

10 May 2021

Dr Anne Webster MP
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
CANBERRA ACT 2600



By email: human.rights@aph.gov.au

Dear Chair

ParentsNext: examination of Social Security (Parenting payment participation requirements - class of persons) instrument 2021

The Law Council welcomes the opportunity to provide a submission to the Parliamentary Joint Committee on Human Rights' (**Committee**) inquiry into the Social Security (Parenting payment participation requirements – class of persons) Instrument 2021 [F2021L00064] (**Instrument**). It is grateful for the assistance of its Indigenous Legal Issues Committee, National Human Rights Committee, and the Law Society of South Australia, in the preparation of this submission.

This submission focuses on the inquiry's second term of reference; *the extent to which the ParentsNext program operates flexibly in practice, such that it treats different cases differently*. In this regard, the Law Council has considered the scope of the Instrument and its potential application to Aboriginal and Torres Strait Islander peoples.

Given the limited timeframe available, the Law Council has not had the opportunity to consider the broader human rights implications of the Instrument at this stage, and restricts its comments to the following preliminary remarks. While the Law Council has not reached a final view on the Instrument, it calls for further consultation with Indigenous groups.

1. Background

The Instrument prescribes a class of persons (**prescribed claimants**) for the purposes of paragraph 500(1)(ca) of the *Social Security Act 1991* (Cth) (**the Act**). This paragraph specifies that prescribed claimants receiving Parenting Payment may be required to participate in ParentsNext, a 'pre-employment' program (**the Program**), in order to remain eligible for the payment.¹

The Instrument intends to provide early support to parents who have what is considered to be a lower level of educational attainment.² The Law Council notes relevant prescribed characteristics of this class include living in a 'jobactive employment region',³ and being either an early school leaver, or of at least 22 years of age without having completed the final year of schooling.⁴

¹ See participation requirements set out in the Act s 500A.

² Explanatory statement, 1.

³ The Instrument, clause 4. The definition of 'jobactive employment region' is a geographical region in Australia in which employment services were delivered by one or more jobactive employment service providers on 1 December 2020.

⁴ The Instrument, clause 6.

The practical effect of the Instrument is that prescribed claimants must fulfill a range of obligations, including:

- attending appointments with a provider;
- choosing a range of activities to prepare themselves for work;
- creating and agreeing on a participation plan (Employment Pathway Plan); and
- reporting on their progress.⁵

The requirement to enter into a participation plan is determined by the Secretary of the Department of Social Services.⁶

In conjunction with the Act, the Law Council acknowledges that the Instrument intends to prevent long-term welfare dependency by supporting prescribed claimants to develop work-specific skills and the confidence to enter paid employment.⁷

In complying with the above participation plan, the claimant may be required to attend playgroups or similar activities, undertake further education and training or participate in other services such as confidence building or counselling.⁸ The terms in the participation plan are to be approved by the Secretary.⁹

In the event that an individual fails to comply with their obligations, their payment may be suspended.¹⁰ In situations where the failure to comply has been persistent without 'reasonable excuse',¹¹ the payment may be reduced by half or in full for a period or cancelled entirely.¹²

Persons are exempt from participation in the Program during a period where due to their circumstances, one or more of a range of exemptions applies to them under Division 3A of Part 2.10 of the Act. This includes domestic violence, certain caring responsibilities, sickness, injury and other reasons.

2. Comment

The Law Council has considered the Instrument in the context of Aboriginal and Torres Strait Islander peoples, noting that as at 28 February 2021, 18 per cent of Program participants identified as such.¹³ It is particularly pertinent to consider the implications for those who may live in regional or remote jobactive areas. In this geographical setting, the Law Council questions the likelihood of some claimants being able to fulfill their obligations in practice.

More broadly, the Law Council is concerned the proposed approach may not have the necessary flexibility, particularly in light of the likely cultural differences between western

⁵ Australian Government, 'Services Australia', *ParentsNext* (Web Page) <<https://www.servicesaustralia.gov.au/individuals/services/centrelink/parentsnext>>.

⁶ The Act ss 501(1).

⁷ Explanatory Statement, the Instrument, 1.

⁸ Statement of compatibility with Human Rights, *Social Security (Parenting payment participation requirements – class of persons) Instrument 2021* (Cth) 6.

⁹ The Act s 501A(5).

¹⁰ *Social Security (Administration) Act 1999* (Cth) Part 3 Div 3AA.

¹¹ See *Social Security (Administration) Act 1999* (Cth) s 42AF(2)(b). This is explored further below.

¹² *Ibid.*

¹³ Senator the Hon Michaelia Cash, Instrument (Letter to Dr Anne Webster MP, 11 March 2021).

and Aboriginal child-rearing practices. The subjective determination as to which range of activities is appropriate to be included in a participation plan is critical.

With respect to its potential application to Aboriginal and Torres Strait Islander peoples, the Law Council also notes that 'Indigenous cultural business' is listed as a potential exemption from an obligation to participate in the Program,¹⁴ however it is not clear how this exemption is to be applied in practice.

In the case of Aboriginal and Torres Strait Islander peoples who do come within the scope of the Instrument and must participate in the Program, the Law Council notes that the cultural issues raised are exacerbated by the compliance regime, as prescribed in the *Social Security (Administration) Act 1999* (Cth).¹⁵ Penalties may apply to a person who has persistently failed to comply with their obligations under the Program, culminating in the potential cancellation of their payment.¹⁶

The Law Council observes that it has been suggested by the Committee that a range of human rights implications arise from the mandatory participation in the Program and subsequent potential for that person's social security payments to be reduced or cancelled as a result of non-compliance.¹⁷ These include the rights to social security, an adequate standard of living, a private life and equality and non-discrimination.¹⁸ It agrees that these implications are of concern.

The Law Council notes that the procedure by which the Secretary is to make a determination as to whether a person in these circumstances has persistently committed mutual obligation failures is specified via legislative instrument.¹⁹ It further notes that there is a requirement for a subsequent assessment of the prescribed claimant's capability and requirements generally, which is conditional on the Secretary's determination that the person has persistently failed to comply.²⁰

The Law Council has considered the reasonable excuses open to a prescribed claimant to justify persistent non-compliance. It notes that section 42AF(2)(b) of the *Social Security (Administration) Act 1999* (Cth) has the effect of making the Secretary's exercise of compliance action conditional on the prescribed claimant being unable to satisfy the Secretary of a 'reasonable excuse' for their failure.

The term 'reasonable excuse' is subsequently determined via legislative instrument,²¹ prescribing a range of factors to which the Secretary must, and must not, have regard in their decision as to whether or not a reasonable excuse applies. This is not an exhaustive list. Cultural reasons or cultural business are not prescribed as a matter to which regard

¹⁴ A 'special circumstances' exemption is available under section 502F of the Act. See Australian Government Department of Education, Skills and Employment 'ParentsNext', *ParentsNext Frequently Asked Questions* (Web Page) <<https://www.dese.gov.au/parentsnext/parentsnext-frequently-asked-questions>>.

¹⁵ Part 3 Div 3AA.

¹⁶ Ibid.

¹⁷ Committee, Commonwealth Parliament, Human Rights Scrutiny Report (Report 2 of 2021, 24 February 2021), 60 [1.132].

¹⁸ Ibid.

¹⁹ Section 42AR(1) of the *Social Security (Administration) Act 1999* (Cth). *Social Security (Administration) (Persistent Non-compliance) (Employment) Determination 2015* (No.1) (F2015L00800, 4 June 2015).

²⁰ Explanatory Statement, *Social Security (Administration) (Non-Compliance) Determination 2018* (Cth) 2.

²¹ *Social Security (Administration) (Reasonable Excuse – Participation Payments) Determination 2018* (F2018L00779, 7 June 2018).

must be had; however, the Instrument prescribes factors such as literacy and language skills,²² unforeseen family or caring responsibilities of the person,²³ or the person not having access to safe, secure and adequate housing,²⁴ as matters which must be considered. While these are important, further attention should be given to cultural factors which may lead to a conclusion that a reasonable excuse applies.

It is unclear to what extent any consultation on the Instrument has occurred with Indigenous communities. The Law Council emphasises that the right to self-determination encompasses the ability of all persons – most relevantly here, Aboriginal and Torres Strait Islander income support recipients - to ‘freely pursue their economic, social and cultural development’.²⁵ They should be closely involved in the development and implementation of policies and programs that impact on them, through consultation and engagement strategies facilitating this objective.

The principle of free, prior and informed consent, as reflected in Article 19 of the United Nations Declaration of the Rights of Indigenous persons,¹⁰¹ is also highly relevant. This not only raises whether there has been meaningful community consultation with affected communities, and consent obtained at that level. It also raises considerations of whether participation in the Program should be based on full, free and informed consent by the relevant individual, which is a position that the Law Council has supported in the context of the cashless debit card.²⁶

To the extent that this has not already occurred, consultation should occur with Indigenous groups who are best placed to understand the potential practical implications of the Instrument on Aboriginal and Torres Strait Islander communities. This is important in terms of understanding the Instrument’s likely outcomes, having regard to the Australian Government’s intentions in introducing the measure.

Please contact Ms Sarah Swan, Policy Lawyer on (02) 6246 3703, or at sarah.swan@lawcouncil.asn.au in the first instance if you would like to discuss this submission further.

Yours sincerely



Dr Jacoba Brasch QC
President

²² Ibid s 5(2)(b).

²³ Ibid s 5(2)(f).

²⁴ Ibid s 5(2)(a).

²⁵ Eg, International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR) art 1; International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 1; and GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007), art 3.

²⁶ Law Council of Australia, *Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020*, Submission to the Senate Community Affairs Legislation Committee, 2 November 2020.