Submission to the Senate Community Affairs Committee inquiry into Centrelink's Compliance Programme

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Robodebt is a discredited programme which **strips out traditional safeguards** of information gathering and qualified judgment based on assembled evidence.[1] It relies upon **the legally flawed assumption** that a debt may be raised through the bald, premature resort to averaged matched data. This data will not be probative for vast numbers of people whose earnings and employers vary across the year. By reversing the onus of proof, it obscures Department's legal responsibility to recognise and resolve the uncertainties a robodebt file can throw up prior to debt raising.[2] The robodebt system unjustly pursues the minimisation of administration costs by 'effectively shift[ing] complex fact finding and data entry functions from the department to the individual'.[3] The Department cannot legally or ethically justify the current structure of its programme.

a. **The ongoing impact of the Federal Government's automated debt collection processes upon current and past income support recipients;**

It is important that the Committee not replicate the errors of past inquiries by focusing on whether the "call to action" given by letters is clearly communicated or whether the underlying calculator is wrongly calibrated.[4] The key question is the Department's responsibility to issue decisions which meet the standard of certainty immanent in the statutory provisions. It possesses the ability to gather information to clarify any obvious, outstanding questions. It must cease asserting the right to apply ATO data where this does not exist. Such statements constitute an **illegitimate behavioural shove of our most vulnerable people.**

The putative right to average is the cork in the bottle of this mass system. It places a moving treadmill, an imbalance of power underneath all the interactions. It asserts that any silence or inaction on the part of the individual can be resolved against the person. That claim is fundamental to all interactions with the department and the desperation many people feel. Noting the existence of a phoneline or adopting plain language does not change the fundamental legal contest and administrative torpor characterising the Department's actions.

The existence of the robodebt scheme is an object lesson in the need for greater public and political reflection on our welfare system. Words like "compliance" or "integrity" blur and

[1] This simply does not reflect the original intention of the legislation, see Commonwealth Parliamentary Debates, Senate 20 September 1999 (Senator Ian Campbell), which refers to how the legislation is underpinned by a logical structure and flow, and reflects best and desired practice in public administration..
[2] The bald reality of the system is well communicated by page 17 of the BOOST training document obtained by ABC 7.30. The decision-maker is told that **any one of** bank statements, payslips or ATO data suffices to issue a debt. The 'claimable' time allocated for investigating the data match and the decision is minimal.
[3] Office of the Ombudsman, First Report, page
[4] Again, finessing the data match will not automatically deliver sound decisions, the ATO data is fundamentally not constructed to deliver the actual pattern of fortnightly earning.

slide so easily into the outsized cultural prop: the dole bludger. The veneer of techno-speak seems to indicate some form of expertise is being applied. It bears repeating again that **working is a literal precondition** for receiving a robodebt notice. The programme adversely impacts those who have suffered the trauma of losing a job, young people trying to make their way for first time, the carer trying to juggle their family with their job, the pensioner or person with disability trying to stay working for a cushion against hardship. Having been involved in this issue for some period of time, I wish to underline that rewinding robodebt is fundamentally about solidarity and empathy with the mums, nurses, the working people who are the inspirational heart of this country.

Contrary to some public commentary, the system of averaging is crude enough that even those who reported accurately during their time on welfare can have discrepancies raised. I have met so many people who have sat at their kitchen table fortnight after fortnight, conscientiously reporting, often for years. Only years later to be told that all of that can be blankly averaged and it's on them. Every Australian, including traditional conservatives, should be concerned that a government agency is asserting the right to lead enforcement actions off a reversed onus of proof. This strikes at the heart of relationship between the state and the citizen: the law applying to our kitchen tables.

Robodebt is a debate about a particular *form* of debt calculation. A form which a majority of the Australian public has now clearly rejected.[5] The department is obtaining an **unfair forensic advantage** over vulnerable people who are unaware of details like the consequences of averaging or that the initial letters do not generally constitute formal statutory notices. Even on the department's own terms, the programme represents an access to justice crisis. This is seen by the low levels of people taking up their appeal rights.[6]

The pattern of appeals shows that a person's outcome under this system is very often shaped by their knowledge, resources and choices. Consider for instance how the Department is willing to permit people to "accept" ATO data.[7] How we still have no answer on how many debts involve the use the averaging method? How we don't know exactly how many people just accepted the debt? This is unacceptable. The author has been saddened to continually meet people who, exhausted, have given up fighting because they "don't have the payslips". Or people who have no idea of the complications that can arise from using bank statements to calculate the pattern of a person's gross fortnightly **earned** income.

The Department has also failed to take intermediate actions which might moderate the impact of reversing the onus for key groups of people. The Department accepted the 2017 recommendation of the Ombudsman that it publish a policy on when it will ***on an exceptional basis*** secure evidence on behalf of people. The Committee should ask the Department and the Department of Social Services to account for why:

[5] Support for abolishing robodebt exists across all demographics: https://www.essentialvision.com.au/wp-content/uploads/2019/08/Essential-Report-050819-V2-1.pdf

[6] The Ombudsman's second report reported on the concerningly low numbers of people who reviewed their 10% penalties even after being specifically written to about their review rights. Over one third of debts being with debt collectors is a worrying sign of disengagement or even lack of awareness of the debt.

[7] This idea of statutory decision by "election" is so embedded it is the leading example given to staff in the BOOST document is of a person calling up to "accept" the ATO data. The ombudsman indicated a substantial proportion of people did this for the 2015 pilot also.

- It took 18 months to publish the wording of an existing internal policy on the use of section 192 in the Guide on Social Security Law.
- It did not properly integrate this policy into core training and frontline documents until challenged by the Ombudsman.[8] It still does not feature in its communications.
- The policy seems to have been used 570 times (Ombudsman, second report) when the system at the time was around half a million debts.[9]
- the policy is so poorly drafted as to be merely facilitative of a structureless "mercy" discretion. In its drafting, it makes a person's vulnerabilities a "relevant factor" to an exceptional decision to go get the evidence necessary to establish a debt.[10]

The stories on ABC 7.30 or other media outlets are not outliers or oversights, they are the predictable outcome of a deliberately opaque, reactive only approach to information gathering and "assistance".

Recommendation:

- **Recommendation: the issuing and quantification of any debt should not be defined by the recipient's behaviour or resources, but by properly assembled documentary evidence.**
- **The Department should amend its exception only information gathering policy into a direct front up commitment to secure accurate, up to date information before raising debts.**
- **The committee should secure data on whether information is more likely to be gathered following appeals (across the levels) or other legal, media or political pressure. It should demand consistency of practice.**

b. **data-matching techniques used by Centrelink, including limitations and uncertainties of data-matching techniques and error-handling processes;**

I would caution the Committee to avoid getting distracted by the Department's semantic policing of the terms "automated" or its efforts to talk up the light misting of human oversight it has applied since 2017.[11] Sadly the Department has excelled at funnelling the robodebt debate into strange waters like whether the payments engine can add or subtract or whether the initial letters are debt notices.

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[8] Ombudsman second report, para 2.56.

[9] As at 20 December 2018, Ombudsman, second report, para 2.56. The author thought this number might be a typo or in need of clarification on first reading?

[10] Guide to Social Security Law, 6.3.9 *Confirming Employment Income*. The ambit grab in this guideline is clearly the lead in sentence:
"When assessing whether exceptional circumstances exist, DHS should review each case on its own merits, taking the **following factors** into consideration:"

[11] Little of substance is furthered by debating the department's press release terminology. The author has previously responded to their laboured semantic framing in pieces such as: https://law.blogs.latrobe.edu.au/2019/07/30/dial-1800-reverse-onus-coming-to-grips-with-robodebt/ and https://law.blogs.latrobe.edu.au/2017/06/21/correcting-record-rebutting-five-flawed-defences-robodebt-programme/

Technology is only part of the robodebt debacle. Its most direct and damaging contribution is the continuing issue of **inaccurately matched employer names or identity information**. Despite the obvious nature of that problem, we still see prominent examples of double counted debts where there is a poor match off trading names and ABN entries. It is deeply concerning to see the Department fail to carry out this most bare and elemental of all checks, particularly as the employer telephone number will be on file.

Setting the poor fuzzy logic settings to one side, the data starved "robot" is merely dividing annual data by 26 and calling it a day. Media coverage of robodebt is full of technical sounding labels like "discrepancy", "ATO data" or "algorithm". These are apt to mislead at times. There is no tech wizardry or advanced analytic expertise underpinning the system. Crucially, unless and until the Department abandons its baldly asserted right to rely on this averaged ATO data, the programme will remain dysfunctional. The department's current approach admits the possibility that vulnerable people will accept averaged data, or that we act without confirming whether records exist. It just skates over the complexities these files involve: inferences from reporting history, webs of entitlements, reconciliation. This is not a dispute about uploading jpegs or fair dinkum chats. The heart of it is the imbalance of power generated by the department declaring the right to fill every silence or gap, or hit every exhausted person who gives up, with averaged data. At the community level, Canberra is making a desert and calling it efficiency.

The department asserts that "every decision is based on the best information available". This neglects vital qualities decisions must have at law: logic and sensitivity to circumstances. The Department has **no right to push past known variables in files**. The statute does not permit uncertainty to be answered by disregard. The task of persuasion is borne by the party seeking to upset the previously existing state of affairs, and this task requires adequate supporting materials.[12]

The legal arguments against robodebt are well established, drawing from the specific statutory provisions and the application of standard administrative law principles. The relevant legislative provisions s 1222A and s1223(1) of the Social Security Administration Act are structured to position the Commonwealth as the entity which asserts and proves the existence of the debt. This structure sits on top of the long-established principle that in administrative decisions, **"the person who asserts must prove".**[13] This principle underlines that any uncertainty in the calculation of debt amounts is to be resolved against the Department.

The broad statement that "there is no duty to inquire in administrative law" is not a licence to deny the existence or import of available and obvious missing information. It does not, in any way, function to modify the **standard of certainty** required to raise the debt under the relevant

[12] See *Power v Comcare* [2015] FCA 1502. (Katzmann J). There is a long history of courts warning that administrators must not think that where something central is uncertain, they can nevertheless proceed to initiate administrative actions against people: ***Telstra*** *Corporation Ltd v* ***Arden*** [1994] FCA 524, *Commonwealth v Borg* [1991] FCA 710, *Reitano v Commonwealth of Australia* (unreported, Evatt, Northrop and Burchett JJ, 13 December 1985). The High Court rulings of *Phillips* (1964) 110 CLR 347 and *The Commonwealth v Muratore* (1978) 141 CLR 296 are often not foregrounded but reflect the principle in operation.

[13] *Re Martin and Commonwealth* (1983) 5 ALD 277 at 287. An everyday principle applied by the Tribunal. The untidy term 'onus' is only used to promote public understanding. *McDonald* 1 FCR 354 Woodward J at 357-358 is of course the leading case on how to handle uncertainty. See Peter Hanks, 'Administrative Law and Welfare Rights: The 40-year story from Green v Daniels to "robot debt recovery"' (2017) 89 *AIAL Forum* 1. The Committee will also be aware of Professor Terry Carney's writings on these issues.

statute. Simple examples include calling a phone number on file or accepting that averaging relatively low amounts cannot be a logically probative decision given the pattern of people's past reporting. The department's continued descriptions of averaging as "a long established" technique have never progressed beyond broad, de-contextualised assertion. The isolated tribunal decisions to which these statements seem to allude do not provide sufficient ground for the robodebt system.[14]

The existence of Federal Court matters should not deter the Committee from recommending that the reverse onus structure be abolished. The Committee should, in particular, seek detail on the visible pattern of settlement of matters by the department. **Why have cases been lost at the AAT1 level? Why were they settled at AAT2? How has department policy evolved to ensure compliance with tribunal rulings?** The Social Security (Administration) Act, section 8(f) emphasises "the need to apply government policy in accordance with the law and with due regard to relevant decisions of the Administrative Appeals Tribunal".[15] The Department should provide evidence which identifies the grounds whereby decisions were set aside and remitted, and how it intends to harmonise its policy settings with those findings. On the final day of the first Senate inquiry, an AAT decision which directly contested Centrelink's approach to the legislation, setting aside a debt with a direction to obtain employer records, was put to departmental representatives. With respect, I believe it is important to return to that part of the transcript and secure a more detailed response from the Department.[16]

These questions have never gone away and will not go away. The questions will be put in every available context until they are answered. The proper, principled action of the Department is to appeal any tribunal decisions which have directly contested its statutory interpretation. Given the prevailing failure to justify its structure, the programme should be discontinued.

Recommendations:

- **The Department discontinue its robodebt approach, specifically disavowing its asserted right to "average" ATO data in order to populate its debt decisions.**
- **Prior to a debt being raised department make efforts to gather accurate information from all sources evident from its record, and it proactively confirms the existence of all relevant evidence prior to any debt being raised.**
- **Experienced staff immediately review all identifiable instances where debts were populated using the apportionment (averaging) method.**
- **The Department should be required to outline the steps it is taking to have due regard to tribunal decisions which reject its approaches in line with section 8 of the Social Security Administration Act.**

[14] In the circumstances it is not necessary for applicants to deploy other background pleadings available to them, such as the application of the *Briginshaw v Briginshaw* standard.
[15] Given the centrality of this legislative principle, Committee should not accept any attempt to claim answering these questions constitute an unreasonable diversion of resources. Principle (d) also mandates the Secretary to have regard to (d) the importance of the system of review of decisions under the social security law. Any current non-availability of information regarding AAT overturns should itself be viewed as poor practice by the Department.
[16] Senate Community Affairs, Hearing, Thursday, 18 May 2017, Page 47.

c. **the handling of under-payment errors, including the number of payments identified and made through data-matching following an under-payment error;**

The Committee will recall that during the last inquiry the Department confirmed that the data match is primed to focus on a $1000 **putative** discrepancy between the annualised tax return and the summed fortnightly declarations.[17] This would appear to inbuild a focus on overpayment to exclusion of underpayments?

It is important to note that restrictions apply to the backdating of payments, even in deeply traumatic cases involving Centrelink error. To embody some of these dynamics, I'd refer the Committee to the recent tribunal case of *Johnson v Department of Social Services*,[18] where a homeless victim of domestic violence had her newstart allowance application wrongfully refused on three occasions in 2016-2017 due to insufficient documentation. The relevant documentation was located at her former home which she had fled from. Eventually, Ms Johnson finally received the correct advice from frontline Centrelink staff that alternative proof could be accepted. She sought to appeal the initial refusal of her Newstart in November 2016 as she had told Centrelink of her situation at the time. The tribunal member commented that:

> "I feel compelled in this instance to note that much of the financial, physical and emotional trauma Ms Johnson was exposed to for almost a year would have been alleviated had Centrelink applied procedures suitable for someone dealing with domestic violence and homelessness at an earlier stage. I also commend the Centrelink staff that eventually offered alternative proof of identity options and the support of a social worker to Ms Johnson."

Nevertheless, Ms Johnson's attempted appeal of the *initial* refusal of her Newstart was timed out by section 107(3) of the social security law. While she was vulnerable and on the streets, with no money, she had unsurprisingly failed to lodge a review of the initial refusal within 13 weeks.[19] This meant that she could only be paid from the date of her appeal: i.e. 2018. The tribunal found that as a homelessness service had now ensured she was put on Newstart in at the end of 2017, hearing her appeal would be futile. The legislation provided no special circumstances discretion to backpay her welfare payments for the time she was homeless, without money and the victim of incorrect evaluations by Centrelink.[20]

This decision embodies how in our welfare system, putative overpayments can travel across time, unmoored from documentary records or time limits but entitlements are treated differently. This is worthy of a principled policy debate.

Recommendation: The Committee should recommend the use of data matching techniques and the amendment of legislation to target underpayments and underclaiming.

[17] This was discussed by the Minister during the ABC Background Briefing programme in 2017.
[18] Johnson and Secretary, Department of Social Services (Social services second review) [2019] AATA 328 (4 March 2019) https://jade.io/article/636799
[19] She was actually trying to lodge fresh application it seems.
[20] This design is putatively due to the activity requirements on Newstart, but of course activity requirements would not be applied to victims of trauma or those with disability, who are most likely to delay their appeals. One hopes Ms Johnson pursued a CDDA scheme claim against the Department.

d. the use of real-time wages data and other techniques to prevent overpayment;

The introduction of Single Touch Payroll has some potential positives for welfare recipients. The author would underline however, that the existence of this long-planned reform confirms robodebt's status as an unprincipled bridge programme. It bears underlining that:

- Up until June 2015, overpayments were manually investigated including through the securing of employer records through section 192 notices.
- In robodebt, the Department asserts the right to apply the averaged data. The person must secure employer records, bank statements or expressly request they be saved by the department's exception only information gathering policy.
- With the rollout of single touch payroll, employer records will once again be restored as the irreplaceable heart of welfare entitlement calculation.

Furthermore. the announcement that the Government plans to shift the welfare system to calculations based on ***received*** income is a generational shift in approach. This is an effort to save administration costs by piping fortnightly real time wage data into the welfare system. If implemented sensitively and accurately, this might moderate the unacceptably byzantine reporting process currently imposed on welfare recipients. They are currently tasked with predicting or reverse engineering their fortnightly gross **earned income**. People have to be advised that they can't simply enter the figures from their payslips but they need to perform ad hoc reconciliation of entitlements and earning patterns.

The received income test and the real time reporting of wages data may however create a **significant vulnerability where ATO data reflects payroll errors**:

- There is limited empirical research on the integrity of payroll in Australia. Published dynamics surrounding poor levels of award compliance and superannuation obviously flag concerns regarding how the data being sucked will be arbitrated and tested for accuracy.
- There will be a need to account in detail for the diversity of employment forms (e.g. contractors) and payroll payment patterns.
- Aligning the Centrelink calendar with payroll cycle is a significant risk – this led to high profile litigation and public controversy in an equivalent rollout in the United Kingdom.

I note that an ambitious savings target has been declared in the short term. The proposed changes represent a significant journey into the unknown. The Department's modelling draws heavily from its Random Sample Survey. It has been over a decade since this survey was audited and found to have inherent limitations.[21] It would be productive for the committee to secure more information on recent iterations of the survey and assess its current methodologies. Its findings are key to generating forward estimates, but only the headline findings are shared.

Recommendation: The committee should secure all the most recent Random Sample Survey data relating to income-based entitlements, it should assess the limitations of the

[21] The National Audit Office Report of 2006 is available here: https://www.anao.gov.au/work/performance-audit/assuring-centrelink-payment-role-random-sample-survey-programme

current survey methodologies and demand greater detail from the DSS and DHS on how they have or will evaluate the accuracy and integrity of payroll data in the lead up to the new reforms

e. the capacity and adequacy of Centrelink and the Department of Human Services to deliver the program, including the use of contract staff and the impact of staff performance targets on the program;

The deployment of contracted labour in decision-making roles should be carefully thought through. The job security and working conditions enjoyed by the modern APS reflect bipartisan public policy choices. A public servant's role as a decision-maker differs in important ways from a frontline commercial employee. The law requires that, while due regard be paid to policy designed by Ministers or department heads, a decision-maker must be free to confidently deploy their independent judgment. It is the duty of the frontline decision-maker to engage with the individual's circumstances, and disapply policy where statutory values are not furthered by it.

This requires human qualities of courage and principle, but also the practical protection of job security and experience in how APS values counterbalance corporate rhetoric. While leaders often extoll frank and fearless quality of their policy advice, there has been comparatively little discussion of the frank and fearless frontline *decision*. Robodebt is a dangerous privileging of abstract system talk, business processes, and behavioural design over concrete files, evidence and decisions.

Contracted compliance staff possess limited delegations[22] and are heavily reliant on poor quality policy guidance. The media coverage of the BOOST programme, and the working environment these corporate techniques generate, should concern all Australians. It requires serious investigation.

The current outsourcing of functions has been achieved by slicing up statutory decision-making processes into purported "simple" phases accompanied by complex escalation or referral procedures.[23] The department will state that contractors receive the "usual" training, that their role is to focus on simple matters. It is worth noting that under OCI – any case that involves a phone call *is* a complex one. Simple cases are meant to be handled by the person uploading material on the online portal. Fundamentally, in making and receiving calls, contractors are functioning as a clearing house for triaging complexities, raising EPEDs, accepting evidence and flagging vulnerabilities.

The current complicated scheme of floor walkers, subject matter experts, authorised review officers and AAT teams is sending debt files pinballing across the department as blunt assumptions unspool. The timeline for a reassessment is not reported on, and those I am

[22] They cannot waive a debt, inbuilding a delay in processing cases relating to vulnerability and departmental error. The relevant delegations were disclosed the Community Affairs committee through *Question on Notice HS 36 (SQ18-000110),* Budget Estimates, 31st May 2018. I note that the delegation includes the power to review the debt, likely reflecting contractor's role in reassessment and checking process. Contractors clearly have a clearing house role, which complicates the idea their work is "simple".

[23] When questioned regarding the type of work it outsources Department representatives have insisted that it will outsource work only where it is "simple", will shortly disappear or is conducted on a short-term project basis.

interacting with report significant time lags even where evidence is tendered. The Committee **should track the pressure building around these roles**, securing data on workload and outcomes at each step.

Recommendations:

The committee should investigate whether the experience levels and position qualifications for ARO, subject matter expert positions have changed since the system was rolled out.

f. **the error rates in the issuing of initial letters and debt notices, the causes of these errors and what steps are routinely taken when errors are identified;**

I would caution the Committee that once again the Department will attempt funnel this term of reference away from its actions. It will once again pursue its line that any reassessed debts reflect "new information" not legal errors. **These assertions by the Department reflect their flawed legal position** and should be met by immediate reference to tribunal appeals challenging the Department's averaging methodology.

The initiating letters and debt notices should be amended to reflect statutory requirements. In all its correspondence and website materials, DHS should make the commitment that no debt will ever be issued:

- Based on blank, first resort to averaged data.
- Without DHS undertaking the elemental check of verifying the ABN of the person's employers and avoiding double counting.
- Without issuing statutory notices to employers where a person's income shows variation in their earnings pattern.
- Where the underlying employer records no longer exist.
- Without DHS undertaking the elemental process of verifying the person's period of employment through calling the number on file.
- Without assessing and **properly valuing** the pattern of the person's past reporting, in particular the earnings pattern e.g. a university student's reporting history will manifest an obvious pattern which should **never be mindlessly averaged.**
- Without securing properly analysing the supplementary documentary and oral evidence needed to perform a proper reconciliation of entitlements using net received income from bank statements. The internal department process for reverse engineer net figures back to gross **must be published as a matter of urgency.**
- Without assessing the availability of waiver at **first instance**.
- Without assembling and properly assessing the **full contact history** of the individual with centrelink including **all existing documents** on file. The Australian public should regard with a sceptical eye the Department's support of data sharing when it has refused to construct the existing data it holds in a way which would maximise service delivery to the individual person.
- No recovery penalty will be raised without underlying, documentary proof that the individual's reporting was flawed without reasonable excuse at first instance.

When placed under pressure about the above dynamics the Department will respond with overgeneralised references to "assisting" or "working with recipients" or that "it is open to the recipient to..." It is time to stop the behavioural "nudges" the current notices engage in. It is time to stop the sharp practice of drafting letters which suggest a debt is imminent if the person takes no action. It is time to administer the debt issuance process in a balanced, principled manner which does not discriminate against those who lack the resources to appreciate the unacceptable generality and powerful legal undertows underpinning the department's initial letters.

Unless and until these commitments are publicly endorsed by the Department, a full operational blueprint embodying them is published, robodebt will still present as a hothouse for error. These errors cannot be solved by recoding an algorithm or using assistive tools based on the Department's own existing distorted datasets.

Recommendation: The Department include direct statements outlining the legal limits applying to the use of averaged data in all its correspondence and communications.

g. the procedures that have been put in place to prevent future errors;

In understanding the limitations of the current procedures or "refinements" that are in place, it is vital to understand that robodebt is a behaviourally framed programme. The Department remains eager to nudge individuals to secure employer records, to self-administer the process of debt raising. This crucial element of the design was again embraced by Departmental representatives at the 2018 Senate inquiry into Service Delivery:

"…It is an important aspect of red tape. If we don't ask for that information from the person, we have to ask for it from their employer, so there is a burden on the employer if we go to them and say, 'Can your payroll section please provide all the information on this customer over a period of time…So I think it's important that any cost shift is between employer and employee and between business and the employee; it isn't between us and the employee."

The Department's stubborn pursuit of this putative **secondary cost push** is crucial to understanding robodebt. The Department has formal information gathering powers and knowledge of the complex variables shaping entitlement calculation. Its actions are a sad illustration of the impoverished, line item focused approaches of APS departments in a *Public Governance and Public Accountability Act* era.

A core method of robodebt correspondence is thus to advert to the possible existence of some future debt, thereby triggering the individual to secure the relevant documentation. Most robodebt letters are not formatted as formal statutory notices – they constitute, in the Department's words an "informal invitation" to respond. There is a profound imbalance of power in this interaction. Those privileged enough to have easy access to legal advice or other resources will be able to contest the soundness of the Department's assertion that its averaging grounds a lawfully issued debt.

In defending its system, the Department will state that a debt can be reassessed at any time. It will continually use phrases such as "it is open to the person or "we look for the person to engage…". This language masks a shift off responsibility for their administrative actions.

I note the Department has recently made the claim that the Ombudsman has "exhaustively reviewed" this programme.[24] In response I would endorse the observations of Peter Hanks QC regarding the nature and limitations of the Ombudsman's initial inquiries:

> "This report does not comment 'on the policy rationale behind the OCI process', the report says nothing about the legislative context in which the OCI operates…it does not ask whether DHS *can* shift the function of complex fact-finding to the individual and require the individual to disprove the existence of a debt."[25]

The distinct focus of the Ombudsman was also underlined by how the Office responded when serious legal issues were raised regarding the application of 10% penalties on debts.[26] The Office found that the legal questions raised "can only be answered by the Court".[27] The Ombudsman's recent follow up report was necessarily limited to overseeing the recommendations which flowed from this specific approach.

I would like to acknowledge that DHS has developed a predictive tool in an effort to strip out some of its more flawed identity/small amount data matches.[28] This, however, still won't answer the "earned income" question or prevent crude assumptions about the number of jobs a person held at once. The emphasis the Department places on these technological innovations underlines the danger that it is becoming **an organisation with its eyes in its hands**: it only sees what it wants to touch. These measures distract from the real practical reform that can deliver certainty: securing employer information which addresses the pattern of fortnightly earning and allowances.

Recommendation: The Department should not issue debts without securing employer records.

i the review process and appeals process for debt notices, including the number of reviews and appeals undertaken;

The author has observed a pattern whereby individuals are being funnelled into "iterative" reassessment process rather than formal ARO review. When requesting an appeal people known to the author have been met by the line that "how can you expect an outcome to change if there is no new evidence?" This is used to piviot them into the reassessment system, where DHS demands documents rather than assessing its existing legally issued decision.

When a debt is raised its original state can and must be questioned. Individuals should be clear that they have a right to challenge an administrative decision directly through ARO review and are not being compelled to provide new information on the Department's terms. While it may

[24] http://mediahub.humanservices.gov.au/ontherecord/17-august-2019-correction-reporting-on-online-compliance/.
[25] Hanks, above n 7 at page 9.
[26] This extent of this legal issue was such that the Department hurriedly recalled tens of thousands debts in the middle of the first senate inquiry in order to send a specific form letter to affected individuals.
[27] Paragraph 2.40 of the first report. This perspective was puzzling given the Office can refer unresolved or contested questions of law for resolution under its statute.
[28] This tool is reported on by the Ombudsman in the second report. It seems to be driven by the Department's own data set and related standard of proof.

be efficient for people to be nudged into reassessments and the lengthy evidence hunt they entail, they must be affirmatively advised that they have a right to challenge the original decision directly.

In relation to appeal outcomes and statistics, I would highlight the **significant scaling up of the contractor led debt raising activity** which occurred from **May 2018**. It was only at this point that the system reached full maturity, with the unfreezing of the **due date processing pool**.

The staged release of **this pool of legally risky debts**[29] has, alongside the interception of tax refunds, driven recent media case studies and litigation. The existence of this pool and the Department's staged approach to the robodebt rollout complicates statistical analysis of appeal rates.[30] As the ombudsman noted (at footnote 28 of its second report):

> "Until early 2018, the department focussed on actioning interventions where the customer contacted the department, as part of a **phased, incremental approach.** From February 2018, the department began contacting the due date processing pool"[31]

The Committee should investigate why the decision was taken to stage the release of debt files in this way.

The Committee should place particular emphasis on the **cases where individuals first heard of their debt over seven years after the review was initiated.** This means they are timed out of the documentary records that might disprove the debt. **Were any of these cases placed in the due date processing pool while the department onboarded contractors?**

The Committee should also investigate the **serious issues** raised by recent FOI Commissioner decisions.[32] These highlight the Department's oppositional handling of freedom of information requests. For many affected by robodebt, **FOI is a key port of call** to obtain necessary records of interactions with the Department. The Department's unacceptable failure to meet legislative standards in claiming practical refusal grounds must be addressed.

Recommendations:

The Department immediately reform its unacceptable approach to the practical refusal exemption for FOI requests.

All debts currently being reassessed or reviewed should have a recovery hold placed on them absent a specific request from a person to begin repayment.

The Committee secure all data on the due date processing pool, its extent, the outcomes of clarifications and appeal rate. The Committee should also get an explanation as to

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[29] The people in this pool seemed to be those who had not completed the review, may not know of the existence of the debt due to dated contact details and were thus more prone to be averaged.
[30] The Ombudsman itself noted an uptick in complaints to it at the end of their follow up investigation period.
[31] Emphasis added.
[32] See for instance, *'QG' and Department of Human Services (Freedom of information)* [2019] AICmr 23 (5 June 2019) and *'QI' and Department of Human Services (Freedom of information)* [2019] AICmr 27 (5 June 2019).

why the rollout of robodebt was staged in a manner that held back the processing of this debt cohort.

The Committee recommend that the time it takes to reassess debt from initial request to outcome is recorded.

k. the use and legality of the debt collection processes used by Centrelink and the Department of Human Services;

In terms of debt collection, the requirement that a person request a recovery hold, and the cumbersome approach to implementing this request, leads to the continual freezing and unfreezing of debt repayments.

In relation to debt collection, the Committee should pay particular attention to the issue of **garnishing**. Garnishing attracts specific criteria, which heavily emphasise properly characterising the individual's communications with the department. The department's processes for this subtle and discrete assessment must be evaluated.

L. the cost of the compliance program to date, including the projected and actual amount raised from the program.

The Department has not modelled how many Australians keep seven year old payslips in their shoebox. Rather, the costings for this project reflect baked in behavioural assumptions about how many people will secure information, accept or appeal the debt. The projections across the forward estimates have thus continually varied, with costs increasing as legal advocacy secures changes or with media outreach regarding people's entitlements. The Committee should ask the Department to update it on how many people it assumes will not complete a review prior to debt issuance, how many will accept ATO data and how many will appeal. It is important to return to the "suggestion" of the Ombudsman in its first report on the system:

"…We asked DHS whether it had done modelling on how many debts were likely to be over-calculated as opposed to undercalculated. DHS advised no such modelling was done.16 In our view the absence of modelling means DHS cannot say how many debts may be under-calculated or overcalculated and by what margin.

The risk of over-recovering debts from social security recipients and the potential impact this may have on this relatively vulnerable group of people, warrants further consideration by DHS. We suggest DHS test a sizeable sample of debts raised by the OCI. The samples should include people who did not respond to the initial letter, as well as people who went online and people who contacted DHS via other channels. We also suggest DHS re-evaluate where the risk for debts calculated on incomplete information should properly lie and investigate whether there are ways to mitigate this risk."[33]

[33] Ombudsman First report, page 8.

Has the department ever carried out the above evaluation? The author remains strongly of the view that the current approach of decision by default, administration by escalation, resolution by intercession is not administratively sensible.

Recommendations:

- **The Committee should request the cost/benefit ratio (dollar of expense per dollar of debt) for pre 2015 versions of manual employment income data matching and contrast it with the current system.**

- **The Committee should secure the current behavioural assumptions on how people will interact with the OCI system. It should secure disaggregated figures[34] for each payment type and evaluate the extent to which a person's age, disability or other factors affect their likelihood of challenging their debt.**

- **The Committee should recommend the Department carries out the comparative study suggested by the Ombudsman in 2017 if it has not already done so.**

[34] The Department should abandon its assertion that this represents an unreasonable diversion of resources.