

## **Expanded Evidence of Professor Aoife Nolan<sup>1</sup>**

I am delighted to join you. My comments today will focus on question 6: the extent to which linking welfare payments to the performance of certain activities by the welfare recipient is consistent with international human rights law. I want to flag at the outset that the human rights issues that I will address here arise from the fact that the instrument makes participation in the ParentsNext programme compulsory and provides that a person who fails to participate may have their parenting payment reduced, suspended or cancelled. Were participation in the scheme voluntary, and not enforced by penalties, these human rights concerns would not arise.

I will start by speaking briefly about the rights of the identified groups of parents who are required to participate in the ParentsNext program and hence are subject to the risk that their parenting payment will be reduced, suspended or cancelled on the grounds of non-conformity with the programme's requirements. As the Committee has already heard today and as discussed in Professor Goldblatt's written submission, the measure raises serious questions with regard to both the positive and negative obligations imposed by the right to social security and the right to an adequate standard of living. These rights are set out in Articles 9 and 11(1) of the International Covenant on Economic, Social and Cultural Rights, respectively.

There is much to say here but I will focus on the issue of limitations or restrictions of these rights. Any imposition of penalties in the form of reduction, suspension or cancellation of parenting payments can be regarded as a limitation on both the right to social security and the right to an adequate standard of living. Article 4 of ICESCR – the general limitations clause in

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that treaty – specifies clear that law must determine any limitations on rights.<sup>2</sup> This is certainly the case here. However, Article 4 makes clear that for such limitations to be permissible in terms of the Covenant, they must also be compatible with the nature of the rights to social security and an ASOL.<sup>3</sup> They must also be solely for the purpose of promoting the general welfare in a democratic society.<sup>4</sup> The Parliamentary Joint Committee must therefore consider whether these requirements are satisfied by the instrument scheme.

The UN Committee on Economic, Social and Cultural Rights has addressed the permissible scope of limitations under Article 4 both implicitly and explicitly in its case-law. In *Pardo v Spain*, a complaint focused on evictions, the UN Committee stated that:

‘[A]rticle 4 of the Covenant stipulates the conditions under which such limitations on the enjoyment of Covenant rights are permitted. Firstly, the limitation must be determined by law. Secondly, it must promote the general welfare in a democratic society. Thirdly, it must be suited to the legitimate purpose cited. Fourthly, the limitation must be necessary, in the sense that if there is more than one measure that could reasonably be expected to serve the purpose of the limitation, the least restrictive measure must be chosen. Lastly, the benefits of the limitation in promoting the general welfare must outweigh the impacts on the enjoyment of the right being limited. *The more serious the impact on the author’s Covenant rights, the greater the scrutiny that must be given to the grounds invoked for such a limitation.*’ (emphasis added)<sup>5</sup>

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<sup>2</sup> Article 4 ICESCR states that, ‘The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.’

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> *Pardo v Spain*, E/C.12/67/D/52/2018 (14 April 2020), para 9(4)

In *Rodríguez v Spain*,<sup>6</sup> a case involving a the reduction of a non-contributory disability benefit/allowance upon the beneficiary being imprisoned, the UN Committee stated that,

‘a non-contributory benefit cannot, in principle, be withdrawn, reduced or suspended as a consequence of the deprivation of liberty of the beneficiary, unless the measure is provided for by law, is *reasonable and proportionate*, and guarantees at least a minimum level of benefits ... *The reasonableness and proportionality of the measure should be evaluated on a case-by-case basis, taking account of the beneficiary’s personal situation.*’ (emphasis added)<sup>7</sup>

In its most detailed recent explicit statement on Article 4, which occurred in its statement on the COVID-19 pandemic,<sup>8</sup> the UN Committee made clear that any limitations to Covenant rights caused by COVID must be necessary to combat the public health crisis, reasonable and proportionate<sup>9</sup>. These conditions impose a very high threshold for compliance. Previously, when considering whether a measure qualifies as “necessary and proportionate” (in the context of evaluating whether a retrogressive measure was permissible), the UN Committee has highlighted that ‘necessary and proportionate’ means that the adoption of any other policy, or a failure to act, would be more detrimental to ESC rights.<sup>10</sup>

The level of intensity accorded to states justification so of limitations will vary.<sup>11</sup> However, the evidence that the Parliamentary Joint Committee has heard suggesting the disproportionate

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<sup>6</sup> UN Doc. E/C.12/57/D/1/2013 (4 March 2016).

<sup>7</sup> See also *Calero v Ecuador*, UN Doc. E/C.12/63/D/10/2015 (26 March 2018).

<sup>8</sup> Committee on Economic, Social and Cultural Rights, ‘Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights’ (UN Doc. E/C.12/2020/1).

<sup>9</sup> *Ibid*, para 11.

<sup>10</sup> UN Committee on Economic, Social and Cultural Rights’ Letter dated 16 May 2012 addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights’, UN Doc. E/C.12/2016/1 (16 May 2012), p.1.

<sup>11</sup> For more, see S. Liebenberg, ‘Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights under the Optional Protocol (2020) 42(1) *Human Rights Quarterly* 48.

impact of the instrument scheme on women and children, including sole parents and indigenous women, means that it is likely that a strict scrutiny would apply.<sup>12</sup> Given that, the Parliamentary Joint Committee will need to consider the following with regard to the instrument under scrutiny: would the adoption of any policy other than this instrument – or a failure to adopt it – be more detrimental to the rights to social security and an adequate standard of living?

I now turn to the rights of the child under the UN Convention on the Rights of the Child. A wide range of children's rights appears to be at risk of being affected by due to the impact of penalties in the form of reduction, suspension or cancellation of parenting payments. These include the child's rights to benefit from social security, which is set out in Article 26 of the UN Convention. Any negative impact on the child's right to benefit from social security will necessarily also impact on the child's right to a standard of living adequate for their development under Article 27 of the UNCRC. This right includes adequate nutrition, clothing and housing. These rights impose a range of immediate and progressive obligations, which I would be happy to discuss further during questions.

Depending on the severity of the impact of any reduction, suspension or cancellation of parenting payments on the position of children, there may also be implications for the child's right to survival and development, which is set out in Article 6 of the UNCRC. Finally, if there is evidence that the linking welfare payments to the performance of certain activities by welfare recipient parents is having a disproportionate impact on certain groups of children – for instance indigenous children or children in sole parent families – this raises issues in terms of the child's right to non-discrimination.<sup>13</sup> The Convention is clear that children must not be

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<sup>12</sup> For support for the assertion that intersectional discrimination triggers strict scrutiny under ICESCR, see *Calero v Ecuador*, para 19(2).

<sup>13</sup> Article 2 UNCRC.

discriminated against on the basis of their parent's status.<sup>14</sup> Drawing on the work of the UN CESCR (to whose work the CRC refers frequently), 'other status' in the open-ended list of prohibited grounds of discrimination set out in Article 2 can be understood to cover 'economic and social situation'.

There is one other requirement that I want to flag at this point. Article 3(1) of the Convention states that in all actions concerning children the best interests of the child shall be a primary consideration. This undoubtedly applies to a measure which, while focused on parents, will unquestionably impact on those parents' children also. Given the potential impacts of scheme penalties on children's rights, the Parliamentary Joint Committee will need to consider carefully whether in fact children's best interests are being secured by the instrument.

In light of the indirect but almost inevitable impact on children of penalties imposed on their parents for non-conformity with the requirements that follow from their being deemed compulsory participants, it is appropriate to regard those penalties as limitations on children's rights also. It should be noted that there is no general limitations clause in the UN Convention on the Rights of the Child. This was arguably due to a reluctance on the part of those who drafted the instrument to contemplate or legitimise limitations on children's rights other than in specified instances where such limitations were deemed necessary. For instance, in the Convention rights to freedom of expression, freedom of association and freedom of peaceful assembly.<sup>15</sup>

However, the UN Committee on the Rights of the Child has recently provided an insight into when limitations beyond these specific civil and political rights may be permissible. In its 2020

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<sup>14</sup> Ibid.

<sup>15</sup> See Articles 13 and 15 UNCRC.

statement on COVID,<sup>16</sup> the Committee addressed the question of limitations on rights motivated by public health in crisis situations. The Committee said that ‘international human rights law exceptionally permits measures that may restrict the enjoyment of certain human rights. It made clear, however, such restrictions must be imposed only when necessary, be proportionate and kept to an absolute minimum’. The Parliamentary Joint Committee will need to consider whether this measure – which was not imposed in a crisis context – meets this test.

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<sup>16</sup> UN Committee on the Rights of the Child, ‘COVID-19 Statement’, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CRC/STA/9095&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CRC/STA/9095&Lang=en) (accessed 15 July 2021).