BREACHING THE RIGHT TO SOCIAL SECURITY

*Tamara Walsh**

Under Australia's current social security breach penalty regime, harsh monetary penalties are imposed on income support recipients who commit (often very minor) breaches of their mutual obligation requirements. The current regime offends a number of provisions of international human rights law, including the rights to social security, an adequate standard of living, free choice of employment and rest and leisure. In addition, the regime contravenes certain provisions in the *Social Security Act 1991* (Cth) and offends established rules of natural justice required under administrative law. Further, the penalty regime breaches a number of established principles of common law, including freedom of contract, the presumption of innocence and the principle that the best interests of the child should be considered paramount in decisions affecting children. The recently passed *AWT Act 2003* (Cth) will go some way towards rectifying some of these contraventions; however, further reforms will be required before it can be said that the government's breach penalty regime does not amount to a breach of the law.

Introduction

Australia's social security breach penalty regime has been condemned by various bodies as being excessively harsh, counter-productive, unjust and damaging to the lives of the individuals concerned.[1] This paper will demonstrate that, in addition to this, the breach penalty regime offends various provisions of international law and domestic law, as well as a number of accepted common law principles in relation to contract, procedural safeguards and the best interests of the child.

The breach penalty regime offends various internationally recognised human rights, including the right to social security, the right to an adequate standard of living, the right to free choice of employment, and the right to rest and leisure. Unfortunately, appeals to international human rights law are often not persuasive in effecting legal and policy reforms in Australia as treaties are not legally binding unless their terms are incorporated into domestic law.[2] In advancing an argument in favour of reform, therefore, it may be more

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* Doctoral candidate, Queensland University of Technology.

1 Ziguras and Flowers (2002); Pearce et al ('Pearce Report') (2002); ACOSS (2001a, 2001b); Salvation Army Australia Southern Territory (2001); National Welfare Rights Network (2001).

2 *Simsek v Minister for Immigration and Ethnic Affairs* (1982) 148 CLR 636 at 641–42; *Kioa v West* (1985) 159 CLR 550 at 570.

persuasive to illustrate the ways in which the current regime breaches domestic law and locally recognised legal principles.

The penalty system applied by Centrelink results in consistent breaches of domestic social security law and administrative law. Centrelink officials routinely fail to take the state of mind of the individual into account before imposing breaches, despite the fact that this is explicitly required in the *Social Security Act 1991* (Cth). Also, those on whom breach penalties are imposed are often not able to access an impartial decision-maker when appealing the determination, nor are they given an opportunity to present their case before the penalty takes effect. This is in clear breach of the rules of natural justice.

Further, the breach penalty regime contravenes established principles of common law. For example, activity agreements would probably not be enforceable contracts at common law and, due to the severity of possible penalties, it could be argued that the presumption of innocence should apply to breach determinations. Also, the principle that the best interests of the child should be considered paramount in the making of decisions that affect children is clearly not being applied in relation to both breaches of Youth Allowance recipients aged under 18 years, and breaches of income support recipients with dependent children.

These persistent breaches of the law undermine the legitimacy of the existing breach penalty regime. Some positive law reform has occurred with the passage of the *Family and Community Services Legislation Amendment (Australians Working Together and other 2001 Budget Measures) Act 2003* (hereafter *AWT Act*), which received royal assent on 24 April 2003, and it is hoped that future welfare reform initiatives will continue to rectify breaches of the law associated with the application and operation of Australia's social security breach penalty regime.

The Breach Penalty Regime

In the past, the provision of welfare in Australia was based on entitlement — social security was considered to be a social right secured by citizenship, and benefits were delivered to those who satisfied the eligibility requirements with few conditions attached.[3] However, in recent decades, the provision of social security as of right has been progressively replaced by a system where the receipt of welfare is conditional on meeting certain 'mutual obligation' requirements. In the late 1980s to early 1990s, concerns of the OECD regarding 'dependency cycles' and the rise of neo-conservative economic theory through leaders such as Thatcher and Reagan began to penetrate Australian social policy, culminating in an overhaul of the social security system.[4] Payments became more targeted, and social security applications were more highly scrutinised, ostensibly to prevent over-payment and fraud.[5]

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3 McLelland (2002), p 215; Carney and Ramia (1999), p 124; Cox (1998); Wearing (1994), pp 177–78; King and Waldron (1988); see also Marshall (1965), pp 92–93, 106, 121, 127–34; Barbalet (1996), pp 57–59; Jayasuriya (1996), p 22.

4 Weatherley (1994), pp 158–59.

5 Weatherley (1994), p 162.

Unemployment benefits were redefined as 'a wage-like payment for "job-search" activities or re-training' — beneficiaries were required to sign contracts detailing their 'reciprocal obligations', penalties were introduced for breaches, and case managers were employed to monitor compliance and report breaches when they occurred.[6]

In recent years, the concept of 'mutual obligation' has expanded to become the central plank of the Australian social security system.[7] Under the current system, the vast majority of unemployed persons (even those experiencing significant labour market barriers, such as homeless persons) are required to sign an 'activity' or 'participation' agreement as part of their mutual obligation requirements; failure to enter into such an agreement may render a person ineligible to receive the benefit claimed.[8] The content of such agreements is supposedly the product of negotiations between the 'jobseeker' and Centrelink[9] and, under its terms, individuals are required to undertake certain 'agreed upon' tasks including job search, training courses, paid work, work experience and self-help courses.[10] If a person fails to satisfy the requirements of the agreement without reasonable excuse,[11] or if they fail to take reasonable steps to comply with the agreement,[12] they may be 'breached' — that is, a penalty may be imposed upon them. Penalties include periods of either rate reduction or non-payment of the benefit claimed, depending on how many times the person has been breached in the last two years.[13] In addition, income support recipients must comply with various administrative requirements, which include provision of certain information to Centrelink[14] and attendance at Centrelink on demand.[15] Failure to comply with these

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6 Goodman (1998), pp 28–29.

7 McLelland, (2002), pp 209, 216; Carney and Ramia (2002), pp 277, 279.

8 See *Social Security Act 1991* (Cth), s 593(1)(e) for Newstart recipients and s 544A(1) for Youth Allowance recipients. From 20 September 2003, some Parenting Payment recipients will also be required to enter into such agreements, see new s 500(1)(c) of the *Social Security Act 1991.*

9 *Social Security Act 1991* (Cth), ss 544A(5), 604(1C).

10 *Social Security Act 1991* (Cth), ss 544B(1), 606(1) and the new s 501B(2) for Parenting Payment recipients which commences operation on 20 September 2003.

11 *Social Security Act 1991* (Cth), ss 550A(a), 601A(1).

12 *Social Security Act 1991* (Cth), ss 541A, 601(3), (4), (6), and the new ss 500ZB, 501(1), (2), 503B(2) for Parenting Payment recipients which commences operation on 20 September 2003.

13 *Social Security Act 1991* (Cth), ss 550, 557 for Youth Allowance, s 624 for Newstart, and the new ss 500ZA, 500ZC, 503B, 503C for Parenting Payment recipients which commence operation on 20 September 2003.

14 *Social Security (Administration) Act* 1999 (Cth), ss 67, 75, 192.

15 *Social Security (Administration) Act* 1999 (Cth), s 63. As a result of the amendments to the *Social Security Act 1991* (Cth) brought about by the *Family and Community Services Amendment Act 2003* (Cth), from 15 April 2003, failure to attend Centrelink on demand no longer amounts to an administrative breach for Youth Allowance recipients; *Family and Community Services Amendment Act 2003* (Cth), s 15, see *Social Security Act 1991* (Cth), new s 558(1).

obligations amounts to an administrative breach, for which penalties may also be imposed.[16]

Currently, mutual obligation requirements apply only to recipients of Youth Allowance and Newstart. However, as a result of the recently passed *AWT Act*, from 20 September 2003, parenting payment recipients whose youngest child has reached the age of 13 years[17] and mature-aged unemployed persons[18] may also be required to sign and comply with activity agreements.

Table 1: Breach Penalties for Youth Allowance Recipients[19]

Breach penalty category	Breach penalty	Total amount withheld	Income support per week during penalty period
1st Activity test breach in 2 yrs	18% reduction for 26 weeks[20]	$725.63	$127.14
2nd Activity test breach in 2 yrs	24% reduction for 26 weeks[21]	$967.51	$117.84
3rd+ Activity test breach in 2 yrs	100% reduction for 8 weeks[22]	$1240.40	$0
Administrative breach	16% reduction for 13 weeks[23]	$322.50	$130.24

16 *Social Security Act 1991* (Cth), s 558 for Youth Allowance and s 631 for Newstart. Currently, there is no mention in the Act of administrative penalties applying to Parenting Payment recipients.

17 *AWT Act* 2003 (Cth), Sch 1, s 12; see the new s 501A of the *Social Security Act 1991*. Some parents, including those with children with selected disabilities, may be exempt from the requirements; see sub-s (2), (2A). A slightly less stringent breach penalty regime will apply to Parenting Payment recipients — see the new ss 500(4), 500ZC, 501, 503C.

18 *AWT Act* 2003 (Cth), Sch 3 and 4. The participation requirements for mature-aged unemployed persons will be more flexible: see new ss 606(1A), (1AB), (1AC). And a slightly less stringent breach penalty regime will apply: see new ss 630A(2), 644AA(2), 644B(2).

19 Figures taken from Centrelink website, www.centrelink.gov.au (accessed 20 January 2003). Calculations based on maximum rate of payment for single recipients without children, not including rent assistance.

20 *Social Security Act 1991* (Cth), ss 557, 557A(1), 557E. As from 20 September 2003, this may be reduced to eight weeks in some circumstances; see the new s 557A(4), (7).

21 *Social Security Act 1991* (Cth), ss 557, 557A(1), 557E(1)(b).

22 *Social Security Act 1991* (Cth), ss 550, 550B(1).

23 *Social Security Act 1991* (Cth), ss 558, 558A. As from 20 September 2003, this may be reduced to eight weeks in some circumstances; see the new s 558A(4),(5).

Table 2: Breach Penalties for Newstart [24]

Breach penalty category	Breach penalty	Total amount withheld	Income support per week during penalty period
1st Activity test breach in 2 yrs	18% reduction for 26 weeks[25]	$877.27	$153.71
2nd Activity test breach in 2 yrs	24% reduction for 26 weeks[26]	$1169.69	$142.46
3rd+ Activity test breach in 2 yrs	100% reduction for 8 weeks[27]	$1499.60	$0
Administrative breach	16% reduction for 13 weeks[28]	$389.90	$157.46

As can be seen from Tables 1, 2 and 3, penalties for activity test and administrative breaches are extremely severe, leaving unemployed people with very little income with which to support themselves.

The number of penalties imposed on Newstart and Youth Allowance recipients has increased dramatically in recent years. In the three years from June 1998, there was a 189 per cent increase in the number of penalties applied,[29] with an estimated 349 100 penalties imposed on unemployed people in 2000–01.[30] Only 2854 of these resulted in prosecutions for fraud.[31]

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24 Figures taken from Centrelink website www.centrelink.gov.au (accessed 20 January 2003). Calculations based on maximum rate of payment for single recipients without children, not including rent assistance.

25 *Social Security Act 1991* (Cth), ss 624(1A)(a), 644AA, 644AE(2)(a). As from 20 September 2003, this may be reduced to eight weeks in some circumstances; see the new s 644AA(1A), (1D).

26 *Social Security Act 1991* (Cth), ss 624(1A)(a), 644AA, 644AE(2)(b).

27 *Social Security Act 1991* (Cth), ss 624(1A)(b), 630A.

28 *Social Security Act 1991* (Cth), ss 631, 644B, 644H(2). As from 20 September 2003, this may be reduced to eight weeks in some circumstances; see the new s 644B(1A), (1B).

29 ACOSS (2001a), p 1.

30 ACOSS (2001a), p 5.

31 Centrelink (2001), p 81.

Table 3: Breach Penalties for Parenting Payment Recipients — commencing 20 September 2003[32]

Penalty type and number	Breach penalty[33]	Total amount withheld	Income support per week during penalty period
1st Activity test breach in 2 yrs	18% reduction for 26 weeks[34]	$1004.80	$176.05
2nd Activity test breach in 2 yrs	24% reduction for 26 weeks[35]	$1339.73	$163.17
3rd+ Activity test breach in 2 yrs	100% reduction for 8 weeks[36]	$1717.60	$0

Breaches of International Law

The current social security breach penalty regime results in breaches of international human rights law, due to both its design and application.

Article 22 of the Universal Declaration of Human Rights (hereafter UDHR) provides for the right to social security to 'everyone, as a member of society'. As mentioned above, social security has traditionally been considered as a right that comes with citizenship. Some commentators argue that this connection between citizenship (or membership of a society) and welfare should, in both principle and practice, be maintained. For example, in *Minister for Immigration and Ethnic Affairs v Teoh*, Gaudron J said: 'Citizenship ... involves obligations on the part of the body politic to the individual, especially if the individual is in a position of vulnerability.'[37] And in its 2000 report, the Australian Citizenship Council argued that if an 'Australian Compact' were drafted (as an alternative to a legally binding bill of rights), a 'commitment to the well-being of all Australians' should be included.[38] The very concept of 'mutual obligation', to the extent that it results in conditional residual welfare and breach penalties for those who are most vulnerable, conflicts with this idea

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32 Figures taken from Centrelink website www.centrelink.gov.au (accessed 20 January 2003). Calculations based on maximum rate of payment for single recipients, not including rent assistance.

33 Note that for parenting payment recipients, resumption of compliance may allow for all or some of the withheld payments to be reimbursed, so the maximum non-payment or rate reduction period may not apply: *Social Security Act 1991* (Cth), new ss 500ZC, 503C.

34 *Social Security Act 1991* (Cth), new ss 503B, 503C, 503E(1).

35 *Social Security Act 1991* (Cth), new ss 503B, 503C, 503E(1).

36 *Social Security Act 1991* (Cth), new ss 500ZA, 500ZC.

37 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 304.

38 Australian Citizenship Council (2000), p 11.

of welfare as a social right; thus the current breach penalty regime offends the internationally recognised human right to social security.

Also relevant to this discussion is article 26 of the Convention on the Rights of the Child (hereafter CROC) which states that every child has the right to social security. This right is compromised by the imposition of breach penalties on young people below the age of 18 years.[39] There is some evidence to suggest that young people are more harshly impacted upon under the current breach penalty regime than many other population groups — young people are more likely to be breached than any other age group[40] and, given the extremely low rates of payment received by young people, the consequences of breaches are extremely severe (see Table 1). Many young people have been left homeless and/or have committed criminal offences in order to support themselves during penalty periods.[41] Further, young people rarely question or challenge breaches, despite the injustice or inappropriateness of them, and many of those who do find the appeal process difficult to navigate.[42] Australia's breaching regime is thus clearly in contravention of the international human right of children to social security.

Similarly, article 25 of the UDHR and article 11(1) of the International Covenant on Economic, Social and Cultural Rights provide for the right to an adequate standard of living. Article 27 of the CROC provides the same right for children, adding that state parties should take appropriate measures to assist parents to implement this right, particularly as regards nutrition, clothing and housing. Clearly, the imposition of non-payment periods and rate reduction periods on benefits that are already less than adequate to meet basic living expenses[43] impacts on income support recipients' ability to provide themselves with life's necessities. In its 2001 survey, The Salvation Army found that 25 per cent of emergency relief recipients presenting at their southern territory centres in the survey period had been breached.[44] Of these, 84 per cent reported that being breached resulted in their being unable to afford food and/or medication, 63 per cent reported that being breached resulted their being unable to pay utility bills and 16.5 per cent reported that being breached had rendered them homeless.[45] Due to the extreme hardship that may result from breach penalties, it is clear that the breach penalty regime offends the international human right to an adequate standard of living.

The breach penalty regime in Australia also results in the routine contravention of article 23(1) of the UDHR, the right to free choice of

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39 Note that young people aged under 18 years are not exempt from activity test requirements: *Social Security Act 1991* (Cth) s 542.

40 Mullins (2001), p 10; ACOSS (2001a), p 21.

41 Mullins (2001), p 10; ACOSS (2001a), p 21.

42 Mullins (2001), p 11; ACOSS (2001a), p 11.

43 Youth Allowance and Newstart are set at or below a basic minimum for meeting ordinary living expenses, and they are significantly lower than other benefits such as the age pension: see Pearce Report (2002), para 8.9; ALRC (2002), para 7.7.

44 Salvation Army Australia Southern Territory (2001), p 9.

45 Salvation Army Australia Southern Territory (2001), pp 10–11.

employment. Under sections 550A(c) and 630(1) of the *Social Security Act 1991*, Youth Allowance and Newstart recipients are obliged to accept any 'suitable' job offer under threat of being breached. The job need not be of the kind sought by the unemployed person to be judged 'suitable',[46] which denies employed people an important aspect of self-determination: the opportunity to develop their skills and experience in the field of their choice. Further, sections 541D(2)(a) and 601(2B) of the *Social Security Act 1991* state that an offer of work is not unsuitable for the sole reason of its requiring travel time of up to 90 minutes each way. Such a requirement denies jobseekers the capacity to make employment choices that will greatly affect their quality of life. The Independent Review of Breaches and Penalties found that there are insufficient legislative and policy safeguards to ensure that inappropriate offers of employment are not forced upon job seekers under threat of breach.[47] The right to free choice of employment is clearly being breached.

Finally, the right to rest and leisure enshrined in article 24 of the UDHR is contravened by the current breach penalty system. For those who remain unemployed in the medium to long term, no respite may be had from the constant obligation to attend job interviews, training and meet other mutual obligation requirements. There is no provision for a period of 'annual leave', despite the fact that at least four weeks' leave is generally available to those in paid employment. The Independent Review of Breaches and Penalties found that this deprives jobseekers' families of the opportunity to have holidays with them and places an unreasonable demand upon jobseekers themselves.[48] In its submission to the Review, the National Welfare Rights Network recommended that jobseekers be exempt from activity test requirements for a period of four weeks each year.[49] This would go some way towards preventing the continued contravention of this fundamental human right.

Thus, as demonstrated above, the breach penalty system offends a number of internationally recognised human rights, including the right to social security, the right to an adequate standard of living, the right to free choice of employment and the right to rest and leisure. The breach penalty regime amounts to a breach of human rights by the Australian government.

Breaches of Domestic Law

The application of the current breach penalty system results in breaches of domestic social security law and administrative law by Centrelink officers.

Social Security Law

The *Social Security Act 1991* makes *mens rea* a legal requirement before a breach can be imposed. This was the case even before the words 'knowingly', 'recklessly' or 'reasonable excuse' were incorporated into the Act; in *Cameron*

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46 See *Social Security Act 1991* (Cth), ss 541D(1A) and 601(2AA).

47 Pearce Report (2002), recommendation 16.1.

48 Pearce Report (2002), para 5.10.

49 National Welfare Rights Network (2001), p 18.

v Holt,[50] where the making of a misleading statement in an application for the continuation of unemployment benefits was at issue, Barwick CJ was of the view that a guilty mind was required, despite the absence of the words 'knowing' or 'reckless' in the wording of the Act.[51] Under the *Social Security Act 1991*, a person may be penalised for an activity test breach only if:

- he/she breached his/her activity/participation agreement 'without reasonable excuse';[52] or
- he/she failed to take 'reasonable steps' to comply with his/her activity/participation agreement;[53] or
- he/she 'knowingly or recklessly' provided false or misleading information in relation to his/her income from remunerative work.[54]

In order to effectively apply the legislation, individuals would need to be contacted by Centrelink prior to the imposition of the breach and invited to offer an explanation for or an answer to the accusations made against them. Yet, despite the clear intention of Parliament to ensure that an individual's state of mind is taken into account before a breach is imposed, concerns have been raised that Centrelink officers often fail to take the *mens rea* element of breaches into account before imposing a penalty.[55] There is currently no explicit requirement that Centrelink officers seek out an income support recipient's point of view before a breach is imposed. Although internal Centrelink guidelines state that an individual should be contacted before a breach is imposed 'where possible', the guidelines tend to imply that a decision to impose a breach would generally be made before the individual is contacted.[56] However, the *AWT Act* reforms this to an extent and, from 20 September 2003, Centrelink will be required to make 'reasonable attempts' to contact Newstart, Youth Allowance and Parenting Payment recipients before a determination is made that the person has failed to take reasonable steps to comply with his/her activity agreement, and (if contact is made) to have regard to the reasons they put forward for the alleged failure before

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50 *Cameron v Holt* (1980) 142 CLR 342.

51 See *Social Security Act* 1947 (Cth), s 138. Barwick CJ took into account two elements of the offence in coming to this conclusion: the fact that the monetary penalty to be imposed was very high and that a sentence of imprisonment was possible; and the fact that the legislation did not evince a clear intention to displace the presumption: *Cameron v Holt* (1980) 142 CLR 342 at 345, 346.

52 See *Social Security Act 1991* (Cth), ss 550A(a), 601A(1).

53 See *Social Security Act 1991* (Cth), ss 541A(a), 601(4) and the new ss 500ZB, 630A(2)(a)(iii). See *Social Security Act 1991* (Cth) ss 541F, 601(6) and the new s 501(2) for definition of 'reasonable steps'.

54 See *Social Security Act 1991* (Cth), ss 550A(e), 630AA(1)(b).

55 ACOSS (2001b), p 9; National Welfare Rights Network (2001), p 5.

56 ACOSS (2001a), p 10; National Welfare Rights Network (2001), p 5.

deciding to impose a penalty.[57] This is a welcome amendment, and has the potential to go some way towards reducing the number of income support recipients receiving breach penalties. However, what constitutes 'reasonable attempts' to make contact is not defined in the Act. The methods available to Centrelink of making contact with such persons will be limited by the recency and type of contact information collected and held by Centrelink. The Independent Review of Breaches and Penalties in the Social Security System found that contact information is not always reliably recorded or updated by Centrelink,[58] and that the contact information collected by Centrelink may not be appropriate with regard to certain individuals;[59] such persons might include those with no fixed address, those who experience difficulty comprehending English, those who do not have a telephone and those with an intellectual disability. The Review recommended that the range of contact details collected by Centrelink be expanded to include more individualised information where appropriate, such as contact information for a service provider, friend or acquaintance in regular contact with the person.[60]

Also, it is not clear from the Act what kind of avenues of redress will be available to a breached person in the event that reasonable attempts at contact have not been made by Centrelink, or at least where this is a moot point.

The effort devoted to and emphasis placed on these new requirements by Centrelink remain to be seen. However, since internal policies of the recent past have stated that there is no requirement to contact the individual before a breach is imposed, and that those accused of breaches should not be given the benefit of the doubt,[61] it seems likely that the after-effects of this ethos may still influence the practice of some Centrelink officers,[62] which may result in a minimalist approach being taken to the new requirements. Further detail in the Act on the lengths to which Centrelink officers should go in attempting to make contact, and avenues of redress for income support recipients in the event that reasonable attempts at contact are not made, may be needed to ensure that these safeguards have any real meaning.

The recent reforms to the breach penalty regime in relation to contacting individuals before imposing a penalty are welcome indeed. However, many breaches have been imposed unjustly in the past, and many more will be imposed prior to the introduction of these reforms in September 2003. On the basis of the *mens rea* requirements that appeared in the Act prior to the reforms introduced by the *AWT Act*, a cause of action may well exist for those breached individuals whose state of mind has not been taken into account by

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57 *AWT Act* 2003 (Cth), Sch 1, ss 12, 20A, 26C; *Social Security Act 1991* (Cth) the new ss 544(3) (Youth Allowance), s 501(5) (Parenting Payment), and s 593(2A), (2B) (Newstart).

58 Pearce Report (2002), para 3.3.

59 Pearce Report (2002), paras 3.6–3.10.

60 Pearce Report (2002), para 3.14.

61 Centrelink policy on intranet, obtained by the Welfare Rights Centre; National Welfare Rights Network (2001), p 5.

62 National Welfare Rights Network (2001), pp 5–6

Centrelink officers, as this is in clear breach of the requirements of the *Social Security Act 1991*.

Breach of the Administrative Law Requirement of Natural Justice

The current practice of Centrelink officers of imposing breaches on income support recipients without seeking the point of view of the individual concerned may also be open to challenge under administrative law rules requiring procedural fairness.

A fundamental rule of the common law doctrine of natural justice is that, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he or she is entitled to know the case sought to be made against him/her and to be given an opportunity of replying to it.[63] This rule has been codified in section 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), which states that a person aggrieved by a decision to which the Act applies[64] may apply to the Federal Court for a review of the decision on the grounds that the rules of natural justice were breached in connection with the making of the decision. The right to procedural fairness of those in receipt of social security benefits is further supported by the decision of the High Court in *Teoh.*[65] In that case, it was held that the Australian government's ratification of the CROC gave rise to a legitimate expectation on the part of the children of a man subject to a deportation order (ie an administrative decision), that they would be afforded procedural fairness with respect to the making of that decision. A like argument may be made with respect to social security recipients, whose right to social security is recognised in article 22 of the UDHR and article 26 of the CROC. It may be argued that the ratification of these covenants gives rise to a legitimate expectation on the part of social security recipients that they will be afforded procedural fairness with respect to any decision which may result in the denial of this right.

Under the common law, statutes are not to be interpreted as interfering with the principles of procedural fairness unless a clear intention is evinced to the contrary.[66] No such intention is expressed in the *Social Security Act 1991* or the *Social Security (Administration) Act 1999.*

There are two principal limbs of the common law duty to observe procedural fairness: the bias rule which states that public officials should make their decisions in such a way that a reasonable observer might reasonably apprehend that the judge brought an impartial and unprejudiced mind to the

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63 *Kioa v West* (1985) 159 CLR 550 at 582.

64 There is no doubt that decisions of Centrelink officials made under the *Social Security Act 1991* (Cth) and the *Social Security (Administration) Act 1999* (Cth) are decisions to which this Act applies; see, for example, *Ross Milton Hagedorn v Department of Social Security* [1996] 1028 FCA 1.

65 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, per Mason CJ and Deane J at 291–92, Toohey J at 301, Gaudron J at 305.

66 *Twist v Council of the Municipality of Randwick* (1976) 136 CLR 106 at 109–10.

resolution of the question;[67] and the hearing rule which states that the regulator is bound to hear the person whose rights, interests or legitimate expectations will be affected before exercising the power.[68]

According to evidence presented to the Independent Review of Breaches and Penalties in the Social Security System by ACOSS and the National Welfare Rights Network, both these aspects of procedural fairness are routinely breached by Centrelink officials imposing breach penalties.[69]

First, the bias rule may be contravened by Centrelink's policy that individuals who believe they have been wrongly breached must first return to the original decision-maker for reconsideration of the decision.[70] This is despite their legislative right of access to initial review by another Centrelink officer (an Authorised Review Officer, or ARO).[71] Further, review of the decision by an ARO may be considered in breach of the bias rule, as there is some debate as to whether AROs are really 'at arm's length' from other Centrelink officers.[72] Also, it is in practice extremely difficult for income support recipients to ensure that their benefit continues to be paid pending review. While there is a right to apply for this,[73] the practice amongst AROs is that it is only available if, in their view, the person has a chance of success.[74] As stated by the National Welfare Rights Network, this makes a 'farce' of the appeal system.[75] Recourse may be had to the Social Security Appeals Tribunal after internal review by the ARO;[76] however, this opportunity is often not taken up by breached individuals, either because they are not aware of their appeal rights,[77] because they lack the negotiation skills to advocate for themselves in this forum,[78] or because they feel too discouraged and fatigued to pursue their claim.[79]

Centrelink policies have also resulted in routine breaches of the hearing rule. As mentioned above, breaches are currently imposed without seeking the point of view of the individual concerned, although it is hoped that this will occur less often once the new requirements commence in September 2003.

Another aspect of Centrelink practice which has resulted in contraventions of the hearing rule is the fact that, currently, penalties commence on the day the individual receives notice of the breach. This clearly

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67 *Johnson v Johnson* (2000) 201 CLR 488 at 492.

68 *Twist v Council of the Municipality of Randwick* (1976) 136 CLR 106 at 110.

69 ACOSS (2001b); National Welfare Rights Network (2001).

70 Pearce Report (2002), paras 8.8–8.9.

71 *Social Security (Administration) Act* 1999 (Cth), s 135.

72 Pearce Report (2002), para 8.6.

73 *Social Security (Administration) Act* 1999 (Cth), s 131.

74 National Welfare Rights Network (2001), p 22.

75 National Welfare Rights Network (2001), p 22.

76 *Social Security (Administration) Act* 1999 (Cth), s 142.

77 ALRC (2002), para 7.129.

78 National Welfare Rights Network (2001), pp 5, 12.

79 Pearce Report (2002), para 8.9; ALRC (2002), para 10.108.

does not afford the individual with sufficient time to appeal the decision before the penalty takes effect. This has been recognised by the government and, as from 20 September 2003, Youth Allowance, Newstart and Parenting Payment recipients will have the benefit of a 14-day interval between the time when notice of the breach is given to them and the start of the breach penalty period.[80]

Again, these reforms are welcome as they afford more time for breached individuals to seek redress in the event of an error or other injustice. However, they do not eliminate all problems associated with ensuring that income support recipients have their case heard. For example, it appears from the Act that the 14-day period will begin from the time written notice is given to the person. Notices sent by Centrelink through the mail are often late[81] and/or sent to the wrong address.[82] Thus, if Centrelink fails in its reasonable attempts to make contact with the person regarding the breach, a situation may still eventuate where individuals do not become aware of the fact that they have been breached until they try to withdraw money from their bank account or they receive a notice from their bank that they are overdrawn on their account,[83] and the opportunity to appeal may still end up eventuating only 'after the damage has been done'.[84] By this time, individuals may lack sufficient financial resources to enable them to contact or attend the Centrelink office to have the breach overturned.[85]

Thus a legal defence on the grounds of a breach of the rules of procedural fairness may be available to individuals who have who have not had reasonable access to an impartial decision-maker upon review, or who have been breached without having the opportunity to present their point of view. It is hoped that the recent amendments may give breached individuals a greater opportunity to have the decision reversed before a period of reduced or non-payment is applied.

Breaches of Common Law Principles

The breach penalty system also offends a number of established common law principles, including freedom of contract, the right to certain procedural safeguards and the principle that the best interests of the child should be considered paramount when making decisions that affect children.

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80 *AWT Act* 2003 (Cth), ss 11, 26A, 26B, 30A, 34A, 34B; see *Social Security Act 1991* (Cth), new ss 550C(2), 557B(2) and 558B(2) for Youth Allowance; new ss 630B(2), 644AB(2) and 644C(2) for Newstart; and s 500ZD(3) for Parenting Payment.

81 ALRC (2002), para 7.85.

82 Pearce Report (2002), para 3.4.

83 Pearce Report (2002), para 7.20.

84 Goodman (1998), p 30.

85 Pearce Report (2002), paras 7.21, 7.22.

Contract

Under the common law, a contract may not be enforceable if there is a substantial difference in the bargaining power of the respective parties. Such a contract may be voidable on the grounds of duress, unconscionable conduct or undue influence if it has not been entered into on a truly voluntary and informed basis.[86]

An activity test agreement is purported to be a contract between the individual and Centrelink.[87] It is a breach of this 'contract' that may lead to the imposition of penalties. Of course, being codified in statute, the social security breaching regime is not subject to common law rules of contract. However, it is interesting to note that contracts of the kind made between Centrelink and income support recipients under the *Social Security Act 1991* would be unacceptable in any other sphere of economic life.[88]

There are a number of elements of the contractual relationship between Centrelink and jobseekers that would make the contract voidable were it subjected to common law scrutiny.

First, entering into an activity agreement is a condition of eligibility for Newstart and Youth Allowance,[89] and from 20 September 2003 it will be a condition of eligibility for some Parenting Payment recipients.[90] Thus failure to enter into such an agreement means that the person is unable to claim the desired benefit. It may be argued that this constitutes a form of duress, or 'illegitimate pressure', as individuals are forced to enter such contracts against their will under threat of losing the only means of livelihood available to them; it may be argued on this basis that they do indeed have 'no choice but to act'.[91]

Second, jobseekers are currently not given sufficient time to reflect on the content of the agreement before signing it. Jobseekers are required to complete an activity agreement at their initial interview with Centrelink. At this time, jobseekers may be expected to be occupied with thoughts of meeting their material needs, rather than possessing a clear enough mind to enter into a contract that will greatly impact on their everyday lives. The Independent Review of Breaches and Penalties in the Social Security System found that individuals are often placed under considerable pressure to complete the agreement immediately by Centrelink staff, who are in turn placed under pressure to ensure that the agreement is signed in their presence at that time.[92]

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86 For a comprehensive discussion of the law in relation to these principles, see Carter and Harland (2002), pp 486–551

87 See references to negotiation and agreement in *Social Security Act 1991* (Cth), s 606(2), (4).

88 Goodman (1998), p 28.

89 *Social Security Act 1991* (Cth), ss 540(c), 593(1)(e).

90 See the new s 500(1)(c) *Social Security Act 1991*.

91 For the relevant legal principles, see *Equiticorp Finance Ltd v Bank of New Zealand* (1993) 32 NSWLR 50 at 88, 106; *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 at 383 and following. See also Goodman (1998), p 27.

92 Pearce Report (2002), para 5.11.

Jobseekers are currently not given the opportunity to reflect on the terms or seek legal or other advice, even though 'cooling-off' periods are standard practice in all consumer credit contracts,[93] and despite the fact that signing the agreement within a 'reasonable' time is provided for in the *Social Security Act*.[94] Instead, breaching is used as a tool to force people into agreements.[95]

As from 20 September 2003, this will change, and a cooling-off period of 14 days will apply to activity/participation agreements made with respect to Youth Allowance, Newstart and Parenting Payment.[96] While this is a welcome development, it must be accepted with some hesitation, due to the fact that for Youth Allowance and Newstart recipients, entitlement to this cooling-off period need only be advised in writing.[97] For many Youth Allowance and Newstart recipients, such as those from diverse cultural and linguistic backgrounds whose preferred language is not English, those who are illiterate, and those who suffer from intellectual disability, advice in this form may be redundant without a verbal explanation.

Further, at some Centrelink offices, information seminars are attended by jobseekers after they sign the activity agreement.[98] It is at these seminars that jobseekers learn about their responsibilities under activity agreements and the consequences of non-compliance, and thus it may not be until the individual attends one of these seminars that the extent of their obligations under the agreement becomes apparent to them.[99] Under these conditions, it cannot be said that jobseekers enter into such 'contracts' voluntarily, or on a sufficiently informed basis. Indeed, it may amount to undue influence, since the relationship between Centrelink and jobseekers naturally involves a degree of ascendency or influence (as Centrelink officers have the power to provide clients with or deprive clients of their means of livelihood), and jobseekers would naturally be entitled to assume that Centrelink officers, as government representatives, could be trusted and relied upon.[100] The element of undue influence in the relationship between Centrelink and jobseekers is compounded

93 ACOSS (2001b), p 15.

94 Under the *Social Security Act 1991* (Cth), s 544C(1) and s 607(1), 'reasonable' delay in signing an activity agreement is permissible.

95 National Welfare Rights Network (2001), p 7.

96 See *Social Security Act 1991* (Cth), new ss 501B(5A), 544B(5A), 606(5A).

97 See *Social Security Act 1991* (Cth), new ss 544B(5B), 606(5B).

98 Pearce Report (2002), para 2.21.

99 This is not to advocate for a requirement that jobseekers attend information seminars before their initial interview. As the Independent Review of Breaches and Penalties in the Social Security System noted (Pearce Report (2002), para 2.23), jobseekers may be more able to focus on the information presented at the seminar once their material needs have been dealt with.

100 *Johnson v Buttress* (1936) 56 CLR 113 at 119–20, 134–35; *Union Fidelity Trustee Co v Gibson* [1971] VR 573 at 575–77.

by the fact that independent legal or other advice is not provided by Centrelink, nor is obtaining it encouraged or even allowed for.[101]

Third, jobseekers' input into the terms of activity agreements is not always secured. Some terms are automatically incorporated into activity test agreements,[102] and it is commonplace for jobseekers to be presented with a prepared agreement which they must sign, or else be breached.[103] Genuine negotiation often does not take place, the result being that the terms of such agreements may impose unreasonable or unsuitable requirements on individuals and this may in turn lead to non-compliance. This is compounded by the fact that many jobseekers experience literacy problems and/or are from diverse cultural and linguistic backgrounds where English is not their preferred language.[104] At common law, such contracts may be voidable on the basis of unconscionable conduct: the jobseeker may be seen to suffer from a legal 'disability' by virtue of their poverty, lack of education, lack of assistance or explanation and/or illiteracy,[105] and unfair advantage is being taken of this 'disability' by Centrelink officials by forcing the signing of such documents under threat of breach or loss of livelihood.[106]

Thus contracts of the nature entered into by income support recipients in accordance with mutual obligation requirements may not be acceptable in any other sphere of economic life; often they amount to voidable contracts on the basis of illegitimate pressure (or duress), undue influence and/or unconscionable conduct.

Presumption of innocence

Social security breaches are not criminal penalties or 'punishments' because, under the Constitution, only a judge can determine guilt and impose punishment.[107] Neither are they true administrative penalties, as true administrative penalties involve a question of fact, where legislation decides when a breach occurs and what the penalty is.[108] Thus social security breaches might reasonably be classified as 'quasi-penalties' in that they are

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101 *Johnson v Buttress* (1936) 56 CLR 113 at 119–20; *Union Fidelity Trustee Co v Gibson* [1971] VR 573 at 577.

102 For example, the person must accept any suitable offer of employment (*Social Security Act 1991* (Cth), s 550A(c)); the person must attend job interviews (*Social Security Act 1991* (Cth), s 601A(1)); the person must take part in and continue to participate in a labour market program for its duration (*Social Security Act 1991* (Cth), s 601A(2)).

103 This is often the case in relation to agreements between individuals and Job Network providers: National Welfare Rights Network (2001), p 12.

104 Pearce Report (2002), para 2.20.

105 *Blomley v Ryan* (1956) 99 CLR 362 at 405.

106 *Commonwealth Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 474.

107 *Australian Constitution,* Chapter III; ALRC (2002), paras 2.66–2.68, 3.16–3.17.

108 ALRC (2002), paras 2.66–2.68, 3.16–3.17.

administrative penalties that involve an exercise of discretion which goes beyond a mechanistic application of legislation.[109]

Procedural safeguards such as the presumption of innocence and the right to have one's case proved against him/her have traditionally been associated with criminal prosecutions due to the severity of possible penalties.[110] However, the distinction between criminal and non-criminal penalties has become substantially blurred in modern times; many trivial actions have been criminalised and many civil and administrative breaches can result in the imposition of harsh penalties.[111] Thus the relaxation of procedural and other safeguards in the context of non-criminal prosecutions now seems arbitrary and is less justifiable.[112]

Social security breaches are an apt example of this. The penalties imposed on unemployed persons for activity test breaches are substantially higher than penalties for criminal offences such as drink driving and assault,[113] yet few procedural safeguards are afforded to those who are breached. Considering the severity of the penalties imposed, it may be argued that it goes against accepted principles of justice that individuals subject to potential breaches are not presumed innocent until proven guilty. In practice, breached individuals must go to extraordinary lengths to prove their innocence — for example, ACOSS reports that where a breach occurs due to non-receipt of correspondence, it is not uncommon for Centrelink and Job Network staff to insist that the person prove the letter was not received before a breach will be lifted.[114] Further, Centrelink officers sometimes rely exclusively on reports from Job Network providers in imposing breaches on jobseekers without conducting a separate investigation.[115] Centrelink officers and Job Network providers act as judge and jury, and jobseekers are considered 'dole cheats' unless and until they are able to establish their innocence.[116]

Thus the current breach penalty regime contravenes accepted principles of justice by denying breached individuals the presumption of innocence.

Best Interests of the Child

Article 3(1) of the CROC states: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' This is commonly termed the 'welfare principle'.

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109 ALRC (2002), para 3.82.

110 ALRC (2002), para 2.82.

111 ALRC (2002), para 2.82.

112 ALRC (2002), para 2.92.

113 Pearce Report (2002), para 7.14; National Welfare Rights Network (2001), p 20.

114 ACOSS (2001b), p 8.

115 Commonwealth Ombudsman (2001), pp 51–52.

116 Goodman (1998), p 27.

As mentioned above, international human rights treaties do not have force of law unless their terms have been validly incorporated into the relevant domestic law by statute.[117] However, it may be argued that this particular principle should influence the behaviour of Centrelink officials in relation to social security breaches regardless of the fact that it has not been incorporated into the *Social Security Act 1991*.

First (as noted above), it was held by the majority of the High Court in *Minister for Immigration and Ethnic Affairs v Teoh* that ratification of international covenants by the executive government gives rise to a legitimate expectation, in the absence of statutory indications to the contrary, that administrative decision-makers will act in conformity with it.[118] It was the view of the majority that, while delegates are not compelled to act in conformity with the terms of a relevant treaty, a decision not to accord with the treaty attracts a right to procedural fairness, including giving notice to those who may be adversely affected by the decision, and providing them with an opportunity to present a case against the taking of such a course.[119] The expectation that the welfare principle will be applied in administrative decisions affecting children may be considered even more robust now as the principle has become increasingly prolific in Australian law in recent years.[120]

Second, the majority of the High Court in *Teoh* held that international conventions may be used as a guide in the development of the common law by the courts.[121] Indeed, Gaudron J asserted that a common law right on the part

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117 *Simsek v Minister for Immigration and Ethnic Affairs* (1982) 148 CLR 636 at 641–42; *Kioa v West* (1985) 159 CLR 550 at 570.

118 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, per Mason CJ and Deane J at 291–92, Toohey J at 301, Gaudron J at 305.

119 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, per Mason CJ and Deane J at 291–92, Toohey J at 301, Gaudron J at 305.

120 The welfare principle appears in a great many Australian Acts including: *Family Law Act 1975* (Cth), ss 63B(b), 65E, 65L(2), 67L, 67V, 67ZC(2); *Adoption Act 2000* (NSW), s 8(1)(a); *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 9(a); *Superannuation Act 1916* (NSW), s 32A; *Adoption Act 1984* (Vic), s 9; *Community Services Act 1970* (Vic), s 13C; *Births, Deaths and Marriages Registration Act 1996* (Vic), s 26(4); *Children and Young Persons Act 1989* (Vic), ss 100–102, 105, 109, 115; *Evidence Act 1958* (Vic), s 42F(3); *Adoption of Children Act 1964* (Qld), s 10; *Child Protection Act 1999* (Qld), s 5(b); *Children's Services Tribunal Act 2000* (Qld), s 7(a); *Commission for Children and Young People Act 2000,* s 6(1)(b); *Child Protection Act 1993* (SA), s 4(1); *Consent to Medical Treatment and Palliative Care Act 1995,* s 13(5); *Adoption Act 1994* (WA), s 3; *Child Welfare Act 1947* (WA), s 3A; *Family Court Act 1997* (WA), s 66; *School Education Act 1999* (WA), s 11; *Education Act 1994* (Tas), ss 5, 7; *Children, Young Persons and their Families Act 1997* (Tas), s 8(2)(a); *Magistrates Court (Children's Division) Act* 1998, ss 13(2), 15(2); *Adoption Act* 1988 (Tas), s 8; *Community Welfare Act* (NT), s 9; *Children and Young People Act 1999* (ACT), s 12(1)(a); *Artificial Conception Act 1985* (ACT), s 11(1)(a).

121 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, per Mason CJ and Deane J at 288, Gaudron J at 304.

of children and their parents exists in Australian law that a child's best interests are to be considered paramount in all administrative decisions which directly affect children as individuals and which have consequences for their future welfare.[122] On these bases, it may be argued that the best interests of children should be considered paramount in the application of breach penalties by Centrelink officials.

Under the current system, children may be affected by breach penalties either directly (by virtue of their being recipients of Youth Allowance) or indirectly (by virtue of their being children of income support recipients). The recent decision to extend mutual obligation requirements to parenting payment recipients from 20 September 2003 will render a further category of children vulnerable to the adverse impacts of breach penalties. As mentioned above, parents' capacity to provide their children with the necessities of life, and young persons' ability to support themselves, are substantially reduced during rate reduction periods, let alone during non-payment periods. Yet there is no provision for penalties to be lifted where they will result in extreme hardship for children.

Consistent with the views of the majority in *Teoh*, it may be argued that the ratification of the CROC places an obligation on Centrelink officials to give children who might be affected by breach penalties notice of the penalty, and an opportunity to present their case. Alternatively, if the views of Gaudron J are adopted, it may be argued that Centrelink officials are required to apply the breach penalty system in accordance with the welfare principle as a matter of common law. This may leave decisions which have not been made in accordance with this principle open to legal challenge. At the very least, adequate notice of the upcoming imposition of a breach penalty, as well as a provision for penalties to be lifted if it is found that the penalty will result in hardship for children, would go some way towards ensuring compliance with the welfare principle.

Conclusion

The Australian breach penalty regime results, both in its design and application, in the contravention of certain provisions of international human rights law and domestic social security law and administrative law. Further, it offends established principles of common law, including freedom of contract, the right to the presumption of innocence, and the principle that the best interests of the child should be considered paramount in making decisions that affect children.

Added to repeated claims by various stakeholders that the breach penalty system is excessively harsh and morally indefensible, these contraventions of international and domestic law further undermine the legitimacy of the breach penalty system. Many positive reforms have been made, particularly as a result of the amendments to the *Social Security Act 1991* brought about by the recently passed *AWT Act 2003*. With welfare reform expected to continue in 2003 and beyond, it is hoped that the breach penalty regime will be

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[122] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 304.

substantially adapted to better meet the requirements of domestic and international law.

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