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Senate Community Affairs References Committee

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

Centrelink's compliance program (the Inquiry)

This submission from the Australian Privacy Foundation (APF) responds to the above Inquiry. We focus our comments on Centrelink's 'Robo-debt' automated debt collection program.

General comments

The APF remains concerned that the Robo-debt program represents an abuse of process. This submission will focus on two main issues.

- First, Robo-debt is not consistent with basic human rights, including the right to privacy.
- Second, we also believe Centrelink is failing to act as a model litigant, as required under the Legal Services Directions 2017.

Although our submission will only focus on the above two issues, we note that there are numerous other problems with the Robo-debt program. It is anticipated that other submissions will cover most of those other issues, but we briefly mention a few of them here in opening.

Underlying assumptions that are flawed include the following:

1. That data-matching between disparate data sources is a reliable and error-free process, when it is not, and the error rates comparing yearly data with fortnightly data would be significant;
2. The data in each database is accurate, when this appears not to have been comprehensively checked; and
3. Algorithms for data-matching and extrapolation of outcomes are accurate, when the program is only as good as the detailed programming.

We remain concerned that a debt claim from Centrelink based on flawed data and unreliable data manipulation methods is knowingly a speculative ambit claim without legal basis. Any assertion by the Government that this type of ambit claim can be supported simply because scared and

vulnerable debtors pay up under threat is manifestly unethical, and obviously unfair. We also argue this type of approach is a breach of the Government's own rules.

Legal Aid Victoria has recently successfully run two cases in Court to challenge Robo-debt, and both debts claimed were found to not be owed.¹ The question must be raised that if every debtor had free legal representation to challenge the debt claimed, how many debts would prove to not be owed, and how much would the Government have to refund? Any claims about the 'success' of this program in revenue collection must be measured against this question. Based on the Legal Aid Victoria cases, it is likely that many of the most vulnerable members of our society have been harassed to pay a debt they did not owe in part or in full.

Privacy

Privacy is a human right. The control of one's own personal information is a key part of the right to privacy. Respecting privacy builds trust. Conversely, using data without consent for secondary purposes destroys trust, especially where it is used without regard to accuracy.

When Centrelink began a data matching program with the Australian Taxation Office (ATO), this was a start in using taxation data for a secondary purpose: ATO information was not collected for the primary purpose of Centrelink payments administration. When people lodge their tax, they do it to inform the Government what they earned, so they can pay the appropriate tax. Using yearly tax data to data match against fortnightly Centrelink data is a secondary purpose. People did not know that their tax records would be used for this other purpose, and the data was not designed or suited for this purpose. To date, there has been no obvious disclosure by the ATO about this speculative secondary use, and no consent was ever sought.

It begs the question: what other secondary use without consent comes next?

It should also be emphasized that the data protection framework of our privacy law, and that of most other countries deriving their privacy laws from the OECD model, specify that data integrity parameters such as accuracy, completeness, currency and relevance are core principles of proper use of personal information: Australians have a legal right to this data integrity.

The Government argues that data matching is necessary to find all the "cheating" Centrelink recipients. In other words, the secondary use, the data matching, and the errors due to data integrity and analytics failures are all justified to meet the end of maximising collection of possible overpayments. The problem is that the ends here do not justify the means. Collecting revenue is not worth a significant breach of trust and privacy, and the trampling of the right to high integrity personal data in significant administrative decisions.

The greater tragedy is that Centrelink has used the data matching program to make demands for thousands of debts that are not owed, or only partly owed. Many thousands of alleged debts have already been successfully challenged.² It is to be expected that many thousands more people would be due refunds if they had access to competent legal or financial advice, or if they

¹ See <https://www.theguardian.com/australia-news/2019/sep/06/centrelink-wipes-robodebt-in-second-case-set-to-challenge-legality-of-scheme>.

² As at February 2019, over 70,000 debts had been wiped or reduced. See: <https://www.theguardian.com/australia-news/2019/feb/06/robodebt-faces-landmark-legal-challenge-over-crude-income-calculations>.

were able to put the flawed data properly to a forensic test of the sort that any business or professional would expect. This means that this secondary use of the data without consent has been used for a completely improper purpose (that is, to make claims for debts that are not owed).

We also believe that it is improper to use the data to target and exploit the most vulnerable and disadvantaged members of our society. People in receipt of Centrelink benefits are often struggling with personal and financial issues. They are vulnerable, and many have limited numeracy or literacy skills of the type that would be necessary to uncover the erroneous basis of the flawed demands and to assert their right not to have to pay a debt that is not owed. Receiving an unexpected demand for payment of an alleged debt is incredibly stressful. Worse, vulnerable people can find it difficult to marshal the resources to even fight the claim because they can have so many other problems, and so few resources. The Government (and broader society) must take extra care when dealing with vulnerable people. Centrelink has here failed to take proper care.

In summary, the tax data should not be used for a secondary purpose without adequate disclosure and consent in accordance with the Privacy Principles. Even if this secondary use was to continue there must be safeguards in place to prevent use that is improper and unethical. And the government must respect a person's legal right, central to privacy and data protection law in this country, to have their personal information used only when it is accurate, complete, up to date and relevant enough to avoid the litany of errors that has been revealed by Robo-debt.

The model litigant rules

The *Legal Services Directions 2017* sets out the Commonwealth's obligation to act as a Model Litigant, which were imposed to address what would otherwise be a great and unfair advantage that the Commonwealth can create for itself as a litigant. We believe that Centrelink is in clear breach of those rules.

Any argument that they do not apply here because the Commonwealth does not have to litigate because it can just garnishee money owed would make a mockery of the intention of these obligations. If they do not apply on this basis, there is an urgent need for legislated obligations in line with this Direction to correct this anomaly.

The relevant model litigant obligations are considered below. Each obligation is italicised.

(a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation

Centrelink has failed to comply with this obligation by:

- Sending out bulk ambit claims which would cause delays when many people dispute those claims
- Failing to provide detailed particulars of their claim
- Making people find old information.

(aa) making an early assessment of:

(ii) the Commonwealth's potential liability in claims against the Commonwealth

Centrelink appears to have consistently failed to assess its potential liability in making the claims. It is unfortunate that the obligations do not extend to what Centrelink should have done, which is assess their evidence in detail to make sure they are making a valid claim.

(c) acting consistently in the handling of claims and litigation

Centrelink has not acted consistently in handling disputes following the claim. For example, if the person is represented by a lawyer, the debt claimed is likely to be wiped. If instead the person has no access to legal advice or help, they are typically forced to pay a debt they may not owe.

(d) endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings, and by participating in alternative dispute resolution processes where appropriate

Interestingly, people in dispute with Centrelink have limited or no access to genuine alternative dispute resolution. They have access to a review by Centrelink and the Administrative Appeals Tribunal. They do not have access to a free, independent and binding dispute resolution scheme.

(i) not requiring the other party to prove a matter which the Commonwealth or the agency knows to be true

Centrelink did not properly review the evidence it held before making a claim. It follows that Centrelink is in breach of this obligation when they make a claim for a debt, and the debtor is required to prove they do not owe it.

(f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim

We believe this obligation represents the most egregious breach by Centrelink, when coupled with the use of data whose low integrity cannot easily be investigated by the person. Centrelink knew that the people they were sending claims to are vulnerable and disadvantaged, and that there have been doubts raised as to the weak evidentiary basis of the claimed debts. Despite this, Centrelink sent claims that scared or just took money from people knowing that many of those people could not access advice and representation. Centrelink did not increase funding for financial counsellors, Legal Aid and community legal centres to ensure all people affected by this large-scale process had help before making the claim. In the circumstances, it seems clear that Centrelink took advantage of these people.

(i) apologising where the Commonwealth or the agency is aware that it or its lawyers have acted wrongfully or improperly

Where are the apologies to everyone? And why are these people not entitled to compensation for the stress and inconvenience caused?

If you have any questions please do not hesitate to contact Kat Lane.

Yours sincerely

Kat Lane,
Vice-Chair