Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative

Due to recent events that have been quite widely traversed in the media regarding the release of personal information to journalists, I am choosing to make this submission anonymously and have my name withheld. This is not necessarily important – as this submission is made from a purely legal perspective. I am not in receipt of a debt nor am I a Centrelink recipient.

There will no doubt be submissions in regards to the morality and monetary effectiveness of these policies. However, I believe that an important topic that must be considered is the legal methods that the DHS has used to data-match and send notices to both current and previous recipients.

My submission is in regards to (a), (e) and (k) from the stated terms of reference and their retrospective operation.

a. the impact of Government automated debt collection processes upon the aged, families with young children, students, people with disability and jobseekers and any others affected by the process;

As recently as just weeks ago, the Department of Human Services ("DHS") portal listed that evidence of income was *recommended* to only be kept for a period of *at least* 6 months. This information was silently removed from the DHS portal in early January. It is accepted that this is merely policy from DHS and can be changed at a subordinate level at any time – however, when policy is changed in correlation with a retrospective audit that is contrary to such policy, it is arguable this is a breach of procedural fairness and natural justice. Indeed, the recent test case which, ironically was in regards to retrospective social security law changes, ruled that a retrospective change to the law does not have the effect of attracting liability to a period where such a liability did not originally exist.[1]

> **Question for the committee:** Is it fair and reasonable for a government department to introduce retrospectively acting policy that conflicts with existing policy (and to an extent, the law) as previously noted by the DHS, particularly where other agencies and law governing such agencies sets time limitations that DHS appears to ignore?

It is not argued that this policy cannot be changed or removed, however it is questionable as to whether this should have retrospective application when the prior policy was in direct conflict resulting in a negative impact on both current and former recipients.

[1] *Director of Public Prosecutions (Cth) v Keating* [2013] HCA 20 (8 May 2013).

e. data-matching between Centrelink and the Australian Taxation Office and the selection of data, including reliance upon Pay As You Go income tax data;

It was stated in the most recent senate hearing that Tax File Numbers ("TFNs") were not used when requesting and matching data from the Australian Taxation Office ("ATO"). Of context, a gazette notice was published in August of 2016 stating the intention to match data between the DHS and ATO going as far back as seven years, if the financial year of 2010 is included.

The reason why TFNs were not used is because the legislation permitting data matching between the ATO and DHS (which uses TFNs), the *Data-Matching Program Act* ("*DMP Act")* only allows for a period of the previous four years to be matched.[2] In this event, there would be a limit on the DHS going beyond 2013 in retrospective data matching. Anything prior would be unlawful. The DHS has effectively side-stepped the existing four-year limitation for existing data matching by requesting data under a 'new' project and adding in the gazette notice the intention to '*…match and validate the Tax Return and the Pay As You Go data sets*'. Using this method, the DHS can subvert existing legislation rendering limitation periods void. The methodology of this route may indeed be questionable not only from a procedural fairness point of view but also a legal point of view. Particularly for those whose 'discrepancies' may exist prior to 2013.

> **Question for the committee**: Were TFNs included by the ATO in the data-set(s) provided to the DHS when the request was made under the *Taxation Administration Act 1953* (Cth) as per the gazette notice? If so, after receiving the data-set from the ATO, were the TFNs used as a key when matching with DHS's data-set, and if this is indeed the case, could it be considered unlawful?

This time limitation exists for many reasons, many of which are logical and do not require mentioning. When considered with respect to both the *DMP Act* and relevant taxation law and policy for record keeping, it never exceeds five years, including the current financial year. Effectively, four years prior to the current financial year is the legally accepted limit for record keeping and auditing in multiple areas of governance. This is documented on the ATO portal[3] and is further reflected in taxation law.[4]

The DHS has argued that accepting bank statements is an acceptable work around to the problems with this historic request for information. What the DHS fails to consider is that bank statements are not always representative of a person's income. For example, if a recipient was paid cash from an employer and the employer was compliant with taxation reporting obligations, retrieving bank statements will be a fruitless endeavour.

Importantly, there are other scenarios where they may not be relevant, particularly in regards to aged pensions or those who received income from financial institutions that do not have the same record keeping requirements

[2] *Data-Matching Program (Assistance and Tax) Act* 1990 (Cth) s 7 (Step 3)
[3] See the ATO Portal: <https://www.ato.gov.au/individuals/income-and-deductions/in-detail/keeping-your-tax-records/>.
[4] *Income Tax Assessment Act* 1997 (Cth) Sect 100.70; Sect 900.165; Sect 121.25; Sect 245.265

as banks. In this event, dividends for example or interest payments may be impossible to account for, particularly when records of up to seven years are required to disprove a debt. In any event, attaining bank records from major institutions beyond a period of 3 years can incur significant fees and stress to those requesting them, not to mention the privacy concerns that may arise from providing such information to the DHS.

k. any other related matters;

A noteworthy mention is also that of the time-period in regards to requesting information that exists in the *Social Security (Administration) Act 1999* (Cth). Under section 69, a person who is no longer in receipt of welfare is not required to respond to a request for information where that request is in regards to an event that occurred more than 13 weeks prior to the notice. Some of these notices appear to far exceed this time limit, reaching as far as seven years.

In copies of the 'request for information' letters that have been sent to past recipients, the wording of the letter contains the phrase 'What you **need** to do [emphasis added]' … and 'Confirm your employment income…'

> **Question for the committee**: Are letters to past recipients which state what 'needs' to be done to effectively avoid a debt being generated, contrary to the *Social Security (Administration) Act 1999* (Cth) for past recipients? Or is it a mere fishing expedition?

From this point of view, the automated generation of debts appears to have been intentional where information is not provided to or is not known by the department to establish a debt. The reasoning for this appears to be that, while the department cannot require information from past recipients beyond 13 weeks, when a debt is raised, that power to require information is re-obtained under Section 193 of the *Social Security (Administration) Act 1999* (Cth).[5] Failure to provide it can allow a debt to be enforced.

If a debt is not generated, then it is arguable that the onus remains with the department to establish or create a debt on the information it has. When a debt is automatically generated by the department, as appears is the case here, on a 'shoot first ask questions later' basis, the onus can be legally forced back onto the recipient to disprove it.

> **Question for the committee**: Was the automated debt generation where no response was received from past recipients done to re-establish a legal requirement for a person to provide or to obtain information for the department? Could this be considered unlawful, or at the very least, a breach of procedural fairness? Or is it a mere fishing expedition?

As can be construed from these actions and the legislation, where there is no debt generated for past recipients and they have not responded to a request for information, there is no legal requirement to provide pay slips or other evidence of income to the department. The department appears to have reversed the standard procedure

[5] *Social Security (Administration) Act 1999* (Cth) s 193

for this reason as, obviously, where they do not have the required information or proof to generate a debt – they should not do so, this method would for many be considered the most fair, ideal and realistic.

Obtaining or requiring information about past recipients, particularly those historic, is difficult for the department to do where no debt exists. Indeed, it makes sense as to why – people's privacy and expectation of procedural fairness are a significant factor in the creation and maintenance of trust in government departments. Generating a debt first appears an easy way of destroying these established principles. Its lawfulness must be considered.

Conclusion

The use of data-matching is not necessarily a bad thing. However, when departments make decisions to exceed statutory time limits, effectively exploiting or creating a loop-hole, questions must be asked as to how this is beneficial to the electorate. Not only may the data-matching be considered unlawful, but in the event of a government department requesting information that goes beyond time-limits set not only by itself, but also the courts and parliament, it appears nothing less than a large breach of procedural fairness on the population. In other words, an abuse of power.

In my opinion, it is important that the committee establish why a more reasonable time-frame was not used when doing this large-scale retrospective audit and to question the legalities of the methods used by DHS to execute these government policies.

Finally, the DHS has noted that 'vulnerable' people are not part of this program. However, what the DHS fails to consider is the event where people who have not been a recipient for many years and previously were not marked as 'vulnerable' may have become so prior to receiving a notice. There appears no acknowledgement of this scenario and something worthy of exploration by the committee.