

**Submission by Assistant Professor Narelle Bedford to the Senate Standing
Committee on Community Affairs in relation to the *Design, scope, cost-benefit
analysis, contracts awarded and implementation associated with the Better
Management of the Social Welfare System initiative***

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Summary of major points:

- The Committee should refer to a report prepared by the Administrative Review Council (ARC) in November 2004, titled '*Automated assistance in administrative decision making*'. This is ARC Report number 46. Arising from this report, was the '*Better practice guide to automated assistance in decision-making*' was published in February 2007, which is another key resource for the inquiry.
- The impact of government automated debt collection will fall most heavily onto those people who are already vulnerable. This fact is given explicit statutory recognition in section 8 of the *Social Security (Administration) Act 1999* (Cth). The requirement placed on vulnerable people to disprove they have a debt is a reverse onus of proof. The Committee should recommend that the automated system be re-designed without this element.
- The Principles of Administration are contained in section 8 of the *Social Security (Administration) Act 1999* (Cth). These principles of administration can provide the Committee with a legislative standard for assessing the automated decision system.
- The Committee could also have regard to the administrative law values of as lawfulness, fairness, rationality, openness/ transparency, and efficiency. However, these values have not yet been defined in agreed detail.
- The Committee could also have regard to the requirements imposed on administrative decisions makers by administrative law. In particular, the requirement to accord procedural fairness, decision to be within jurisdiction, that there must be evidence or other material to justify decisions, that decisions not be made under direction or at the behest of another, and be made in accordance with the merits of the particular case and that decisions be reasonable.
- The Committee should consider whether section 6A of the *Social Security (Administration) Act 1999* (Cth) is drafted in a manner that is over-broad and should be re-drafted to be more specific and also contain reference to balancing the needs of recipients.
- The Committee should investigate whether the conferral of power on the AAT to conduct external merits review of automated decisions is sufficiently broad.
- The Committee should consider the need for an independent scrutiny panel which would be interdisciplinary and operated across government departments to provide on-going oversight and expert external review of the automated social welfare system initiative.
- The Committee positively record the previous work undertaken in the of automated decisions by the ARC and recommend that the government immediately re-establish funding and reactivate this expert administrative law advisory body.
- The structure, context and purpose of *the Social Security (Administration) Act 1999* (Cth) are such that the Committee should conclude that section 208 (and 209) is the proper basis for the release of information and section 202 does not over-ride or provide an alternative source of authority to release information. In fact, section 202 is designed for the protection of personal information.

Introductory comments

1. I welcome the opportunity to make a submission to the inquiry on the ***Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative.***
2. This submission is intended to be made public.
3. This submission addresses the following specific inquiry Terms of Reference (TOR): (a), (d), (h) and (k).
4. I am currently an Assistant Professor in the Faculty of Law at Bond University, where I research and teach in the field of administrative law. Therefore, I have professional expertise in the subject matter of this inquiry.
5. I note the Committee will be holding a hearing in Queensland on 18 May and I would be available on that day to appear in person in Brisbane should the Committee find that helpful.

Generally about automated decisions

6. It is recommended that the Committee have reference to a report prepared by the Administrative Review Council (ARC) to the Attorney-General in November 2004, titled '*Automated assistance in administrative decision making*'. This is ARC Report number 46. Arising from this report, was the '*Better practice guide to automated assistance in decision-making*' was published in February 2007, which is another key resource for the inquiry.

TOR (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

7. The impact of government automated debt collection will fall most heavily onto those people who are already vulnerable (including but not limited to the aged, families with young children, students, people with disability and jobseekers). This fact is given explicit statutory recognition in section 8 of the *Social Security (Administration) Act 1999* (Cth) where it refers to 'the special needs of disadvantaged groups in the community; and the need to be responsive to the interests of the Aboriginal and Torres Strait Islander communities and to cultural and linguistic diversity'.
8. In addition to creating a double disadvantage for vulnerable people, the system has the potential to erode public confidence in the very system that is designed to support members of our society at times of need.
9. The requirement placed on vulnerable people to disprove they have a debt is a reverse onus of proof. This burden is rarely justified and certainly not when it is placed onto vulnerable people. The Committee should recommend that the automated system be re-designed without this element.

Administrative law values

10. ARC Report 46 and the best practice guide refer to the need for automated assistance to comply with administrative law values identified as lawfulness, fairness, rationality, openness/ transparency, and efficiency. At a conceptual level this is appropriate; however, these values are not defined and can be imprecise and lack clarity when guiding the Committee and the Department.
11. The Ombudsman referred and positively incorporated these values in Report number 2 of 2017, titled 'Centrelink's automated debt raising and recovery system: A report about

the Department of Human Services' online compliance intervention system for debt raising and recovery', published in April 2017. Despite adopting these values, they were similarly undefined by the Ombudsman.

12. Many of these administrative law values are embodied in the Principles of Administration contained in section 8 of the *Social Security (Administration) Act 1999* (Cth). These principles of administration therefore provide the Committee with a legislative standard for assessing the automated decision system.
13. Additionally, it may be helpful to instead focus on legally recognised and specific administrative law grounds for which government decisions can be challenged as these grounds have been the subject of detailed considerations through case law and therefore can provide more detailed guidance to the Committee. These grounds can be found in section 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

Administrative law grounds to challenge government decisions

14. High Court cases have held that administrative decision makers must provide procedural fairness to those rights, interests or legitimate expectations will be affected. Procedural fairness is contextual in its operation and incorporates its features based on the specific circumstances of the individual matter. At its core, procedural fairness requires a fair hearing which includes disclosure of adverse information and the opportunity to effectively respond to that material. The automated decision system has impacted vulnerable people and is not compliant with the requirements of procedural fairness, which rise to recognise the vulnerability.
15. Another ground is that decisions must be made by those with jurisdiction to make the decision. As noted in ARC Report 46, where a decision is made by a computer there is a need for the relevant legislation to specifically permit the making of the decision by a computer. This will ensure that automated decisions are lawfully made. In this regard, the Committee should consider whether section 6A of the *Social Security (Administration) Act 1999* (Cth) is drafted in a manner that is over-broad and should be re-drafted to be more specific and also contain reference to balancing the needs of recipients. It is also relevant for the Committee to consider whether the requirement that the computer programs were under the 'Secretary's control' as required by that section and what the term 'control' might mean in that context.
16. Another ground is that decisions must be made on the basis of evidence or other material to justify the decision. This ground therefore requires the detailed disclosure of the basis for the automated decision.
17. Another ground is that an exercise of discretionary power must not be at the direction or behest of another person. Although the wording refers to a person, it could be interpreted broadly to mean that a discretionary power must be personally - that is not by a computer or automated system. This principle forms the basis of the recommendation in the ARC Report 46 that automated decisions are best suited to non-discretionary decision-making.
18. Another ground is that an exercise of discretionary power must be made in accordance with rules and policies and with regard to the merits of the particular case. This underlies the importance of an internal mechanism to ensure that results generated by the automated system are in fact taking into account the individual's particular circumstances.
19. Another ground is that decisions must not be unreasonable. The High Court has held that a reasonable decision will disclose a framework of rationality. Automated decisions must also comply with this requirement, and a detailed explanation for the basis and

reasoning in a decision must be provided for any decision arising from an automated process.

TOR (d) The adequacy of Centrelink complaint and review processes

20. This submission will focus on the adequacy of the review process. In this regard, the advice and explanation of external review options must be provided to recipients of automated decisions. This should include the range of options available such as the Ombudsman and the Administrative Appeals Tribunal (AAT). The AAT can only exercise the jurisdiction specifically conferred on it by legislation, so it is recommended that the Committee investigate whether the conferral of power on the AAT to conduct external merits review of automated decisions is sufficiently broad.

Expert legal advisory bodies

21. It is recommended that an independent scrutiny panel which is interdisciplinary and operates across government departments be established to provide on-going oversight and external review of the automated social welfare system initiative. This is so any further design refinements or indeed errors can be detected. This recommendation is in accordance with Principle 24 of ARC Report 46.
22. It is recommended that the Committee positively record the previous work undertaken in the of automated decisions by the ARC and recommend that the government immediately re-establish funding and reactivate this expert advisory body.

TOR (h) The Government's response to concerns raised by affected individuals, Centrelink and departmental staff, community groups and parliamentarians & TOR (k) any other related matters

23. This submission is concentrated on a particular aspect of the government's response to an affected individual, that is the government response of releasing personal information about an affected person to a journalist. The government sought to rely on section 202 of the *Social Security (Administration) Act 1999* (Cth) as the source of authority to do so.
24. Through undertaking a process of statutory interpretation, the statute prescribes a detailed mechanism for the release of information in section 208 (and 209) of the same Act. The structure, context and purpose of the Act are such that the Committee should conclude that section 208 (and 209) is the proper basis for the release of information and section 202 does not over-ride or provide an alternative source of authority to release information. In fact section 202 is designed for the protection of personal information.

Agreement with prior submissions

25. Finally, I support the entire content of submissions made by my academic colleagues, Senior Lecturer Dr O'Donovan (submission 121) and the joint submission by Senior Lecturer Melissa Castan and Assistant Professor Kate Galloway (submission 115).

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