-recent initiative of introducing a fully privatised 'job network' catering for finding work for the unemployed, a scheme based on quasi-market competition by placement agencies in response to standardised 'commencement' and 'completion' payments for three main categories of degrees of need for assistance on the part of the unemployed (Considine 1999; Ramia and Carney 2001; Carney and Ramia 2002).

This rather rosy picture of Australia's initiatives, without discussion of the evidence showing that the system was associated with a very serious erosion in the rights of unemployed people to receive income support, is not surprising. As Anne Bayesfsky has commented, '[t]he idea that governments will take the opportunity to present their international human rights situation to international forums in self-critical or negative terms is illusory' (see Hudson 2002).

In fact, over the early life of these reforms, the incidence of rate reduction or loss of all payment penalties for such faults as failure to keep appointment almost trebled in number, while younger unemployed, and those characterised by long-term unemployment, marginalised labour force and social attachments, and vulnerable customers of the new network also suffered (OECD 2001; Carney 2005b; Carney 2006a, chs 7, 10).

In its concluding observations on the state report, the Committee noted that 'in spite of existing guarantees pertaining to economic, social and cultural rights in the state party's domestic legislation, the covenant continues to have no legal status at the federal and state level, thereby impeding the full recognition and applicability of its provisions'. It made specific recommendations about aspects of Australia's social security laws (for example, in relation to home workers and new immigrants) and requested that Australia provide additional, more detailed information in its next report about the right to social security (ESCR Committee 2000, paras 13, 27, 32, 36).

The fuzziness of the human rights standards, it is argued, is complicit in permitting such uncritical reporting. That fuzziness is compounded in some areas by *inherent* tensions between different aspects of some international treaty pronouncements, as illustrated by programs for the disabled.

Some standards, such as the disability standards, are internally conflicted?

Within OECD countries, Australian payments for disability and carers were found to rate extremely well when an ILO-derived 'core' set of rating indices was used to compare policies and programs in each of the countries reviewed (Dixon and Hyde 2000). Yet it rates poorly on other criteria, such as the degree to which the programs recognise a 'social' rather than a 'medical' conception of the need for care and support (Stratton and Delaney 2000), or the scope (and generosity) of the support extended (Gleeson 1998). Australia, for example, is one of the few developed countries not to have a payment geared to meeting the 'actual cost' of disability (Carney 2002).

As argued more fully elsewhere (Carney 2003), framing social security policies for the disabled poses a choice between two somewhat contradictory messages. Article 3 of the UN Declaration on the Rights of the Disabled — which speaks of disabled people having '*the same fundamental rights* as their fellow-citizens of the same age' (emphasis added) — expresses the principle of 'normalisation' (or equal treatment irrespective of disability, such as by 'mainstreaming' services), while Art 7 — which speaks of the '*right to economic and social security* … [and] the right, according to their

capabilities, to secure and retain employment or to engage in a useful, productive and remunerative occupation' (emphasis added) — instead favours the provision of social security in ways which recognise the *specific needs* of people with a disability (Jones and Basser Marks 1999). That rift between 'equality' and 'special needs' has significantly widened in recent years in Australia, as social security payments have been shifted to hinge on objective, medical measures of disability, disregarding subjective measures such as the personal attributes and skills of the person, or their realistic access to education or labour markets (Carney 2006a, ch 8). As a consequence, there has been a substantial erosion of the goal of equality of social 'participation' for the disabled, traditionally expressed as pursuit of T H Marshall's claim of *social rights of citizenship* (Carney 2003).

In human rights terms, taking access to the security provided by the disability support pension as the test case, the two paradigms lead to very different outcomes. Take two applicants with severely arthritic knee and ankle joints, one living in a paved city environment which makes it possible to walk around on foot, the other in a remote sandy desert location where such mobility is not physically possible. The 'medical impairment rating' paradigm rates both claimants *equally* (since restrictions on anatomical movement are the same), while the 'social consequences' paradigm views the need to navigate unpaved, uneven ground as a factor increasing that person's level of disability, and therefore strengthens that individual's claim for a pension. The first position essentially sees elimination of environmental barriers to participation of the disabled as being addressed by *other* initiatives, rather than accepting that welfare policy should treat people differently by virtue of any differing *needs* which stem from the interaction between their impairments and say their locational, attitudinal or labour market disadvantages.

As shown elsewhere (Carney 2003; Carney 2006a), this duality of voice within the relevant UN statement about disability simply played into the hands of successive governments determined to rein in fiscal outlays for the disabled, irrespective of the human consequences of those policies. Under the Welfare to Work legislation, eligibility for the disability support pension is significantly narrowed, forcing many people onto Newstart payments for the unemployed, where refusal to accept a particular job carries heavy financial penalties in the form of loss of benefit eligibility (Carney 2006a, ch 8), while wage rates can be lowered through the new Work Choices power to set a separate minimum wage for the disabled.

A rights vacuum for the unemployed?

The unemployed in Australia faced a rather different problem, that of an absence of a basis for developing a rights dialogue about penalties which impacted on large

numbers of people, with a severity greater than that of fines for many criminal offences (ACOSS 2000, 2001, 2002).

As previously observed (Carney 2005b), neoliberal reforms of welfare which reduce the role for the state and expose social security clients to market forces have been the most emblematic of recent changes to Australian welfare and the twin reforms to labour laws (Carney 2006b). For people of workforce age, Australia has also embraced the North American idea of 'mutual obligation' (Moss 2000; Yeatman and Owler 2001), based around ideas of reciprocal 'obligations' (Macintyre 1999) and client 'capacity building' (Jayasuriya 2000; Jayasuriya 2001). Compulsory 'work for welfare' programs are one illustration of this; contractual bases of welfare, such as job-seeker 'activity agreements' (or imposed contracts), are another (Carney and Ramia 1999). Mutual obligation remains a contentious policy, however, with critiques directed to the lack of even-handedness, and the shaky moral foundations of the notion (Goodin 2001; Kinnear 2002).

Long-term unemployed, or other vulnerable people confronting major barriers to labour market re-entry, are disadvantaged by the reforms, and especially to the erosion of their rights (Carney and Ramia 2002). Services are often withheld by 'parking' less responsive clients, when providers decide that it is not economic to invest substantial sums in attempting to equip them for work if the eventual 'completion payments' and low likelihood of success render it a poor business risk (Considine 2001; OECD 2001). Moreover, studies show that there is no receptive climate of respect within privatised entities for principles of administrative process or guarantees of individual rights of claimants, because such values simply do not resonate well with the 'enterprise culture' cultivated by the underlying logic of the new network (Considine 2000; 2001; Carney 2005b).

A key problem in both instances, it seems, lay in the incentive structure created by the reforms (further, Carney 2005a). As the government's own evaluation reported, groups such as the disabled, people with drug dependency and those with emotional barriers or mental retardation, as well as those with low skills or long durations of unemployment, are particularly at risk (Department of Employment and Workplace Relations 2002, 96–97):

> The research … suggests that the assistance provided under Intensive Assistance, and the activities that job seekers pursue as a result, do not work well for all job seekers … particularly … those who have been in assistance longer and who are more disadvantaged … In qualitative research, providers confirmed that they often 'give up' on job seekers who are too hard to assist. … They indicated that they were extremely unlikely to obtain employment for these job seekers and that their time would be better spent helping others.

> Such 'hard-to-help' job seekers receive the minimum assistance required to meet contractual obligations.

The Productivity Commission report into the system supported the efficiencies and potential for flexibility and innovation offered by the job network, but it too suggested further changes to address the disadvantage suffered by vulnerable groups and the long-term unemployed (Productivity Commission 2002, xx).

In response to OECD and other earlier criticisms from peak bodies (OECD 2001), the government changed and softened the breach regime, starting in 2002 (Vanstone 2002). Even so, Department of Employment and Workplace Relations figures disclosed that 106,000 breaches were imposed in the 12 months to 2005, 64,000 of which were the heavier activity test breaches (a 26-week, 18 per cent rate reduction for a first breach in two years, 24 percent for the second breach), and 3800 were third-breach, eight-week 'total loss of payment' penalties (Senate 2005, 26, para 2.71).

So the belated adoption in the 2005 welfare reform package (effective from July 2006) of the OECD's preference for a policy of reliance mainly on 'suspensions' (ss 626 and 627 of the *Social Security Act*, as amended) is both welcome on grounds of fairness, and more consistent with the balance of research evidence — which shows that sanctions serve administrative, not policy, objectives. Sanctions have been shown to simply tend to 'organise' people to accept *administrative* processes rather than serve to educate them about *program* requirements (Wilson, Stoker and McGrath 1999). The rules are often poorly understood by clients, and they have been shown to bear down most harshly on those confronting the *largest* barriers to employment (Hasenfeld, Ghose and Larson 2004).

Yet it is surely telling that *human rights* arguments counted for nought in these debates about achieving this welcome shift in policies, even though the welfare sector has long cast its arguments in favour of establishing welfare as a 'right' not a discretionary dispensation, and has done so the world over ever since Charles Reich's path-breaking argument in 1964. Instead, it was lobbying by peak welfare bodies such as ACOSS (Australian Council of Social Service), and the weight of rational or 'evidence-based' critiques emanating from bodies as diverse as the OECD and the Productivity Commission, or academic researchers, which served to tip the balance in favour of recognition of overly harsh impacts on the vulnerable.

Conclusion

Recent reforms of social security in Australia have followed the neoliberal path (Beeson and Firth 1998), such as through the creation and expansion of the power of

markets (for example, the job network for the unemployed) or quasi-markets which operate as hybrids between a statutory agency and a privatised body (for example, the creation of Centrelink, the statutory corporation which delivers income support programs (Zanetti 1998; Rowlands 1999).

In a country which lacks robust statutory human rights protections such as a Bill of Rights, it is unsurprising that substantive social security laws provided scant examples of decision-making which could be said to demonstrate a favourable impact or interpretation grounded in human rights analysis. Common law protections are weak reeds, which bend in the face of a clear expression of parliamentary will, irrespective of its justice or fairness: greater weight is given to the expression of the democratic will, as expressed through the political process, than to the protection of fundamental rights of the individual. That is problematic for social security clients, who are notoriously regarded around the world as being especially vulnerable to negation of their rights due to their impoverishment, relative powerlessness and liability to being made a political scapegoat (Goodin 1985; Handler 1997; Eardley, Abello and Macdonald 2001; Beer and Forster 2002; Wax 2003; Handler 2004; Carney 2006a).

Paradoxically, however, even 'strong' expressions of a right to social security — such as those brought down by the US Supreme Court during the halcyon early days after civil rights gains achieved by Bill of Rights challenges to the lack of procedural fairness in welfare decision-making, or against arbitrary denial of the 'new property' of welfare (Reich 1964; Simon 1985; Fleischmann 1990) — proved quite unable to temper the excesses of neoliberal welfare reform in the US over the last decade (Handler 2002b, 2002a). As we have seen, Canadian 'Charter' experience has also been bleak (Macklem 2006, 35), while the South African attempt to express social rights in a way which strikes a balance between the rights focus of international treaties and the resource constraints of the political sphere also proved less successful than hoped for (Koutnatzis 2005), confirming Sadurski's pessimism about the capacity for ample statements about social rights to translate readily into an adequacy of social benefits (Sadurski 2002).

Advocates of reliance on common law protections, such as Sadurski, can therefore take some comfort from the sensitive appreciation of international obligations as displayed in Administrative Appeals Tribunal and court decisions dealing with discretionary aspects of social security law, or from the robust merits appeal system enacted by the legislature. However, given the rather bleak status of substantive welfare rights in Australia, it is cool comfort at best. ●

References

Australian cases

Green v Daniels (1977) 13 ALR 1

Minister of State for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273

Re Ezekiel and Director-General of Social Services (1984) 6 ALN N235

Re Higgins and Secretary, Department of Social Security (1993) AATA 9232 (Blow DP)

Re Jonkers and Department of Family and Community Services (unreported, 12 May 1999, AATA 99/0311, Christie M)

Re Minister for Immigration and Multicultural Affairs; Ex parte Lam (2003) 195 ALR 502

Re Mokofsi and Secretary, Department of Family and Community Services (1999) 55 ALD 605 (Handley SM, Barber M)

Re Reine and Secretary, Department of Family and Community Services (2005) AATA 435 (Forgie DP)

Re Secretary, Department of Family and Community Services and Vu [2001] AATA 706; (2001) 65 ALD 499; 33 AAR 402; 4(11) SSR 127

Re Secretary, Department of Social Security and Chin (1998) 52 ALD 337; 27 AAR 1 (Barnett DP; Billings and Weerasooriya M)

Re Secretary, Department of Social Security and Clemson (1991) 14 AAR 261; 63 SSR 888 (Johnston DP)

Re Secretary, Department of Social Security and Dagher (1997) 50 ALD 258; 2(12) SSR 163; ATA 12329

Re Secretary, Department of Social Security and Kumar (1992) 26 ALD 530

Re Secretary, Department of Social Security and Underwood (1991) 25 ALD 343; 15 AAR 81

Secretary, Department of Social Security v Chin (1999) 56 ALD 682; 3(11) SSR (Nicholson J)

Secretary, Department of Social Security v Clemson (1993) 40 FCR 9; 17 AAR 68; 71 SSR 1030

Other references

ACOSS (Australian Council of Social Service) (2000) *Social Security Breaches: Penalising the Most Disadvantaged* ACOSS, Sydney

ACOSS (2001) *Breaching the Safety Net: The Harsh Impact of Social Security Penalties* ACOSS, Sydney

ACOSS (2002) *Joint Statement by Peak Disability and Community Groups: Change in Direction Needed on Welfare Reform*

Allars M (1995) 'One small step for legal doctrine, one giant leap towards integrity in government: Teoh's case and the internationalisation of administrative law' 17 *Sydney Law Review* pp 204–41

ARC (Administrative Review Council) (1995) *Better Decisions: Review of Commonwealth Merits Review Tribunals* Administrative Review Council, Canberra

Bailey P (1997) 'Right to an adequate standard of living: new issues for Australian law' 4(1) *Australian Journal of Human Rights* pp 25–50

Beer A and Forster C (2002) 'Global restructuring, the welfare state and urban programmes: federal policies and inequality within Australian cities' 10(1) *European Planning Studies* pp 7–25

Beeson M and Firth A (1998) 'Neoliberalism as a political rationality: Australian public policy since the 1980s' 34 *Journal of Sociology* pp 215–31

Bonoli G and Sarfati H (eds) (2002) *Labour Market and Social Protection Reforms in International Perspective: Parallel or Converging Tracks?* Ashgate, Aldershot

Carney T (1991) 'Disability support pension: towards workforce opportunities or social control?' 14 *University of New South Wales Law Journal* pp 220–46

Carney T (1994) 'Client rights and system integrity in the relational state' in J Disney and L Briggs (eds) *Social Security Policy: Issues and Options* AGPS, Canberra pp 191–208

Carney T (2002) 'Australia: workers' welfare state or responsive pragmatism?' 16 *Zeitschrift fur austlandisches und internationales Arbeits- und Sozialrecht* pp 360–90

Carney T (2003) 'Disability and social security: compatible or not?' 9(2) *Australian Journal of Human Rights* pp 139–72

Carney T (2005a) 'Lessons from Australia's fully privatised labour exchange reform (job network): from "rights" to "management"?' 19(1) *Zeitschrift fur austlandisches und internationales Arbeits- und Sozialrecht* pp 77–105

Carney T (2005b) 'Not the old way, not the third way, but the OECD/US way?: welfare sanctions and active welfare in Australia' 12(2) *Journal of Social Security Law* pp 57–80

Carney T (2006a) *Social Security Law and Policy* Federation Press, Sydney

Carney T (2006b) 'Welfare to work: or work discipline revisited?' 41(1) *Australian Journal of Social Issues* pp 27–48

Carney T and Hanks P (1986) *Australian Social Security Law, Policy and Administration* Oxford University Press, Melbourne

Carney T and Ramia G (1999) 'From citizenship to contractualism: the transition from unemployment benefits to employment services in Australia' 6 *Australian Journal of Administrative Law* pp 117–39

Carney T and Ramia G (2002) *From Rights to Management: Contract, New Public Management and Employment Services* Kluwer Law International, Dordrecht

Carpenter M (2000) 'It's a small world': mental health policy under welfare capitalism since 1945' 22(5) *Sociology of Health & Illness* pp 602–20

Castles F (1985) *The Working Class and Welfare: Reflections on the Political Development of the Welfare State in Australia and New Zealand, 1890–1980* Allen & Unwin, Sydney

Castles F (1994) 'The wage earners' welfare state revisited: refurbishing the established model of Australian social protection, 1983–93' 29 *Australian Journal of Social Issues* pp 120–45

Charlesworth H (1993) 'The Australian reluctance about rights' 31 *Osgoode Hall Law Journal* pp 195–232

Charlesworth H (2002) 'International law and Australian law in the 21st century' 6(1) *Newcastle Law Review* pp 1–15

Charlesworth H (2005) 'Human rights and statutory interpretation' in S Corcoran and S Bottomley (eds) *Interpreting Statutes* Federation Press, Sydney ch 6, pp 100–17

Charlesworth H, Chiam M, Hovell D and Williams G (2003) 'Deep anxieties: Australia and the international legal order' 25 *Sydney Law Review* pp 423–65

Considine M (1999) 'Markets, networks and the new welfare state: employment assistance reforms in Australia' 28 *Journal of Social Policy* pp 183–203

Considine M (2000) 'Selling the unemployed: the performance of bureaucracies, firms and non-profits in the new Australian "market" for unemployment assistance' 34 *Social Policy and Administration* pp 274–95

Considine M (2001) *Enterprising States: The Public Management of Welfare-to-Work* Cambridge University Press, Cambridge

Department of Employment and Workplace Relations (2002) *Job Network Evaluation: Stage 3 Effectiveness Report* Department of Employment and Workplace Relations, Canberra

Dixon J and Hyde M (2000) 'A global perspective on social security programmes for disabled people' 15 *Disability and Society* pp 709–30

Eardley T, Abello D and Macdonald H (2001) *Is the Job Network Benefitting Disadvantaged Job Seekers?: Preliminary Evidence from a Study of Non-Profit Employment Services* Social Policy Research Centre, Sydney

ESCR Committee (Committee on Economic, Social and Cultural Rights) (1991) *Revised General Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights E/C.12/1991/1*

ESCR Committee (2000) *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia (2000) E/C.12/1/Add.50*

ESCR Committee (2006) 'Draft General Comment on Art 9 of the ICESCR' [Online] Available: <www.ohchr.org/english/bodies/cescr/discussion.htm> [2006, June 12]

Fleischmann B (1990) 'A cultural historian's reading of Charles Reich's impact on the contemporary discourse on "welfare"' 31 *William and Mary Law Review* pp 307–20

Froehlic M (1985) 'Administrative non-acquiescence in judicial decisions' 53 *George Washington Law Review* pp 147–67

Gardner J (1995) 'The Social Security Appeals Tribunal: 20 years of evolution' 20 *Alternative Law Journal* pp 242–46

Gleeson B (1998) 'Disability and poverty' in R Fincher and J Nieuwenhuysen (eds) *Australian Poverty: Then and Now* Melbourne University Press, Melbourne pp 314–33

Goodin R (1985) *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities* University of Chicago Press, Chicago

Goodin R (2001) 'False principles of welfare reform' 36(3) *Australian Journal of Social Issues* pp 189–205

Hanagan M (1997) 'Citizenship, claim-making and the right to work: Britain, 1884–1911' 26(4) *Theory and Society* pp 449–74

Handler J (1997) 'Welfare reform in the United States' 35 *Osgoode Hall Law Journal* pp 289–307

Handler J (2002a) *Myth and Ceremony in Workfare: Rights, Contracts and Client Satisfaction* UCLA, School of Law Research Paper No 02-21, University of California, Los Angeles

Handler J (2002b) 'Social citizenship and workfare in the US and western Europe: from status to contract', paper delivered at the conference *Canadian Law and Society Association and the Law and Society Association* (30 May–1 June 2002), Vancouver, Canada

Handler J F (2004) *Social Citizenship and Workfare in the United States and Western Europe: The Paradox of Inclusion* Cambridge University Press, Cambridge

Hartman Y (2005) 'In bed with the enemy: some ideas on the connections between neoliberalism and the welfare state' 53(1) *Current Sociology* pp 57–73

Hasenfeld Y, Ghose T and Larson K (2004) 'The logic of sanctioning welfare recipients: an empirical assessment' 78(2) *Social Service Review* pp 304–19

Hudson A (2002) 'Dangerous potential: streamlining the United Nations human rights committees' 8(2) *Australian Journal of Human Rights* pp 55–78

Iding L (2003) 'In a poor state: the long road to human rights protection on the basis of social condition' 41 *Alberta Law Review* pp 513–25

Jamrozik A (1994) 'From harvester to de-regulation: wage earners in the Australian welfare state' 29 *Australian Journal of Social Issues* pp 162–69

Jayasuriya K (2000) 'Capability, freedom and the new social democracy' 71 *The Political Quarterly* pp 282–99

Jayasuriya K (2001) 'Agency, autonomy and the new contractualism' 18 *Law in Context* pp 57–78

Jones M and Basser Marks L (1999) 'Disability, rights and law in Australia' in M Jones and L Basser Marks (eds) *Disability, Divers-Ability and Legal Change* Martinus Nijhoff, The Hague pp 189–208

Kelly P (1992) *The End of Certainty* Allen & Unwin, St Leonards, NSW

Kinnear P (2002) 'Mutual obligation: a reasonable policy?' in T Eardley and E Bradbury (eds) *Competing Visions: Refereed Proceedings of the National Social Policy Conference 2001* Social Policy Research Centre, University of New South Wales, Sydney pp 248–63

Koller S (1997) 'Unequal treatment for newly arrived migrants under the Social Security Act' 4 *Australian Journal of Human Rights* pp 169–74

Koutnatzis S (2005) 'Social rights as a constitutional compromise: lessons from comparative experience' 44 *Columbia Journal of Transnational Law* pp 74–133

Lacey W (2001) 'In the wake of Teoh: finding an appropriate government response' 29 *Federal Law Review* pp 219–40

Lacey W (2004) 'A prelude to the demise of Teoh: the High Court decision in Re Minister for Immigration and Multicultural Affairs; Ex parte Lam' 26(1) *Sydney Law Review* pp 131–56

Lynch P (2005) 'Understanding and responding to begging' 29 *Melbourne University Law Review* pp 518–55

Macintyre C (1999) 'From entitlement to obligation in the Australian welfare state' 34 *Australian Journal of Social Issues* pp 103–18

Macklem P (2006) *Social Rights in Canada* Faculty of Law, University of Toronto, Toronto

Maher L (1994) 'The Australian experiment in merits review tribunals' 1994 *Law in Context* pp 73–106

Maranville D (1986) 'Non-acquiescence: outlaw agencies, imperial courts and the perils of pluralism' 39 *Vanderbilt Law Review* pp 471–538

Mendes P (1999) 'From the wage earners welfare state to the targeted welfare state: the social welfare policies of the Australian Labor Party, 1983–99' 52 *Australian Social Work* pp 33–38

Meng W (2004) 'International labor standards and international trade law' in E Benvenisti and G Nolte (eds) *The Welfare State, Globalization, and International Law* Springer-Verlag, Berlin pp 371–94

Moss J (2000) 'The ethics and politics of mutual obligation' 35(1) *Australian Journal of Social Issues* pp 1–14

O'Connor D (1993) 'Effective administrative review: an analysis of two-tier review' 1 *Australian Journal of Administrative Law* pp 4–12

OECD (Organisation for Economic Co-operation and Development) (2001) *Innovations in Labour Market Policies: The Australian Way* OECD, Paris

Otto D and Wiseman D (2001) 'In search of "effective remedies": applying the International Covenant on Economic, Social and Cultural Rights to Australia' 7(1) *Australian Journal of Human Rights* pp 5–46

Parker S (2006) 'International justice: the United Nations, human rights and disability' 22(1) *Journal of Comparative Social Welfare* pp 63–78

Peetz D (2006) *Brave New Workplace: How Individual Contracts Are Changing Our Jobs* Allen & Unwin, Sydney

Piotrowicz R and Kaye S (2000) *Human Rights in International and Australian Law* Butterworths, Sydney

Potter J (1992) 'Adjudication by social security appeals tribunals: a research study' 21 *Anglo-American Law Review* pp 341–71

Productivity Commission (2002) *Independent Review of Job Network, Report No 21* AusInfo, Canberra

Ramia G and Carney T (2001) 'Contractualism, managerialism and welfare: the Australian experiment with a marketised employment services network' 29 *Policy and Politics* pp 59–80

Ramia G and Wailes N (2006) 'Putting wage-earners into wage-earners' welfare states: the relationship between social policy and industrial relations in Australia and New Zealand' 41(1) *Australian Journal of Social Issues* pp 49–68

Rees N (2002) 'International human rights obligations and mental health review tribunals', paper delivered at the conference *Detention, Decisions and Dilemmas: Reviewing Involuntary Detention and Treatment into the 21st Century* (18 October 2002), Melbourne

Reich C (1964) 'The new property' 73 *Yale Law Journal* pp 733–87

Ronalds C (1998) *Discrimination Law and Practice* Federation Press, Sydney

Rowlands D (1999) 'Institutional change in the APS: the case of DSS and Centrelink' 1 *Australian Social Policy* pp 183–201

Sadurski W (2002) 'Enduring and empowering: the Bill of Rights in the third millennium: postcommunist charters of rights in Europe and the US Bill of Rights' 65 *Law & Contemporary Problems* pp 223–50

Senate (2005) *Employment and Workplace Relations Legislation Amendment (Welfare to Work and Other Measures) Bill 2005* Senate Community Affairs Legislation Committee, Canberra

Simon W (1985) 'The invention and reinvention of welfare rights' 44 *Maryland Law Review* pp 1–37

Steiner J and Alston P (1996) *International Human Rights in Context: Law, Politics, Morals* Clarendon Press, Oxford

Stratton K and Delaney J (2000) 'Reviewing changes to the Child Disability

Allowance: giving parents a voice' 53 *Australian Social Work* pp 5–11

Theodore N and Peck J (2001) 'Searching for best practice in welfare-to-work: the means, the method and the message' 29(1) *Policy and Politics* pp 81–94

United Nations Economic and Social Council (1998) *Third Periodic Report: Australia. 23/07/98. E/1994/104/Add.22. (State Party Report)* [Online] Available: <www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.1994.104.ADD.22.En?Opendocument> [2006, October 13]

Vanstone A (2002) 'Breaching rules change to protect the vulnerable' [Online] Available: <www.facs.gov.au/internet/minfacs.nsf> [2002, March 30]

Watchirs H (2000) *Application of Rights Analysis Instrument to Australian Mental Health Legislation* Department of Health and Aged Care, Canberra

Watchirs H and Heesom G (1996) *Report on a Rights Analysis Instrument for Use in Evaluating Mental Health Legislation* Human Rights Branch, Attorney-General's Department, Canberra

Wax A (2003) 'Social welfare, human dignity and the puzzle of what we owe each other' 27 *Harvard Journal of Law and Public Policy* pp 121–36

Wilson L, Stoker R and McGrath D (1999) 'Welfare bureaus as moral tutors: what do clients learn from paternalistic welfare reforms?' 80(3) *Social Science Quarterly* pp 473–86

Yeatman A and Owler K (2001) 'Contractualism, clientage and individualised service delivery' 18 *Law in Context* pp 34–56

Zanetti C (1998) 'Managing change: focus on improving service quality and information management' 57 *Australian Journal of Public Administration* pp 19–31