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Committee Secretary
Senate Community Affairs References Committee
Parliament House
Canberra ACT 2600

By email: community.affairs.sen@aph.gov.au

Economic Justice Australia (EJA) submission to the inquiry into Centrelink's compliance program

1. Economic Justice Australia (EJA) is the peak organisation for community legal centres providing specialist advice regarding social security issues and rights. Our members across Australia have provided free and independent information, advice, education and representation in the area of social security for over 30 years.

2. EJA draws on its members' casework experience to identify systemic policy issues and provide expert advice to government on reforms needed to make the social security system more effective and accessible. Our law and policy reform work:

   - Strengthens the effectiveness and integrity of our social security system;
   - Educates the community; and
   - Improves people's lives by reducing poverty and inequality.

3. EJA welcomes the opportunity to make this supplementary submission to the Committee's inquiry into Centrelink's compliance program.

4. Our comments and recommendations below are further to EJA's original submission to the Committee regarding the inquiry – submission number 27, accessible here. Please note that since lodging that submission, our organisation has changed its name from National Social Security Rights Network to Economic Justice Australia.

Lack of human oversight and reversal of the onus of proof

5. A lack of human oversight was the central shortcoming of the online compliance intervention (OCI) system. As the Federal Court confirmed in *Deanna Amato* v *the Commonwealth of Australia*[1], sole reliance on automated income averaging, without human investigation as to the existence of a debt, led Services Australia to raise debts with no legal basis.

6. Human oversight should be an integral part of any future compliance system, not only to meet legislative requirements but also to satisfy the standards required by ethical frameworks, such as those identified by the Australian Human Rights Commission, discussed further in the sections below.

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[1] Federal Court of Australia, VID611/2019, 11 November 2019

7. As discussed in our previous submission to this Inquiry (para 3.2), prior to the introduction of the OCI system debts identified as a result of ATO data-matching were generally raised with greater human oversight. Departmental officers engaged in calculating and raising debts were previously required to obtain additional information necessary to accurately assess and calculate any possible debt owed, having regard to fluctuations in income over the debt period. This information was obtained from the person if possible - ideally via payslips. If the person was unable to provide details of their income over the period in question, Centrelink obtained the information from the person's employer or financial institution, generally by issuing a notice under social security legislation requiring that the information be provided.

8. Pre-OCI debt-raising processes ensured a level of human oversight and scrutiny of relevant information that enabled the Department to be satisfied that they had sufficient proof of a debt under s1223(1) of the Social Security Act before issuing a debt notice. Importantly this included situations where potential overpayments were identified via data-matching between the ATO and Centrelink. The onus of proof appropriately rested with Department.

9. The onus of proof was reversed for debts raised under the OCI system, with many debt notice recipients forced to seek internal review to obtain a satisfactory explanation of how the debt occurred, and how it was calculated. In some cases, this reversal of the onus of proof was blatant. Many clients contacting EJA member centres advised that Centrelink denied them the right to internal review of OCI system debts. These clients reported that Centrelink compliance officers informed them that their debt could not be reviewed unless they provided detailed evidence of their income (generally payslips) for the debt period.

10. In order to comply with the law moving forward, Services Australia must develop stringent processes for gathering sufficient proof to accurately calculate and raise debts in the light of ATO data. People with debts raised without due regard to details of actual income should not be required to disprove the debt. The onus of proof is on the Department and processes must reflect this at all stages. Authorised Review Officers should be instructed to cancel debts raised without sufficient proof.

11. Income data-matching and averaging has a legitimate role to play in this process only as a starting point of the inquiry that triggers further investigation by Services Australia compliance officers. This process should include clear procedures and guidelines for debt investigation, developed in consultation with relevant bodies and community groups and be enshrined in the Guide to Social Security Law.[2]

12. The guidelines must address two key factors – the mode and quality of investigation.

Ensuring Departmental responsibility for information-gathering

13. In providing adequate human oversight through investigation in the future, the government should exercise its considerable information-gathering powers to contact third parties for information rather than solely relying on asking payment recipients to provide it. While Services Australia should offer people the opportunity to provide relevant information such as payslips, the onus should never be reversed so that people are denied appeal rights until they are able to provide evidence to disprove the validity of a debt.

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[2] Per Recommendation 4(d) of 2017 report by the Commonwealth Ombudsman—Department of Human Services: Centrelink's automated debt raising and recovery system

14. People should only be expected to provide information that is reasonably practicable for them to obtain, taking into account the nature of the information required and their circumstances. Responsibility for gathering information which is likely to be difficult to obtain, for example income records older than two years, should automatically fall to Services Australia.

15. Our members have assisted many clients, like Brianna in the case study below, for whom issues such as mental illness, relationship breakdown, cognitive impairment or caring responsibilities made obtaining the required information impossible. Many others had not retained payslips for the relevant period and were unable to obtain records from their employer – either because their employer could not be contacted or the employer was unco-operative.

> **Case study:** Brianna was 28 years of age when she was first contacted as part of an OCI system review. At the time she had been diagnosed with PTSD as a result of a serious sexual assault the previous year and was in the middle of the court process which ultimately resulted in the conviction of the offender. Brianna was highly distressed and suicidal at the time. In response to a compliance officer's request, Brianna provided payslips but was told that the payslips she had provided did not cover the correct period.
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> Over the following months Centrelink sent Brianna multiple debt notices totalling nearly $10,000, each notice informing her she was required to repay the debt immediately. Brianna firmly believed that the debt was not right and made multiple attempts to appeal Centrelink's decision. Centrelink finally conducted a review by an Authorised Review Officer. The review failed to correct the unlawful calculation of Brianna's debt, even though the review officer had evidence to show the debt calculation was incorrect. An interest charge was later applied to Brianna's debt as she did not agree to repay the amount Centrelink was demanding. Centrelink then garnisheed Brianna's tax return. Brianna was only notified of the garnishee after the fact. At the time, she was unemployed and unable to pay her rent.
>
> Brianna sought assistance from the Welfare Rights Centre, who represented her in an appeal to the AAT. The Tribunal set aside the debt on the basis that it was based on false assumptions about her earnings. This was over eight years after Centrelink had first contacted Brianna as a result of the OCI system compliance review which led to the raising of the debt.

Resourcing to enable quality oversight

16. Quality investigative oversight is key to ensuring the legality of the debt raising process. Under the OCI system, pressure to finalise debt investigations as quickly as possible meant staff did not adequately scrutinise cases before raising a debt. This contributed to widespread inaccuracies and errors that led to almost a third of debts being reduced or reversed by the AAT on review.[3]

17. This culture of quota-based productivity also led to failures in how staff communicated with recipients. Many payment recipients received incorrect or insufficient information regarding the investigation of a potential debt and the particular vulnerabilities of recipients, including mental health issues, were not taken into account. This created the widespread conditions of stress and fear that has characterised many recipients' communication with compliance

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[3] https://www.theguardian.com/australia-news/2020/feb/12/coalition-warned-robodebt-scheme-was-unenforceable-three-years-before-it-acted

teams. Compliance processes need to embed the need to treat people in a respectful and supportive manner.

18. In future, the assessment of performance of compliance staff should focus on the accuracy and legality of their investigation rather than on the number of debts raised. This will help to create a culture of debt investigation that ensures accuracy of overpayment calculation and the legality of debts raised.

Single Touch Payroll

19. The use of real-time Single Touch Payroll data is highly anticipated as an important step in minimising the instances of social security debt. In particular, the reporting of paid rather than earned income and the ability for recipients to use ATO data as the basis for their reporting will facilitate accurate income-testing of fortnightly social security entitlements.

20. However, the STP must also be administered with sufficient human oversight to avoid replicating the mistakes of the OCI system. Centrelink staff must be available to assist recipients over the phone or online, and recipients should be made aware that they are able to seek assistance. This will minimise the risk of recipients entering data incorrectly or deferring to the ATO data when it is in fact incorrect.

21. Further, Services Australia should identify and address cases where recipients are consistently adjusting the ATO-provided data, as this may indicate an issue with the participant's reporting or with reporting by the employer. For example, contact could be made with recipients to discuss their reporting where they have adjusted ATO-provided data in three reporting periods. These checkpoints of human oversight should take into account the vulnerability of many clients and the prevalence of casual work where wages are often irregular, delayed or mis-reported by employers.

Recommendation A: That Services Australia develop a stringent process for gathering sufficient proof to raise a debt that:
   i.   includes clear procedures and guidelines for debt investigation and overpayment calculation
   ii.   is developed in consultation with relevant bodies and community groups
   iii. is set out in the Guide to Social Security Law
   iv.   places the onus on Services Australia to use its information-gathering powers to collect sufficient proof before raising a debt
   v.   assesses the performance of compliance staff based on the accuracy and legality of their investigation.

Recommendation B: That protections be built into the Single Touch Payroll system to ensure fairness and legality through sufficient human oversight, including:
   i.   readily available phone/online assistance for recipients at every stage of the STP process
   ii.   contact with recipients who have adjusted ATO-provided data in three reporting periods, to ascertain the reason for adjustment and identify possible issues.

Recommendation C: That Services Australia be sufficiently resourced to provide an adequate level and quality of human oversight over any future automation to ensure:
   i.   accuracy in decision-making, and
   ii.   people interacting with the social security system are treated with dignity, respect and support.

The need for an ethical framework

22. The design of technological systems that deal with social security must be guided by a data ethics framework that promotes accountability and fairness. This would ensure that the efficiency gains offered by automation do not come at the expense of human rights and legality.

23. Despite numerous sets of best-practice principles, Australia currently lacks a binding and enforceable data ethics framework for government agencies. The potential content and design of such a framework can be found in existing data ethics literature and practices in other jurisdictions.

Existing frameworks

24. In its Discussion Paper on human rights and technology, the Australian Human Rights Commission reached the provisional conclusion that AI-informed decision-making must be:[4]

   - lawful, complying with existing laws and having legal authority where necessary
   - transparent, encompassing the notion that affected individuals are notified of AI being a material factor in a decision engaging their human rights, as well as transparency regarding government use of AI
   - explainable, requiring a meaningful explanation for an AI-informed decision
   - used responsibly and with clear parameters for liability
   - subject to appropriate human oversight and intervention.

25. The Commonwealth Ombudsman has also outlined best practice guidelines for data ethics, in the 2019 edition of the 'Automated decision-making better practice guide'.[5] The guidelines reflect the OECD's voluntary guiding principles for the design, development and use of AI which Australia signed in May 2019; and the Department of Industry, Innovation and Science's eight AI ethics principles:[6]

   1) Human, social and environmental wellbeing: Throughout their lifecycle, AI systems should benefit individuals, society and the environment.

   2) Human-centred values: Throughout their lifecycle, AI systems should respect human rights, diversity, and the autonomy of individuals.

   3) Fairness: Throughout their lifecycle, AI systems should be inclusive and accessible, and should not involve or result in unfair discrimination against individuals, communities or groups.

   4) Privacy protection and security: Throughout their lifecycle, AI systems should respect and uphold privacy rights and data protection, and ensure the security of data.

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[4] Human Rights and Technology Discussion Paper, 2019, p. 75
[5] https://www.ombudsman.gov.au/better-practice-guides/automated-decision-guide#sec-4
[6] Department of Industry, Innovation and Science "AI Ethics Principles" accessed at https://www.industry.gov.au/data-and-publications/building-australias-artificial-intelligence-capability/ai-ethics-framework/ai-ethics-principles

5) Reliability and safety: Throughout their lifecycle, AI systems should reliably operate in accordance with their intended purpose.

6) Transparency and explainability: There should be transparency and responsible disclosure to ensure people know when they are being significantly impacted by an AI system, and can find out when an AI system is engaging with them.

7) Contestability: When an AI system significantly impacts a person, community, group or environment, there should be a timely process to allow people to challenge the use or output of the AI system.

8) Accountability: Those responsible for the different phases of the AI system lifecycle should be identifiable and accountable for the outcomes of the AI systems, and human oversight of AI systems should be enabled.

In summary, the guidelines provide that in considering the use of AI, agencies should:

- Assess whether system meets each of the AI Ethics Principles.
- Assess whether the system will uphold the administrative law values of legality and fairness.
- Map whether the decision-making path involves the exercise of judgement or discretion.
- Identify the legislative authority for the decision/s.
- Identify whether notice is provided to an affected individual before a decision is made.
- Consider consulting with an administrative law expert.
- Engage a multidisciplinary team to assess the system:
  - legal
  - policy owners
  - architecture, data and other information technology experts
  - program managers
  - service delivery professionals.
- Undertake a risk assessment.
- Undertake a Privacy Impact Assessment.
- Seek assurance from any contractors that legislative requirements and best practice principles have been adhered to.
- Design and deliver according to Digital Service Standards.
- Undertake testing and verification of rules to ensure decisions are legal, accurate, fair and consistent.
- Undertake user testing of the system to ensure that the automated system and supporting channels are accessible and inclusive of people regardless of ability and environment.
- Assess and deliver training needs for staff in using the system.
- Ensure decisions can be easily explained to an individual or external oversight body, court or tribunal.
- Provide publicly available information about the system.
- Ensure there are avenues of review for decisions made.
- Establish a sustainable and ongoing monitoring and review cycle to ensure decisions are legal, accurate, fair and consistent.

26. Additional considerations apply for technological systems engaged in the administration of social security. As the AHRC recognised in its 2019 Discussion Paper on human rights and technology:[7]

> "The use of AI in the delivery of government services like social welfare engages a range of human rights. The right to social security, for example, is protected in international human rights law. The Committee on Economic, Social and Cultural Rights (CESCR) has concluded this right imposes an obligation on governments to ensure that eligibility criteria for social security benefits are 'reasonable, proportionate and transparent'. Further, any 'withdrawal, reduction or suspension' of social security benefits should be circumscribed and 'based on grounds that are reasonable, subject to due process, and provided for in national law'."

27. The use of technology in raising social security debts or reducing payment rates must therefore be carefully assessed against these requirements.

28. Guidelines for the use of technology in social security compliance systems must take into account the vulnerabilities of many of those engaging with Centrelink. Automated decision-making can produce inequality in the application of the law by disadvantaging citizens on the wrong side of the 'digital divide'.[8] The drive to automation produces ever-more complex demands of digital engagement by citizens who wish to influence or challenge an administrative decision.[9] People such as older people, people with disability, people in regional and remote communities, and Indigenous Australians can have significantly lower levels of digital literacy and barriers to access. This means that people among these groups can have less opportunity to influence or challenge a decision made by computer, or understand the mechanics of AI-assisted decision-making, compared to more digitally connected groups.

29. In the case of robodebts, averaging of data was automatically applied to recipients who were unable to check their income information online, meaning recipients with less digital access were more likely to receive an unlawful debt, and less likely to successfully appeal that debt. Further, automatic application of the recovery fee was more likely to impact those who could not contact or effectively communicate with the Department. The inequality in digital access and literacy means that automated decision-making is likely to promote unfairness when applied to vulnerable groups.

30. The design of technological systems for social security must be guided by an awareness of vulnerabilities and inequalities which the system may inadvertently compound. A robust design process will combine awareness of these inequalities with the application of a data ethics framework and consultation process. This will allow ethics issues to be identified and rectified before a system is implemented.

Other jurisdictions

31. International experience offers useful guidance for designing and implementing ethical digital systems. In July 2020, New Zealand became the first country in the world to launch a Charter

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[7] https://tech.humanrights.gov.au/our-work

[8] Peter K. Yu, 'Bridging the digital divide: equality in the information age' (2002) 20 *Cardozo Law Journal* 1.

[9] Paul Schwartz, 'Data Processing and Government Administration: The Failure of the American Legal Response to the Computer', (1992) 43 *Hastings Law Journal* 1321.

for the use of algorithms by government agencies.[10] The Charter has been signed by 21 major New Zealand government agencies, who have agreed to commit to a range of measures including:

- explaining how decisions are informed by algorithms
- making sure data is fit for purpose by understanding its limitations and identifying and managing bias
- identifying and actively engaging with people, communities and groups who have an interest in algorithms, and consulting with those impacted by their use
- ensuring that privacy, ethics, and human rights are safeguarded by regularly peer reviewing algorithms
- embedding a Te Ao Māori perspective in the development and use of the algorithms
- retaining human oversight by nominating a point of contact for public inquiries about algorithms, providing a channel for challenging or appealing of decisions informed by algorithms and clearly explaining the role of humans in decisions informed by algorithms.

32. Several features of the Charter can help inform existing data ethics frameworks in Australia and the design of social security systems particularly. The emphasis on human oversight is an important addition to the existing Australian guidelines, especially having regard to the vulnerabilities of welfare recipients. Understanding the limitations of data is another key consideration following the over-emphasis on inaccurate data that characterized the OCI. Lastly, regular review and consultation must form part of an accountability framework for systems design in order to identify and address emerging issues.

33. The EU's General Data Protection Regulation (GDPR) offers further guidance for data ethics in technology-assisted decision-making. Article 22 of the GDP provides that:

> The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.

34. If an individual has given explicit consent for their data to be used in an automated process, they retain:
> 'at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision'.[11]

35. The provision of a right to obtain human intervention is an important implementation of the emphasis on human oversight and accountability highlighted in data ethics frameworks. The GDPR also offers an important example of enshrining explainability and accountability into the use of personal data for decision-making. Articles 13-15 of the GDPR enshrine a right to:
> 'meaningful information about the logic involved [in the automated decision-making], as well as the significance and the envisaged consequences of such processing for the data subject.'[12]

36. The language of rights in the GDPR is particularly significant in granting individuals the ability to take legal action where their data rights are breached. Individuals can:

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[10] https://data.govt.nz/use-data/data-ethics/government-algorithm-transparency-and-accountability/algorithm-charter/#commitment
[11] General Data Protection Regulation, (European Union) 2016/679 art 22(3)
[12] Article 13(2)(f), Article 14(2)(g), Article 15(1)(h),

- receive compensation from the data controller if they have suffered material or non-material damage as a result of an infringement on the GDPR[13]
- lodge a claim with a supervisory authority if they consider that the processing of their personal data infringes the GDPR[14]
- obtain effective judicial remedy against a supervisory authority which did not handle their complaint or does not inform the individual about the progress or outcome of their complaint within 3 months[15]
- obtain effective judicial remedy if they consider that their data rights have been infringed as a result of GDPR non-compliance.[16]

37. The GDPR offers a useful model for enshrining legally enforceable rights to the legal and accountable use of personal data in technology-assisted decision-making. The right to human intervention and meaningful explanation, as well as protection from solely automatic decision-making are crucial for accountable social security administration.

Recommendation D: That the Commonwealth commits to development of a charter of digital ethics principles to guide its agencies in data use and technology-assisted decision-making, including:
- lawfulness, including through
    o complying with existing laws
    o having legal authority for the decision
- transparency, including through
    o early consultation with affected groups, community bodies and other relevant stakeholders regarding the design and use of digital systems
    o opening technology-assisted decision-making to the scrutiny of internal, external and legal accountability mechanisms
- explainability, including through
    o a right to meaningful and clear information about the logic involved in the use of an individual's data
    o a right to meaningful and clear information about the significance and envisaged consequence of the use of an individual's data
- responsible use, including through:
    o making sure data is fit for purpose by understanding its limitations and identifying and managing bias
    o considering particular vulnerabilities of affected individuals in the design of technology-assisted decision-making
    o outlawing decision-making which is based solely on automated processing
- appropriate human oversight and intervention, including through:
    o availability of human points of contact regarding digital systems
    o human intervention to ensure digital systems are understood and used properly by individuals
    o human checking of proscribed technology-assisted decisions, including debt calculations, to ensure accuracy of decisions made via automated processing
- accountability, including through:

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[13] Article 82
[14] Article 77
[15] Article 78
[16] Article 79

- o regular review and consultation regarding the use and impact of digital technology
- o a legally enforceable right for individuals' data to be used in compliance with these principles and a right to compensation and judicial remedy where this right is infringed
- o easily accessible channels for challenging technology-assisted decisions.

Contact for this submission

EJA would welcome the opportunity to provide further feedback to the Committee on our submission.

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