

Mandate of the Special Rapporteur on extreme poverty and human rights

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on extreme poverty and human rights, pursuant to Human Rights Council resolution 35/19.

Thank you for your response dated 15 January 2018 to my earlier letter of 17 October 2017 concerning the *Social Services Legislation Amendment Act 2017 (Amendment Act)* and *Social Services Legislation Amendment (Welfare Reform) Bill 2017 (Welfare Reform Bill)*.

While it was not raised in your letter, I have since learned that the Government has removed the drug testing trial from the Welfare Reform Bill.¹ I am pleased that these trials have been removed from the proposed legislation, given my view that such tests would have been incompatible with Australia's obligations under the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*.

By way of brief response to your reply, I note the following:

- It is stated that “[t]he Government’s aim is to make the social safety net protection protecting Australians stronger through reforms that better target payments to those most in need and support workforce participation.” But the principal thrust of the recent and current welfare reforms seems to be to cut overall spending through a reduced social safety net. Referring to the Amendment Bill, the Attorney-General introduced the bill as “the next instalment of remaining unlegislated savings” and a short term \$2.4 billion and medium term \$6.8 billion “saving.”² It is difficult to see exactly how this makes the safety net ‘stronger.’ While the term ‘targeting’ suggests greater efficiency, its actual impact is to reduce the number of persons to whom protection is available.
- In response to my question about whether the Government had considered alternative measures to the ones introduced in the Amendment Act, beyond citing the 2015 report on Australia’s welfare system which is said to provide support for the Amendment Act, the response relies heavily on

¹ Supplementary Explanatory Memorandum available at <http://bit.ly/2F536eT> accessed on 22/01/18 via https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5927.

² Commonwealth of Australia Parliamentary Debates, Senate Official Hansard No. 3, 2017 FORTY-FIFTH PARLIAMENT FIRST SESSION—SECOND PERIOD (Wednesday, 22 March 2017) (**Second Reading Speech**), 1765.

the notion of Cabinet confidentiality to justify providing no information about whether any alternative approaches were considered. While the Government's elaborate explanation of standard parliamentary procedure in Australia is noted, it does not respond to the question posed. As I indicated in my letter of 17 October 2017, a proposed measure that diminishes existing levels of protection of a right recognized in the ICESCR needs to be assessed against other available measures, so that it is demonstrated to be the "least restrictive alternative." Such an analysis of whether Australia has acted in conformity with its international human rights obligations under the ICESCR becomes exceedingly difficult if the Government refuses to explain whether or not alternative ways of achieving stated objectives were considered. Leaving aside the negative implications of this approach for evidence-based decision-making, or for meaningful subsequent parliamentary policy discussions, the work of the Human Rights Council's Special Procedures in examining alleged human rights violations is significantly undermined by such an approach. It would seem to be feasible for a government to provide information pertaining to whether a measure can be considered the "least restrictive alternative" while also taking into account the principle of Cabinet confidentiality.

- The responses on pages 4 and 5 in relation to question 7 in my letter of 17 October 2017 relating to indirect discrimination against women are problematic for a number of reasons. First, the presence of discrimination is not negated merely because, as the Government claims, a measure applies "irrespective of gender." While formal and direct discrimination may indeed be absent, my question was triggered by indications that the Amendment Act impacts women more severely than men and therefore may discriminate indirectly. The Government does not directly address the question and limits itself to stating that it is "clear that many mothers rely on family payments." I am also puzzled by the claim that the impacts on women are "sufficiently small" because women only "forgo a small increase in payment that would have occurred under the normal indexation arrangements". This approach fails to assess the actual impact of such indexation on women living in or near poverty, and also suggests that "sufficiently small" discrimination would not be contrary to the prohibition on discrimination against women.
- The claim that the maintenance of payment rates of the Family Tax Benefit (on page 3) does not amount to a cut, ignores the reality that effective payment rates will drop as inflation rates rise without concurrent adjustment to payment rates.

Beyond those specific responses, my general concern is that the measures taken reveal a troubling shift in recent years in Australia towards an increasingly punitive and

conditional approach to social security. While it is laudable that Australia scores above the average OECD spending on family benefits, that is a particular category of benefits and does not include many of the most important benefits designed to ensure that the poorest members of society are adequately protected in times of serious need. Indeed, high spending in that category is entirely compatible with approaches elsewhere in the welfare system that are alleged to discriminate on the grounds of gender and race.

The latter concern has been widely raised within the Australian community in relation to the *Social Services Legislation Amendment (Cashless Debit Card) Bill 2017 (Cashless Bill)*. As with each of the other bills I have reviewed in the context of these social security reforms, the Senate Committee has recently recommended that the bill be passed.³

The cashless debit card is a grey bank-looking card that cannot be used to buy alcohol, gamble, or withdraw cash.⁴ Overall payment amounts are not altered under the scheme. Rather, fortnightly payments are divided up such that 80 per cent is paid onto the cashless debit card and 20 per cent is paid into a person's regular bank account. The person can only access 20 per cent of their social security in cash form.

The cashless debit card trial was commenced in 2016 in three communities: Ceduna in South Australia, and Kununurra and Wyndham in Western Australia.⁵ These are all communities with a relatively high proportion of social security recipients who are Aboriginal and Torres Strait Islanders.⁶ The fact that the cashless cards are being trialled in predominantly Aboriginal communities has been criticised for being racially discriminatory.⁷ Key Aboriginal and Torres Strait Islander representatives have voiced their opposition to the cashless debit cards.⁸ There is evidence that domestic violence has

³ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/CashlessDebitCard/Report

⁴ <https://www.dss.gov.au/families-and-children/programmes-services/welfare-conditional/cashless-debit-card-overview>.

⁵ See the progressive dates for commencement at <https://www.mhs.gov.au/media-releases>. For the enabling legislation see the *Social Security Legislation Amendment (Debit Card Trial) Act 2015 (Cth)*.

⁶ Melissa Davey in Ceduna "Ration days again': cashless welfare card ignites shame, <https://www.theguardian.com/australia-news/2017/jan/09/ration-days-again-cashless-welfare-card-ignites-shame>

⁷ See *Ibid*.

⁸ See the submissions to the Committee Inquiry by the the Aboriginal and Torres Strait Islander Social Justice Commissioner, June Oscar; the National Congress of Australia's First Peoples; and the Kimberley Land Council. See also: "While we acknowledge the widespread negative impacts of alcohol and drugs in the Australian community, it is evident that it is Aboriginal people and communities who are most often penalised by punitive, experimental and top-down policies regarding an issue that impacts the whole of society. The government has taken what the KLC would characterise as a 'sledgehammer' approach, which does little to address the root cause of the issues faced by Aboriginal people, particularly those in the East Kimberley." <http://klc.org.au/news-media/newsroom/news-detail/2017/11/16/cashless-debit-card-opening-statement---tyronne-garstone>

increased in Kununurra since the card's introduction.⁹ The cashless cards scheme is intended to be spread to other communities by means of the Cashless Bill.¹⁰

Government commissioned evaluations of the cashless debit card program have been heavily criticised for lacking rigour.¹¹ The Senate Committee recognised deep concerns that the Orima Report, on the basis of which the trial expansion has been proposed, is methodologically flawed and that the Government has misinterpreted the reports' findings.¹²

There have been reports of increased stigma and shame associated with having to use the distinctive, grey cashless card.¹³ There have also been allegations of child hunger, insufficient cash for household expenses, informal exchanges of card credit for cash involving monetary losses for the social security recipient, and financial losses for small retailers.¹⁴ These effects are very concerning given the negative consequences for those living in poverty.

I have received a submission from a civil society organization alleging that the bill does not provide an evidence-based approach to substance use disorder and gambling addictions. In particular, it undermines the self-determination of Aboriginal and Torres Strait Islander peoples, which is deleterious for their mental health and reduces hope for healing. Beyond that, the Senate Committee Inquiry report acknowledges that “[t]he human rights committee concluded that, based on the information provided, the measures introduced by the bill may not be a reasonable and proportionate limitation on human rights.”¹⁵

While I do not wish to prejudice the accuracy of these allegations, I remain deeply concerned at the underlying assumptions of these various initiatives and the failure to seek to evaluate proposed initiatives in light of Australia's human rights obligations, and its membership of the Human Rights Council.

Please accept, Excellency, the assurances of my highest consideration.

Philip Alston
Special Rapporteur on extreme poverty and human rights

⁹ <https://www.theguardian.com/australia-news/2018/jan/12/family-violence-rates-rise-in-kimberley-towns-with-cashless-welfare>

¹⁰ For example, to the Wide Bay region in Queensland, including Bundaberg and Hervey Bay
<https://www.mhs.gov.au/media-releases/2017-09-21-cashless-welfare-card-bundaberghervey-bay>.

¹¹ <https://www.theguardian.com/australia-news/2017/sep/18/cashless-welfare-card-report-does-not-support-ministers-claims-researcher-says>;
http://caepr.cass.anu.edu.au/sites/default/files/docs/CAEPR_Topical_Issues_1_2017_0.pdf

¹² Senate Inquire report at paragraphs 2.22-2.40.

¹³ See e.g. Melissa Davey, *'Ration days again': cashless welfare card ignites shame* and
<https://www.theguardian.com/australia-news/2017/may/05/shop-owner-says-cashless-welfare-card-has-left-him-100000-short>.

¹⁴ Ibid.

¹⁵ PJCHR, Report 11 of 2017, 17 October 2017, p. 137, referring to paragraph 1.25 Senate Committee Inquiry report.