

Our reference: JT



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Senate Standing Committees on Community Affairs
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Dear Committee

Submission to the Community Affairs References Committee's inquiry into the Centrelink compliance program

Victoria Legal Aid (VLA) is a Victorian statutory authority, and a major provider of legal advocacy, advice and assistance to socially and economically disadvantaged Victorians. Our organisation works to improve access to justice and pursues innovative ways of providing assistance to reduce the prevalence of legal problems in the community. We assist people with their legal problems at courts and tribunals, deliver early intervention programs, and assist more than 100,000 people each year.

Informed by our work, we have prepared this brief follow-up submission on the Community Affairs References Committee's (**Committee**) inquiry into the Centrelink compliance program (**Robodebt**). We refer to our previous submission for a detailed explanation of our clients' experiences with Robodebt, concerns around inaccuracy and unlawfulness of the program, Robodebt's systemic impact, and the lack of transparency in reviews and appeals.¹ This submission provides information and recommendations which respond to changes to the Robodebt program in the last year, including the importance of measures to reduce hardship during the COVID-19 pandemic, and outstanding issues to prevent future hardship in addition to the recommendations in this Committee's second interim report.²

Reflecting on recent changes, VLA notes the following key concerns which remain unresolved:

1. Ensuring no unfair aspects of Robodebt are re-introduced or maintained
2. Extending COVID-19 measures to prevent future hardship, and
3. Learning from the mistakes of Robodebt for future decision-making.

We will briefly outline each of these concerns and can provide further information on request.

¹ National Legal Aid, *Rethink Robo-debt: Building a fair and accurate system people can trust – Submission to the Senate Community Affairs References Committee Inquiry into Centrelink's Compliance Program* (27 September 2019) <https://www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/other-activities#compliance-program>.

² Senate Community Affairs References Committee, *Centrelink's compliance program – Second interim report* (September 2020) https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Centrelinkcompliance/Second_Interim_Report.

1. Ensuring no unfair aspects of Robodebt are re-introduced or maintained

VLA welcomed the Australian Government's announcements to discontinue the process of raising Centrelink debts based solely using income averaging, and to provide refunds to people who received robodebts.³ However, the lengthy delay in conceding Robodebt's unlawfulness and the continued implementation of the scheme has led to over 500,000 debts being unlawfully raised and over \$720 million to be refunded to people affected.⁴

We also welcome the recommendations in the Committee's second inquiry report, and particularly note the recommendation for an independent review into the policy, design, administration and impact of Centrelink's Robodebt program.⁵

(a) Resumption of Centrelink debt recovery using 'proof points'

Centrelink has confirmed that it will no longer raise debts that rely only on averaging of ATO data. However, the Minister for Social Services has stated that Centrelink will 'continue to use income averaging as the basis to identify, with other areas of proof point, whether a debt may exist, and to engage with Australians to ask them to speak to the department about whether a debt may or may not exist'.⁶

VLA has concerns that the use of 'proof points' discussed by the Minister may lead to raising further inaccurate, unfair and unlawful robodebts against Australians. We are concerned about the use of bank statements as evidence to establish a debt. In our view, relying on bank statements raises similar legal issues to those considered in *Amato v Commonwealth of Australia (Amato)*.⁷ The approach is inconsistent with the relevant provisions of the *Social Security Act 1991* (Cth) (**the Act**), as without additional evidence, bank statements are not capable of enabling a decision-maker to determine when a particular amount is first earned, derived or received. Relying on bank statements, Centrelink is unable to determine what fortnight the income should fall into, and what amount to allocate to each fortnight. We also note that people are not required to provide additional documentation unless they receive a formal notice under specific provisions of the Act.

In our previous submission, we raised concerns about the difficulty of people trying to locate old bank statements or payslips, and that the reverse onus on individuals to disprove that a debt exists does not comply with the requirements of the Act.⁸ VLA has heard from clients and community stakeholders that some people who have contacted Centrelink for assistance have

³ Victoria Legal Aid, *Two weeks before legal challenge Australian Government rewinds robo-debt* (19 November 2019) <https://www.legalaid.vic.gov.au/about-us/news/two-weeks-before-legal-challenge-australian-government-rewinds-robo-debt>; Victoria Legal Aid, *Justice for hundreds of thousands of people affected by robo-debt* (29 May 2020) <https://www.legalaid.vic.gov.au/about-us/news/justice-for-hundreds-of-thousands-of-people-affected-by-robo-debt>.

⁴ We note that the total dollar figure of those debts is not clear and does not seem to have been made publicly available. The refund figure only represents the amount that Centrelink had recovered not the total value of the over 470,000 debts which required refunds. Services Australia has confirmed that the total value of the 48,900 debts which were zeroed but did not require a refund as it had not recovered any payment was \$229 million. Senate Standing Committee on Community Affairs, 'Services Australia – Answer to Question on Notice', *Inquiry into Centrelink's Compliance Program – Public Hearing* (17 August 2020).

⁵ Above n 2, Recommendation 5.

⁶ Minister for Government Services The Hon Stuart Robert MP, *Transcript: Doorstop, ABC News* (19 November 2019) <https://minister.servicesaustralia.gov.au/transcripts/2019-11-19-doorstop-abc-news>.

⁷ Order of Justice Davies in *Amato v The Commonwealth of Australia* (Federal Court of Australia, VID611/2019, 27 November 2019).

⁸ Above n 1, p. 14, 18, 20, 31

continued to be told that they are required to disprove the debt and provide additional documentation. The uncertainty of not knowing whether Centrelink will attempt to pursue them again is also causing significant distress and anxiety for VLA clients.

Recommendation 1: The Australian Government should confirm that when Centrelink debt recovery resumes, Centrelink will not attempt to re-introduce the reverse onus of proof by continuing to require individuals to provide additional documentation (e.g. payslips or bank statements) to disprove a Centrelink debt or threat of a debt, or to rely on these documents to raise a Centrelink debt without sufficient proof.

(b) Access to reviews

In our previous submission, we outlined how VLA clients have been wrongfully excluded from statutory review on the basis that they are required to provide new information in relation to a debt decision or they have been diverted into a less formal 'reassessment' process, in breach of s 129 of the *Social Security Act (Administration) Act 1999* (Cth) (**Administration Act**). Issues with accessing review of Centrelink decisions were comprehensively addressed in a 2011 report of the Commonwealth Ombudsman, yet some of the problems identified persist.⁹

We continue to hear that people calling Centrelink to contest a decision are being informed that they need to provide further documentation before their matter will be referred to an Authorised Review Officer (**ARO**) for review. This is inconsistent with a person's right to have a formal ARO review on the basis that they believe the decision in question is not the correct or preferable decision, without having to provide more information or documentation. There is no legal basis on which Centrelink can refuse to conduct an ARO review once requested.

People should be able to access the review to which they are legally entitled. The importance of a system of review is emphasised in the principles set out in subsection of 8(d) of the Administration Act. VLA remains concerned that Centrelink has not implemented processes to ensure people can review decisions to confirm that current or future debts do not rely on inaccurate or unlawful debt raising methods.

Recommendation 2: Centrelink should review its processes to ensure people can access statutory reviews available under the *Social Security Act (Administration) Act 1999* (Cth).

(c) Centrelink resourcing, preparedness and customer service

Our clients' experiences attempting to resolve their robodebts directly with Centrelink¹⁰ have highlighted that Centrelink requires adequate resourcing to provide accurate, high quality and customer-centred assistance. Centrelink must have adequate systems in place to respond to demand, including for people experiencing acute hardship during COVID-19 seeking assistance for JobSeeker, JobKeeper and COVID-19 supplements.

⁹ Commonwealth Ombudsman, *Centrelink The Right of Review – Having Choices, Making Choices*, (March 2011) https://www.ombudsman.gov.au/__data/assets/pdf_file/0013/30451/March-2011-Centrelink-Right-to-reviewhaving-choices,-making-choices.pdf.

¹⁰ See above n 1.

Recommendation 3: The Australian Government should ensure Centrelink is adequately resourced with properly trained staff to implement accurate systems, and provide accessible and high quality services without significant delays for service users.

(d) Debt recovery practices

As outlined in our previous submission, the processes of adding interest and penalties, garnishing tax returns, and referring robodebts to external debt collectors, caused significant hardship for clients, and deterred VLA clients from resolving their robodebts. In *Amato*, the Commonwealth Government conceded that the robodebt was unlawful as the information before the decision-maker was not capable of satisfying the decision-maker that any of the necessary preconditions for the addition of a 10% penalty were present.¹¹ Centrelink must not engage in debt recovery practices which exacerbate financial hardship for our clients in its policies or in practice.

Recommendation 4: The Australian Government should ensure:

- (a) applying the 10% penalty is only done in accordance with the law
- (b) debt recovery practices do not cause or exacerbate hardship for people in exceptional circumstances (e.g. family violence, financial hardship, homelessness, mental health issues, etc.), and
- (c) external debt collection agencies operate within a framework which includes strict compliance with guidelines and effective complaint and review mechanisms.

VLA would also support an Australian National Audit Office (**ANAO**) investigation into the referral of robodebts to external agencies, and the consequences of debt recovery practices on people affected by Robodebt. ANAO is currently considering a potential audit in relation to Services Australia's Debt Administration and Recovery that could explore these issues.¹²

2. Extending COVID-19 measures to prevent future hardship

We support the Australian Government's 6 month pause on Centrelink debt recovery until October 2020. This is a welcome announcement which has played a role in reducing stress and financial hardship for many Australians during a period of crisis.

Given Australia's economy is now in a recession and the socioeconomic impacts are continuing to be felt by Victorians currently in restrictive lockdown, we are concerned that the resumption of Centrelink debt recovery in a matter of weeks will cause significant hardship for thousands of Victorians unable to return to, or to find, work.

Recommendation 5: The Australian Government should extend the pause on Centrelink debt recovery until other COVID-19 measures have been extended (e.g. at least 28 March 2021 in line with JobKeeper payments).

There are further measures the Australian Government could also implement to address the negative impact of Centrelink debt recovery during COVID-19, including:

¹¹ Above n 7 [4].

¹² Australian National Audit Office (ANAO), *Debt Administration and Recovery – Performance Audit (Potential)* <https://www.anao.gov.au/work/performance-audit/debt-administration-and-recovery>.

- (a) **Opt-in repayment system:** Automatically suspending repayments on payment plans, but allowing a person to “opt-in” to repay or continue to repay their debt. In our experience, many people on payment plans are not aware of Centrelink’s change in policies for COVID-19. A number of our clients experiencing financial hardship caused by COVID-19 have contacted Centrelink and arranged for suspensions, but were been aware of this option until they spoke with one of our lawyers. This automatic suspension would also reduce the burden on Centrelink resources caused by people needing to call to make these arrangements.
- (b) **Access to advance payments:** Modifying current policies to enable people with outstanding debts to obtain advance payments if they are experiencing a COVID-19 related personal crisis. This would enable people in acute crisis with a need for immediate funds to access essential payments.
- (c) **Safeguard lump sum payments:** Taking steps to prevent debts being offset against lump sum payments. We anticipate that there may be a significant increase in claims for payment resulting in backpay, and family tax benefit underpayments due to lower income than originally estimated. At a time of crisis where people may have requested a stay on rent, mortgage or credit card payments while awaiting a lump sum payment, people may be budgeting to receive the full amount they are entitled to and require certainty about financial planning.

3. Learning from the mistakes of Robodebt for future decision-making

VLA considers that there are significant lessons for Centrelink, Services Australia and the Australian Government more broadly about how Robodebt was planned, designed and implemented over a number of years, in the face of sustained public criticism. Alarming, existing mechanisms designed to facilitate access to information, circuit breakers to prompt reviews and reconsideration of government policies and programs, all failed to stop Robodebt.

The following recommendations highlight the need for a further inquiry into Robodebt to prevent a repeat for future government programs, as recommended by the Committee in its second interim report.

(a) Transparency and access to information

When trying to understand how robodebts were calculated and the legal basis for debts being raised, the Australian Government did not release clear information about the income averaging method used. Existing processes – such as Freedom of Information (**FOI**) processes, or data disclosed during Senate Estimates – did not reveal how debts were calculated, which presented barriers to individuals to understand whether their robodebt was accurately or lawfully raised and lawyers being able to provide advice. In addition, FOI requests were often slow, and the information released by Centrelink was difficult for clients to understand.

Problems with the accuracy and lawfulness of Robodebt may have been identified earlier if decision-making tools were publicly accessible, and key processes and systems were clearly set out in policy documents. In addition, individuals would have been able to better understand the reasons for their debts and respond appropriately if they were able to access clear information explaining the reasoning and calculations.

Future Centrelink and automated service delivery systems should operate transparently with clear and accessible documents and mechanisms for people to understand the process, identify errors and easily remedy any injustice.

Recommendation 6: The Australian Government should improve mechanisms to access information about government programs and decisions so people affected understand processes used and reasons for outcomes, particularly relating to Centrelink debt recovery.

(b) Consultation and co-design with stakeholders

The scale of Robodebt led to a significant increase in demand for legal advice from community and government-funded legal services. High impact system changes of this kind should require consultation with key stakeholders, including notification of implementation timelines to allow service planning and basic detail about the operation of the scheme to enable the provision of advice. We refer to our submission to the Australian Human Rights Commission's Human Rights and Technology Discussion paper for a more detailed explanation of these concepts, and further mechanisms to ensure technology-assisted government decision-making is properly regulated and respects human rights.¹³

Recommendation 7: Any new Centrelink debt recovery and automated government processes should:

- (a) properly consider the lawfulness and potential community impact of new systems before they are introduced,
- (b) consult and co-design with relevant agencies (e.g. Legal Aid Commissions, social security CLCs, financial counsellors) and affected communities to inform their development, and
- (c) ensure support services are aware of timelines so they can prepare information and plan services for people likely to be affected.

(c) Implementation of AAT decisions

As early as 2017, the Australian Government was warned by the Administrative Appeals Tribunal (**AAT**) that Robodebt was unlawful and that attempts to enforce a debt raised solely on income averaging was unlawful. The Secretary is required under the Administration Act to have regard to the importance of a system of review, and the need to apply policy with due regard to relevant AAT decisions.

VLA is concerned that the Australian Government continued to ignore AAT decisions, or failed to review Centrelink policies and procedures to address the problems identified by the AAT. If the Government had responded to AAT decisions earlier and implemented changes accordingly, it could have prevented significant hardship for hundreds of thousands of people who were targeted by Robodebt after 2017.

¹³ Victoria Legal Aid, *Submission to the Australian Human Rights Commission's Human Rights and Technology Discussion Paper* (10 March 2020) <https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-submission-to-australian-human-rights-commission-human-rights-and-technology-project-10-march-2020.pdf>.

Recommendation 8: The Australian Government should re-visit existing policies and procedures to assess why AAT decisions were ignored, and how to ensure obligations to properly administer the social security system are upheld.

(d) Effective oversight of government decision-making

VLA is concerned that existing oversight mechanisms of government decision-making were unable to put a stop to Robodebt.

The Commonwealth Ombudsman is an independent agency tasked with investigating the administrative actions of Australian Government departments and agencies, and the Ombudsman investigated the Robodebt system after receiving complaints from many people targeted by the scheme. In April 2017, the Ombudsman released its report on Robodebt and stated that it was satisfied that the scheme was operating accurately and that minor amendments to the Robodebt process could remedy the complaints they received.¹⁴ This assessment was later conceded by the Commonwealth government to be incorrect in *Amato*.

The Australian Government also did not support the first interim report released by this Committee in February 2020, which recommended that the Senate adopt a resolution requiring the production of documents (including legal advice) to assist the Committee to complete its inquiry.

Robodebt has shown that existing oversight mechanisms did not operate as intended, and were insufficient to trigger action by the Australian Government to properly review and reconsider the fairness, accuracy and lawfulness of the Robodebt program. In future, there must be effective circuit breakers or checks and balances to stop aspects of government programs which may be unlawful, unfair or inaccurate during the early stages. This would prevent further hardship to individuals, as well as the extended implementation of unlawful and costly systems.

Recommendation 9: The Australian Government should embed scheduled and responsive review mechanisms to ensure meaningful consideration of the impact and lawfulness of government programs and processes.

Yours faithfully

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¹⁴ Commonwealth Ombudsman, *Centrelink's automated debt raising and recovery system – a report about the Department of Human Services' Online Compliance Intervention System for debt raising and recovery* (April 2017) https://www.ombudsman.gov.au/_data/assets/pdf_file/0022/43528/Report-Centrelinks-automated-debt-raising-and-recovery-system-April-2017.pdf.