

Senate Community Affairs References Committee
PO Box 6100
Parliament House
Canberra ACT 2600

5 April 2017

Dear Members of the Committee:

Inquiry into the Design, Scope, Cost-benefit Analysis, Contracts Awarded and Implementation Associated with the Better Management of the Social Welfare System Centrelink Initiative

We are pleased to provide this Submission to the Senate Inquiry into the ‘Centrelink Initiative’.

This submission addresses the terms of reference of the Inquiry in particular in relation to:

- (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;
- (c) the capacity of the Department of Human Services and Centrelink services, including online, IT, telephone services and service centres to cope with levels of demand related to the implementation of the program;
- (d) the adequacy of Centrelink complaint and review processes, including advice or direction given to Centrelink staff regarding the management of customer queries or complaints;
- (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;
- (g) the error rates in issuing of debt notices, when these started being identified and steps taken to remedy errors;
- (h) the Government’s response to concerns raised by affected individuals, Centrelink and departmental staff, community groups and parliamentarians;
- (j) the adequacy of departmental management of the Online Compliance Intervention (‘OCI’), including:
 - (vi) decisions taken in relation to IT systems and service design that may have contributed to problems experienced by Centrelink clients; and

1. Summary

- 1.1. Government automated debt collection processes have adversely affected customers, including vulnerable groups, through the absence of procedural fairness.
- 1.2. The scale of the Centrelink Initiative has created a disproportionate burden on Departmental processes of review. The Department’s inability to cope with this burden denies customers procedural fairness.
- 1.3. The comparison of two datasets—Centrelink fortnightly payments and Australian Taxation Office (‘ATO’) annual income—with different parameters deliberately embeds a mismatch that alters the purpose of the inquiry from one of identification and recovery of overpayment to one of **retrospective compliance**, at odds with procedural fairness.

- 1.4. Regardless of semantics as to whether the initial Centrelink notice is a ‘debt’, the ‘accuracy’ or ‘error rate’ of the ‘debt notices’ reflects a process based upon an assumption of ‘guilt’ with a consequently **reversed onus of proof** on the citizen to demonstrate ‘innocence’, at odds with procedural fairness.
- 1.5. Government arguments for ‘**public interest**’ in the protection of government finances omit to account for the public interest of maintaining the relationship between the citizen and the State that is supported through good governance, the rule of law, and more particularly, through procedural fairness.
- 1.6. The government’s **public response** has failed to engage with the expression of public sentiment about the justice of the system, reinforcing the perception that it is deliberately designed to be punitive. This erodes public confidence in systems of governance and reflects at least a public perception of an abuse of power.

2. We are each lawyers and legal academics whose research interests include the digital contexts of law.
 - 2.1. Kate Galloway’s research canvases the capacity of the law to comprehend the effect of data collection on individuals and the boundary between what is personal (private) and the exercise of State power.¹
 - 2.2. Melissa Castan’s research includes public law, Constitutional law, human rights, and the operation of digital contexts on the law.²

3. Focus and Definitions

- 3.1. This submission focuses on the absence of procedural fairness within the automated debt-recovery system (the ‘Centrelink Initiative’). The system thus represents an abuse of government power, at odds with principles of good governance and the rule of law.
- 3.2. In this submission:
 - 3.2.1. ‘Better Management of the Social Welfare System Centrelink Initiative’ is referred to as the Centrelink Initiative
 - 3.2.2. ‘Department of Human Services’ is referred to as the Department
 - 3.2.3. ‘customer’ refers to those present or past recipients of Centrelink benefits, and the targets of the Centrelink Initiative

4. Reverse Onus of Proof

- 4.1. The Centrelink Initiative has implemented a system designed to establish an onus of proof on former customers to demonstrate that they have *not* been overpaid by the Department.
- 4.2. This burden arises where the Department’s algorithm identifies a discrepancy between the customer’s *annual* income and their *fortnightly* Centrelink payments for the same period. The format of existing data—Centrelink fortnightly receipts and ATO annual

¹ <https://works.bepress.com/kate-galloway/>

² https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=87538

income—cannot be reconciled by technology.³ Consequently, it is likely that even for customers having received correct payments, the system will identify a discrepancy and thus trigger the process.

- 4.3. The likelihood of a discrepancy is increased because the algorithm does not cater for differences in an employer's name (eg where a business name is given to Centrelink, but a company name is used for the ATO records). Thus the system is designed to raise suspicion—to be disproved—of two employers where there is in fact only one.
- 4.4. The burden of proof does not arise from any factual comparison between a person's Centrelink payments and their actual income for those *weeks* during which they received a benefit.
- 4.5. Where customers cannot find evidence of their income receipts for the actual period under review, customers report that they are either told (by Departmental officials or by debt collectors) that they have no choice, or they *feel* that they have no choice but to pay the difference.⁴ This evidences the effect of an unconstrained exercise of government power contrary to principles of natural justice, and of good government.
- 4.6. The Centrelink Initiative amounts to a fishing expedition that entraps past customers, rather than a genuine attempt to establish overpayment and to recover those amounts. This calls into question the government's justification for the program.

5. Retrospective Compliance System

- 5.1. The design of the algorithm supporting the Centrelink Initiative has two consequences.
 - 5.1.1. First, it deliberately incorrectly flags customers deemed to have a potential debt.
 - 5.1.2. Secondly, it does so on an unprecedented scale—a scale that makes this project qualitatively different from any such audit or oversight process undertaken by humans.
- 5.2. As is evident through its design, this system is not calculated to capture overpayments. It is designed to manufacture responsibility on huge numbers of frequently vulnerable customers to prove their entitlements after the fact, and after (sometimes well after) the Department's own recommended time frame for retaining documents.⁵
- 5.3. The effect of the system and its scale is that the Centrelink Initiative imposes a retrospective administrative compliance system through a process leaving the customer with a contingent capacity to respond to the requisite standard. While it is clear that the customer must disclose to the Department any issues affecting their entitlement to receive payments, the operation of the Centrelink Initiative goes beyond that. The result is that the honest customer cannot ever know that their matter has been disposed of. They may at any time in the future be put to proof as to their past entitlement.
- 5.4. Retrospectivity in administrative processes, as in legislation, is suspect as undermining the rule of law. People must know the law to be able to comply with it. As a new system

³ This point is made by Murray David Neuzerling, 'Data Illiteracy is Causing Centrelink to Issue False Debts' (1 January 2017) <https://mdneuzerling.com/2017/01/01/data-illiteracy-is-causing-centrelink-to-issue-false-debts/>.

⁴ Customer accounts are collected at <https://www.notmydebt.com.au/stories/notmydebt-stories>.

⁵ Originally, Centrelink recommended keeping pay slips for six months—but during the height of public concern over the automated debt-recovery system, deleted this recommendation from its website: Christopher Knaus, 'Centrelink Drops Flawed Advice to Welfare Recipients to Keep Payslips for Six Months' *Guardian Online* (10 January 2017) <https://www.theguardian.com/australia-news/2017/jan/10/centrelink-drops-flawed-advice-to-welfare-recipients-to-keep-payslips-for-six-months>.

of retrospective compliance, customers may well not have the requisite documentation to assert their ‘innocence’.

5.5. As the Australian Law Reform Commission has pointed out:

Subordinate legislation with retrospective operation may be more difficult to justify as these instruments are less visible to the public. Unless the enabling Act specifies to the contrary, a legislative instrument has no effect if it has retrospective operation and, as a result, disadvantages or imposes liabilities on a person.⁶

5.6. Analogously, a retrospective administrative process is likewise open to criticism. To this extent, the Centrelink Initiative represents an exercise of government power contrary to natural justice and the rule of law, and thus undermines the traditional freedoms and fundamental principles that underpin our legal and governmental systems.⁷

6. Review Mechanisms

- 6.1. An important aspect of transparent governance and of the valid exercise of executive power in accordance with natural justice, is the right of review.
- 6.2. The Centrelink Initiative offers a review process, and also a complaints mechanism through the Commonwealth Ombudsman.⁸ However the scale of the Centrelink Initiative, designed to mismatch customer data, has not been supported by a *commensurate* system of support or review.
- 6.3. Historically, Centrelink has been criticised for poor customer service. For example, the National Audit Office has found that ‘nearly a quarter of the 57 million phone calls made to Centrelink [in 2014] went unanswered and that Australians spent 143 years waiting in vain to speak to Centrelink in 2013-2014, before simply hanging up...’⁹ Contemporary anecdotal accounts¹⁰ indicate that it remains difficult to get in touch with the Department if you have been issued with a notice, or with a demand to pay.
- 6.4. For customers who through disadvantage of one kind or another do not have the knowledge, resources, or resilience to engage with an inadequate review or support system, the consequences of an absence of procedural fairness through genuine review processes are compounded.
- 6.5. The right to procedural fairness in administrative decision-making has been affirmed by the High Court. Mason J, for example, has said that:

it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect

⁶ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Interim Report 127), [9.104].

⁷ *Ibid.*

⁸ Outlined on the Centrelink website: <https://www.humanservices.gov.au/customer/enablers/reviews-and-appeals#a2>.

⁹ Noel Towell, ‘Centrelink Blocks 60,000 Calls a Day, Blames Smartphone Apps’ *Sydney Morning Herald* (online) 23 October 2015 <<http://www.smh.com.au/it-pro/government-it/centrelink-blocks-60000-calls-a-day-blames-smartphone-apps-20151023-gkgmeo.html>>.

¹⁰ See eg <https://www.notmydebt.com.au/stories/notmydebt-stories>.

rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.¹¹

6.6. The Centrelink Initiative does affect the ‘rights, interests, and legitimate expectations’ of customers. Further, there is obviously here a clear intention that a review process be available, however the reality is that the review process is not accessible to many customers. For those with relatively small ‘debts’ the time and cost involved in review of the decision may make it cost-effective simply to pay the debt. This does not demonstrate the effectiveness or justice of the debt recovery system.

7. Public Interest

7.1. The government uses the language of *public interest* in justifying the process. Minister Alan Tudge has said

People who work hard and pay taxes to assist those in need expect there to be integrity in the welfare system, and that is exactly what we are ensuring.¹²

7.2. We agree that it is in the public interest that government take care with public money, and that it implement systems to ensure accurate accounting of its expenditure. However, we submit that it is also in the public interest that government processes uphold basic principles of justice and fairness as a feature of constitutional curbs on the exercise of executive power directly against the citizen.¹³

7.3. We also submit that it is in the public interest that government operations uphold public confidence through transparent and accountable processes. In failing to do so, the Centrelink Initiative fails to uphold procedural justice and thus public confidence in government.

8. Government Responses

8.1. On the whole, public statements by the Department and the Government assert the correctness of the system. They seek to justify the system based on the volume of recovered payments, without engaging with public criticism of the processes deployed to achieve this ‘rate of recovery’.

8.2. The Department has released personal information of customers, in an attempt to ‘set the record straight’.¹⁴ This too represents a breach of procedural fairness, in failing to recognise the power of government against the relative lack of power of the citizen. The rule of law is expressly designed to protect citizens against such an abuse of power.

¹¹ *Kioa v West* (1985) 159 CLR 550, 584.

¹² Quoted in Jackson Stiles, James Ried and Neil Frankland, ‘Centrelink Debt System a ‘Success’: Minister Alan Tudge’ *The New Daily* (12 January 2017) <http://thenewdaily.com.au/money/finance-news/2017/01/12/centrelink-debt-system-success/>.

¹³ See comments by Robert French CJ, ‘Procedural Fairness—Indispensable to Justice?’ Speech delivered at Sir Anthony Mason Lecture, The University of Melbourne Law School Law Students' Society, 7 October 2010, 1–2.

¹⁴ Luke Henriques Gomes, ‘“Doxing”: Centrelink’s Release of Single Mum’s Personal Details Sparks Outrage’ *The New Daily* (1 March 2017) <http://thenewdaily.com.au/news/national/2017/03/01/centrelink-andie-fox-doxing/>.

Principles of procedural fairness recognise the power imbalance which may exist between an administrative decision-maker, such as a delegate representing a government agency, and an individual citizen.¹⁵

- 8.3. We submit this is a manifest misuse of government power in what amounts to a public relations battle. Instead of dealing with questions of procedural fairness within its own system, the government has sought to use its superior power against the customer in a public forum to compound the manifest absence of procedural fairness otherwise within the system.
9. We consent to this submission being made public, and would be pleased to give evidence in any Senate Hearings associated with this Inquiry.

Yours sincerely

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¹⁵ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Interim Report 127), 14.4.