

Statement of Genevieve Bolton

Name: Genevieve Bolton

Address: Known to the Royal Commission

Occupation: Solicitor

Date: 20 October 2022

1. This statement made by me, Genevieve Bolton, accurately sets out the evidence that I am prepared to give to the Royal Commission into the Robodebt Scheme.
2. This statement is true and correct to the best of my knowledge and belief.
3. I make this statement on behalf of Economic Justice Australia (**EJA**) and I am authorised to do so. I make this statement based on matters within my own knowledge, the records of EJA that I have reviewed and having made inquiries of its officers and employees.
4. I provide this statement in response to a request dated 13 October 2022 from the Royal Commission and numbered NTG-0045 (**Notice**).

Section 1: Current position and professional background

State your personal details, including:

- (a) *your full name;*
- (b) *your current position with Economic Justice Australia (the **Organisation**); and*
- (c) *your relevant qualifications and professional experience.*

5. I am currently the Chair of EJA. I have been in this role since 7 August 2016. A copy of my curriculum vitae is annexed to this statement as **Annexure GB1**.
6. As Chair of EJA I am responsible, along with the other Board members, for setting the strategic direction of the organisation, ensuring that it complies with governance, financial and funding requirements and monitoring its performance.

Section 2: The Organisation

1. *Provide a description of the Organisation, including its:*
 - (a) *establishment and history;*
 - (b) *purpose, role, and functions;*
 - (c) *organisational structure, governance, and membership;*
 - (d) *legal status;*
 - (e) *staffing;*
 - (f) *funding and sources of funding;*
 - (g) *the services the Organisation provides; and*
 - (h) *the type of services provided by your member organisations.*

Include in your description any significant changes in these features of your Organisation which occurred during the Relevant Period.

(a) Establishment and History

7. EJA is the peak organisation for community legal centres providing specialist advice to people regarding their social security issues and rights.
8. The “National Welfare Rights Network” (the Network) was formed by seven community legal centres around Australia in 1990. The Network’s aim was to utilise members’ frontline experience in helping clients navigate the social security system and deal with the Department of Social Security (and later Centrelink, from 1997), to improve social security law and policy. The Network was initially comprised of community legal centres in Melbourne, Adelaide, Perth, Brisbane, Sydney, Wollongong, and Canberra.

9. The Welfare Rights funding program was then established with an allocation in the Attorney General's Department portfolio of \$1 million to provide funding to community legal centres to provide social security legal assistance.
10. In 2003, the Network became an incorporated association and obtained a \$20,000 per year start up grant from the Scully Fund. The growing reach and impact of the Network saw it secure Commonwealth Secretariat funding for the first time in 2014.
11. The Network's name was changed in 2017 to the National Social Security Rights Network (NSSRN), to avoid confusion around the meaning of "welfare".
12. In 2018, the Network secured grant funding for a further three years, enabling a focus on undertaking projects aiming to build an evidence base to inform advice to the Department of Social Services (DSS) regarding its programs, policies, and initiatives. This reflected the Department's revised Families and Communities Service Improvement (FCSI) Activity Guidelines' increased focus on funding projects that provide evidence and advice about the Department's programs, policy, and initiatives. The Commonwealth made explicit its intention that funded activities would no longer include advocacy.¹
13. The Executive Officer report in the minutes of the Network's Board Meeting of 13 February 2018 states:

***“National Secretariat funding”** Leanne and Gen met with DSS on 30 January and learned about the process for the next FCSI funding round. The six organisations in the funding group will be invited to apply for the same pool of funding (no indexation increase) in a competitive round to be advertised in March with 4 weeks to submit. We sought clarification on the meaning of ‘advocacy’ given that DSS has made it clear that no advocacy will be included in the funded activities due to the risk of a constitutional challenge. We were advised that distributing our research for others to use in their advocacy would be acceptable but publishing/promoting our recommendations may be a “grey area”. Advocacy engaged in with other sources of funding would also be acceptable. The work that the Network*

¹ For further background see https://www.acoss.org.au/media_release/whos-afraid-of-advocacy/

has been doing over the past few years focusing on evidence-based research places it in a strong position to make a compelling funding application.”

A copy of the Network’s Board Meeting minutes of 13 February 2018 is annexed to this statement as **Annexure GB2**.

14. At a Special General Meeting on 4 February 2020, the Network changed its name to “Economic Justice Australia”. The organisation’s new name was selected to highlight its role in informing systemic change to the social security system and connect its work to the economic human rights set out in the International Covenant on Economic, Social, and Cultural Rights.
15. In 2021, EJA secured grant funding for a further three years, with an Activity Work Plan that largely replicates the previous plans.

(b) Purpose, Role, and Functions

16. EJA’s vision is for a fair social security system in Australia.
17. We work to achieve this fair social security system in Australia by:
 - a. Supporting member centres to deliver high quality legal services (as described in paragraph 36) to people interacting with the social security system, to ensure they can navigate the system and have access to their entitlements; and
 - b. Driving changes to social security law, policy, and administration to improve outcomes for people experiencing disadvantage.
18. EJA provides expert advice to government on social security reform to make it more effective and accessible. Our recommendations are informed by our members’ decades of frontline experience.
19. Our work recognises the right to social security contained in article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) to which Australia is a party.
20. EJA’s DSS deliverables include:

- a. Submissions or responses to selected Parliamentary inquiries and other consultations relevant to social security law, policy and administration where the Network can add value with its expertise and casework experience. To this end, providing detailed submissions to Government and Parliamentary inquiries about the administration of social security policies and programs through consultation with member organisations to prepare a national response. Similarly, to collaborate with other allied organisations on submissions to minimise duplication of effort and maximise the strength of shared messages. EJA applies a human rights lens to its work.
- b. Meetings/consultations with Department of Social Services (DSS), Services Australia (SA) and Department of Employment (DESE); preparation; liaison with DSS and SA; and co-ordination of EJA representation.
- c. Production of two newsletters per annum – with articles that analyse income support policy or proposals.
- d. Feedback to Government – Provision of advice to government as issues arise (in addition to substantive research projects).
- e. Two research projects – production of research projects that collate and analyse data from one or more member centres, on an area of importance to income support policy and administration.
- f. Distribution of reports/documents – provision of reports/documents to DSS and subsequent publication on EJA's website. The website is framed to support the dissemination of information.

(c) Organisational Structure, Governance, and Membership

21. EJA is an incorporated association registered with the Australian Charities and Not-for-profits Commission and is managed by a board. Current board members are:
 - a. Genevieve Bolton (Chair) – Executive Director/Principal Solicitor, Canberra Community Law ACT;
 - b. Katherine Boyle (Deputy Chair) – Executive Director, Welfare Rights Centre NSW;

- c. Kate Beaumont (Treasurer) – Executive Officer, Welfare Rights & Advocacy Service WA;
 - d. Natalie Ross (ordinary member) – Principal Solicitor, Welfare Rights Centre NSW;
 - e. Emma Cvitak (ordinary member) – Community Lawyer, Barwon Community Legal Service VIC;
 - f. Abby Cone (ordinary member) – Solicitor, Townsville Community Law QLD;
 - g. Rhea Thomas (ordinary member) – Solicitor, Welfare Rights & Advocacy Service WA;
 - h. Irini Shnody (independent member) – Financial Controller, Telstra Corporation; and
 - i. Mitra Kakas (independent member) – Deputy CEO, HOST International.
22. EJA's members are social security legal services which are not for profit organisations in Australia that:
- a. provide free and independent information, advice and/or representation to individuals and/or organisations about Social Security Laws and the administration of those laws through Centrelink and/or Government Departments from time to time;
 - b. hold Professional Indemnity Insurance through the National Association of Community Legal Centre's scheme of insurance or a similar scheme of insurance; and
 - c. are incorporated bodies pursuant to the Corporations Act 2001 (Cth) or the incorporated associations' legislation in the State or Territory in which the organisation has its registered office.
23. EJA's associate members are organisations which, as determined by the Board, support the objects of the organisation.
24. In the Relevant Period, the members was as follows. In the 2015-16 financial year, the members were:
- a. Australian Capital Territory - Canberra Community Law;

- b. New South Wales - Welfare Rights Centre (NSW), Illawarra Legal Centre;
 - c. Northern Territory - Darwin Community Legal Centre;
 - d. Queensland - Basic Rights Queensland Inc, Townsville Community Legal Service;
 - e. South Australia - Welfare Rights Centre (SA) Inc;
 - f. Tasmania - Hobart Community Legal Service Inc, Launceston Community Legal Centre;
 - g. Victoria - Barwon Community Legal Service, Social Security Rights, Victoria; and
 - h. Western Australia - Sussex Street Community Law Service, Freemantle Community Legal Centre, Welfare Rights and Advocacy Service.
25. There were currently 14 members, following the following changes: Uniting Communities (SA) joined as member in South Australia in 2018 and Welfare Rights Centre (SA) Inc ceased to operate in June 2019.
26. In the 2015-16 financial year there were three Associate Members: North Australian Aboriginal Justice Agency (NAAJA); Central Australian Aboriginal Legal Aid Service (CAALAS) and Kingsford Legal Centre.
27. Kingsford Legal Centre ceased being an associate member in the 2015-16 financial year. The Central Australian Aboriginal Legal Aid Service (CAALAS) ceased being an associate member at the beginning of 2018 as their service provision was subsumed by the North Australian Aboriginal Justice Agency (NAAJA) from 1 January 2018. There are currently seven associate members:
- a. Northern Australian Aboriginal Justice Agency (NAAJA);
 - b. Katherine Women's Information & Legal Service (KWILS);
 - c. Central Australian Women's Legal Service (CAWLS);
 - d. Kimberley Community Legal Service (KCLS);
 - e. Top End Women's Legal Service (TEWLS);
 - f. North Australian Aboriginal Family Legal Service (NAAFLS); and

- g. Mid North Coast Community Legal Centre (MNCCLC).

(d) Legal Status

- 28. EJA is an incorporated association.²

(e) Staffing

- 29. EJA's current staff members are
 - a. Chief Executive Officer- Leanne Ho;
 - b. Law Reform Officer - Linda Forbes;
 - c. Policy and Communications Officer - Terina Hegarty; and
 - d. Project officer - Lucia Mai.

(f) Funding and Sources of Funding

- 30. EJA is primarily funded by an Australian Government DSS Grant to the amount of \$250,000 a year. Funding has been at this level during the entire period relevant to the Robodebt Scheme.
- 31. EJA has some additional sources of funding through its membership fees, conference fees, and small donations.

(g) The Services the Organisation Provides

- 32. EJA supports its member community legal centres to deliver high quality legal services for people navigating the social security system by providing the services described below in paragraph 36. We connect people in need with our member organisations across Australia and provide resources on social security processes through our website, factsheets, webinars, conferences, and social media.
- 33. We use the insights from our member centres' case work to identify systemic issues that we explore in more detail through our research and discuss in submissions for policy and law reform.

² Accessible at: <https://www.acnc.gov.au/charity/charities/eaeb643-3aaf-e811-a95e-000d3ad24c60/profile>.

34. EJA provides this expert advice to government with recommendations on social security policy and law reform, with the aim of making the system more effective and equitable, especially for those most disadvantaged.
35. Our law and policy reform work aims to:
 - a. Strengthen the effectiveness and integrity of our social security system;
 - b. Educate the community; and
 - c. Improve people's lives by reducing poverty and inequality.
36. EJA's services to its member organisations include:
 - a. Organising and hosting an annual EJA Conference;
 - b. Regular email communications to members;
 - c. Seeking and attending briefings by DSS and SA in relation to new policies and programs or changes to existing ones; and providing a regular email bulletin updating members about proposed or new Government policies or changes to existing programs and policies in the area of income support, and regarding legislative changes;
 - d. Undertaking three online/webinar training sessions for member organisations and other service providers in the sector, with support for individual service providers as required;
 - e. Designing, promoting and hosting online training sessions and webinars for member centres and other service sectors on key issues and recent changes in income support policy and administration, and providing follow up support for individual service providers as required;
 - f. Hosting monthly EJA member link ups;
 - g. Providing secretariat support for link ups to support EJA member organisations to disseminate information about changes to social security and family assistance policies or programs and obtain feedback about the impact of policies on community members.

(h) The Type of Services Provided by your Member Organisations

37. The member organisations are community legal services that provide advice and assistance to members of the public in navigating the social security system and dealing with Centrelink.

Section 3: The Organisation's work related to the Robodebt Scheme

Identify and describe the work the Organisation has carried out in connection with the Robodebt Scheme including:

- (a) any reviews or analysis of the Robodebt Scheme, including legal and policy aspects of the Robodebt Scheme, and its accuracy, lawfulness or fairness;*
- (b) any communications or attempted communications, meetings or engagement with any Government Department or Agency or any Minister;*
- (c) the preparation of submissions to any inquiries, reviews or committees considering the Robodebt Scheme, including any appearances to give evidence;*
- (d) any publications, reports or material prepared by the Organisation;*
- (e) any compilation of material and information with respect to the Robodebt Scheme, including its operation and impact;*
- (f) any production of information about the Robodebt Scheme for member organisations;*
- (g) any other policy work undertaken by the Organisation;*
- (h) your engagement with member organisations in connection with the Robodebt Scheme;*
- (i) any engagement or liaison with other relevant organisations.*

In responding to this question, please:

- (i) describe or comment on any additional workload or cost imposed upon the Organisation by reason of its activities in connection with the Robodebt Scheme;*

(ii) identify any additional funding received by your Organisation for work conducted in relation to the Robodebt Scheme; and

(iii) identify any constraints on the Organisation in its funding or resourcing of the work described above.

38. EJA's views regarding the OCI / Robodebt Scheme were set out in various submissions over the Relevant Period, including:
- a. NSSRN submission to the Senate Legal and Constitutional Affairs Committee inquiry into Centrelink's Compliance Program³ (lodged 27 September 2019);
 - b. NSSRN Submission to the Senate Community Affairs References Committee Inquiry into the Better Management of the Social System Initiative⁴ (lodged 22 March 2017).
 - c. NSSRN Submission to the Australian Human Rights Commission's Human Rights and Technology Project⁵ (lodged 11 October 2018); and
 - d. NSSRN Submission in Relation to the Social Services and Other Legislation Amendment (Simplifying Income Reporting and Other Measures) Bill 2020⁶ (lodged 14 February 2020);
 - e. EJA submission to the Senate Community Affairs References Committee inquiry into Centrelink's compliance program⁷ (lodged 2 October 2020); and
 - f. EJA Pre-Budget Budget Submission 2021-2022⁸ (lodged 28 January 2021).

³ Accessible at: <https://www.ejaustralia.org.au/submission-to-centrelink-complian-program-inquiry/>

⁴ Accessible at: <https://www.ejaustralia.org.au/nssrn-submission-better-management-of-the-social-welfare-system-initiative-inquiry-final/>

⁵ Accessible at: <https://www.ejaustralia.org.au/human-rights-technology/>

⁶ Accessible at: <https://www.ejaustralia.org.au/simplifying-income-reporting-submission-nssrn/>

⁷ Accessible at: <https://www.ejaustralia.org.au/inquiry-into-centrelinks-compliance-program/>

⁸ Accessible at: <https://www.ejaustralia.org.au/pre-budget-submission-2021-2022/>

EJA made appearances in support of its submissions as follows:

- g. Senate Community Affairs References Committee Inquiry into the Better Management of the Social Welfare System Initiative⁹, on 19 April 2017; and
 - h. Senate Legal and Constitutional Affairs Committee inquiry into Centrelink's Compliance Program¹⁰, on 3 October 2019.
39. EJA prepared, commissioned, and published reports and material about the Robodebt Scheme including:
- a. A Factsheet on the Robodebt Scheme which was widely circulated in early 2017;
 - b. "Administrative Law and Robodebt" article which was published on the UNSW Faculty of Law public blog on 8 March 2017¹¹;
 - c. "Robodebt – Challenges and Opportunities for Administration and Accountability", by Terry Carney for EJA's *Social Security Rights Review*, 8 February 2019¹²;
 - d. "Run-Away Robo-Debt Train Derailed: Pity about Inadequate Damage Clean Up", by Terry Carney for EJA's *Social Security Rights Review*, 4 February 2020¹³;
 - e. EJA Robo-debt Webinar, presented by Terry Carney, 18 February 2020;
 - f. "Robodebt, in the Aftermath of Government Backdowns", by Terry Carney for EJA's *Social Security Rights Review*, 12 August 2020;¹⁴

⁹ Accessible at: <https://www.ejaustralia.org.au/nssrn-submission-better-management-of-the-social-welfare-system-initiative-inquiry-final/>

¹⁰ Accessible at: <https://www.ejaustralia.org.au/submission-to-centrelink-compliance-program-inquiry/>

¹¹ <https://www.auspublaw.org/blog/2017/03/centrelinks-robodebt-system>

¹² <https://www.ejaustralia.org.au/run-away-robo-debt-train-derailed-pity-about-inadequate-damage-clean-up/>

¹³ <https://www.ejaustralia.org.au/run-away-robo-debt-train-derailed-pity-about-inadequate-damage-clean-up/>

¹⁴ <https://www.ejaustralia.org.au/category/social-security-rights-review/page/4/>

- g. “Robodebt, Refunds and Redress – The Questions left Unanswered”, EJA’s *Social Security Rights Review*, 18 February 2021;¹⁵ and
 - h. Updated EJA Robodebt Factsheet regarding the Robodebt Class Action, July 2022.
40. EJA engaged with Government about the Robodebt Scheme (through relaying concerns via forums such as biannual meetings with the Department of Social Services and Human Services, participation on the Welfare Payment Infrastructure Transformative (WPIT) Civil Society Advisory Group, and informal contact with the DHS Online Compliance team), including:
- a. Attending a meeting with DHS on 9 January 2017;
 - b. Attending a meeting with DHS on 7 February 2018 to view the Robodebt communications;
 - c. Attending a meeting with DHS on the Robodebt Compliance Portal on or around May 2018;
 - d. Attending a meeting with DHS Online Compliance Intervention Team on 26 July 2018 to discuss the expansion of Robodebt to vulnerability-indicated customers;
 - e. Attending a biannual meeting with DHS in November 2019 where EJA gave feedback on draft Robodebt letters; and
 - f. Attending a briefing by DHS by SA on 9 July 2022 in relation to Robodebt.
41. EJA engaged with Member Organisations about the Robodebt Scheme including:
- a. Providing an information briefing on Robodebt on 17 January 2017;
 - b. Providing an update on Robodebt on 7 March 2017 and facilitating a general discussion of casework experience of member centres;
 - c. Providing an information briefing on Robodebt on 4 April 2017;

¹⁵ <https://www.ejaustralia.org.au/robodebt-refunds-and-redress-the-questions-left-unanswered/>

- d. Seeking member centres' views and experiences of Robodebt at a members monthly meeting in September 2017, to inform ongoing policy work;
- e. Facilitating discussion about changes to the Robodebt Compliance Portal on 5 June 2018 following a briefing from DHS;
- f. Organising a conference for member centres on 25 and 26 August 2018 which included a session presented by DHS and a session presented by Terry Carney on Robodebt;
- g. Providing an update on the Robodebt Compliance Portal on 6 November 2018;
- h. Organising in December 2019 a briefing from DHS in relation to changes to the Robodebt system and collating a list of questions from member centres;
- i. Organising for Gordon Legal to attend a members' meeting on 3 December 2019 to discuss Robodebt;
- j. Seeking feedback from member centres on the Robodebt letters to provide to DHS in March 2019;
- k. Facilitating discussion on Robodebt matters (concerns around the enforcement of departure prohibition orders) at a members' meeting on 2 April 2019;
- l. Facilitating discussion on Robodebt matters at a members' meeting on 10 December 2019;
- m. Facilitating discussion on the Robodebt change announcement at a members' meeting on 4 February 2022;
- n. Organising for Terry Carney to present a webinar on Robodebt, held on 18 February 2022;
- o. Facilitating discussion on the Robodebt class action at members' meeting on 2 June 2020, and drafting a list of questions to be put to Gordon Legal;
- p. Collating questions from member centres to ask SA at Robodebt briefing held on 9 June 2020;

- q. Organising a Robodebt Webinar, presented by Terry Carney held on 27 October 2020; and
 - r. Facilitating discussions on Robodebt at members meetings held on 7 December 2021, 2 February 2021, 2 March 2021, 13 April 2021, 5 October 2021.
42. EJA also engaged regularly with the Commonwealth Ombudsman in relation to the Robodebt Scheme including a meeting in December 2016.
43. EJA did not receive any additional funding for its work in relation to the Robodebt Scheme, this resulting in work being completed out of hours and on weekends.

Section 4: Robodebt Scheme Views

Provide your views as to the accuracy, fairness and lawfulness of the Robodebt Scheme, including whether your views developed or changed during the Relevant Period and why, and to the extent you consider the Robodebt Scheme to be inaccurate, unfair or unlawful:

- (a) set out the elements or features of the Robodebt Scheme which in your view made it inaccurate, unfair or unlawful; and*
- (b) identify any changes or improvements made to the Robodebt Scheme during the Relevant Period, and describe the extent to which they addressed these elements or features.*

44. Once the OCI system was fully operational in September 2016, the NSSRN (now named EJA¹⁶, hereon after referred to as EJA) closely monitored implementation of the system. EJA developed its understanding of the OCI / Robodebt Scheme's operation and impacts on affected individuals via meetings with the DHS / SA¹⁷ and consultations with EJA member organisations. EJA members provided EJA

¹⁶ The National Social Security Rights Network changed its name to Economic Justice Australia in February 2020.

¹⁷ The Department of Human Services changes its name to Services Australia on 29 May 2019.

with several Robodebt case studies which pointed to issues regarding the Scheme's operation, and the impacts on clients seeking to appeal against recovery. This input confirmed EJA's view that the Robodebt Scheme was fundamentally flawed and fell short of accepted administrative law standards and sound public administration.

45. As outlined in section 3, EJA made a submission to the Senate Community Affairs Reference Committee inquiry into the Better Management of the Social Welfare System Initiative dated 22 March 2017, recommending that the scheme be abandoned on the basis of concerns that the Online Intervention (**OCI**) system now known as the Robodebt Scheme was not compatible with administrative law standards and sound public administration. As noted in EJA's submission, critically important issues of principle for public administration were raised by the use of an automated decision making process which may result in debts being raised on the basis of incomplete and inaccurate factual information in certain instances, and the shifting of the burden onto individuals to establish that the decision was wrong through reassessment or appeal. As EJA explained in its submission to that inquiry, the decision to use the OCI system to raise and recover debts based on historical data files going back to 2010 without adequate warning or preparation was unfair and created the risk that current and former social security recipients would have to repay money that they did not owe.
46. In its submission dated 27 September 2019 to the Senate Legal and Constitutional Affairs Committee's Inquiry into Centrelink's compliance program, EJA noted that whilst some minor changes had been made to the administration of the system (largely focused on improving communication with individuals and the user experience of the OCI confirmation portal), the fundamental flaws with the system had not been addressed. EJA noted that there had been no change to the erroneous method of calculating debts and the reverse burden of proof placed on the recipient to disprove the existence of the debt. In EJA's view these flaws in the process for raising the debts called into question the legal basis for the resulting debts. EJA also raised concerns about the lack of adequate human oversight in the calculation and raising of social security debts – calculations that require complex considerations regarding notification obligations, changes in circumstances, earnings fluctuations, and identification of any administrative error.

47. As the Federal Court found in *Deanna Amato and the Commonwealth of Australia*^{18 19}, sole reliance on automated income averaging without human investigation as to the existence of a debt recoverable under social security law, was unlawful. The Court found that the demand for payment of the Applicant's alleged debt was not validly made, as the information before the decision-maker acting on behalf of the Department of Human Services (DHS) was not capable of satisfying themselves that a debt was owed "*within the scope of s1222A(a) and s1223(1) of the Social Security Act 1991 (Cth) in the amount of the alleged debt*"²⁰.

Data matching as a trigger for compliance review

48. As discussed in EJA's submissions to the Senate inquiries into Centrelink's compliance program²¹, before the introduction of the OCI / Robodebt Scheme, social security debts identified as a result of ATO data-matching were generally raised with human oversight. If the DHS/SA data match indicated a possible discrepancy between income employment earnings assessed by Centrelink for a person and the amount assessed by the ATO, this triggered a review to establish whether the person had been overpaid social security entitlements – including identification of the date of commencement and end-date of the debt recoverable under social security law. Most importantly, the review involved scrutiny of whether the person met their reporting obligations as set out in notices issued under s1222A(a) and s1223(1) of the *Social Security Act 1991*.
49. The review would generally involve a Centrelink compliance officer contacting the person, evaluating the person's income declarations and other documentation on record (such as payslips), and if necessary, obtaining additional information necessary to accurately assess and calculate any possible debt owed, having regard to fortnightly fluctuations in earnings. This information, such as payslips, was obtained from the person if possible. If the person was unable to provide

¹⁸ Federal Court of Australia, VID611/2019, 11 November 2019

¹⁹ Also see *And see Prygodicz and Commonwealth of Australia (No 2)* [2021] FCA 644; (2021) 173 ALD 277

²⁰ Federal Court of Australia, VID611/2019, 11 November 2019 [1(a)].

²¹ Accessible at: <https://www.ejaustralia.org.au/inquiry-into-centrelinks-compliance-program/> and <https://www.ejaustralia.org.au/submission-to-centrelink-compliance-program-inquiry/>

details of their income over the period in question, Centrelink obtained the information from the person's employer or financial institution, generally by issuing a notice under s196 of the *Social Security Administration Act 1999*, requiring that the information be provided by that third party.

50. Before implementation of the OCI / Robodebt Scheme, compliance processes and procedural guidelines relating to the Australian Taxation Office (ATO) – DHS/SA data matching thereby assured a level of human oversight and scrutiny of relevant information to be entered as data for the automated calculation of any recoverable debt. For a debt to be raised, a human delegate needed to be satisfied that they had sufficient proof of a debt under s1223(1) of the *Social Security Act 1991* before issuing a debt notice. The onus of proof appropriately rested with DHS - as appropriate, and as alluded to in the *Amato* Federal Court decision.

Data matching as trigger for debt raising rather than for review

51. The fundamental flaw with the OCI / Robodebt Scheme was that the data matching involved comparison of earnings data collected by the ATO in respect of an entire financial year, with earnings reported by that person to Centrelink in respect of the periods they received an income support payment. Where there were gaps in the information provided to Centrelink, the OCI algorithm filled in these gaps by averaging out the ATO reported annual income across the 26 fortnightly Centrelink employment reporting periods for that tax year, or a shorter period if dates were available – i.e. the system treated income as if it has been earned at a consistent fortnightly rate over the total period rather than applying the precise amount in respect of each fortnight in which the income was actually earned.
52. This method of averaging assumed that the person had worked consistent fortnightly hours across an entire given period. In many cases, this method incorrectly determined that the person had a social security debt in respect of payment fortnights for which the person had correctly reported their gross earnings, and for which they had been paid their correct income-tested entitlement.
53. The result was that Robodebts were often inaccurate. In EJA member centres' experience, many recipients of Robodebt notices were aware that this was the case and approached Centrelink to point out why they believed a mistake had

been made, often only to be told that the computer calculation 'would be correct' and that to dispute the debt they would need to provide pay slips.

Reversal of the onus of proof

54. A central issue raised repeatedly by EJA in its submissions to various inquiries has been that the OCI / Robodebt Scheme reversed the burden of proof in respect of social security debt raising. Under the OCI process the system automatically sent a letter to the person about an income discrepancy. The letter used the ATO data and invited the person to go online to confirm or update information by a deadline. There was also a reminder letter. EJA member centres reported that many such letters were misunderstood or disregarded by recipients, either due to confusing wording, or because the recipient could not access payslips or bank statements to prove their income. In other cases Robodebt notice recipients ignored the request for evidence simply because they were overwhelmed and distressed.
55. This reversal of the burden of proof is especially problematic given Centrelink's broad powers to recover debts – including through the use of garnishee powers that allow Centrelink to recover alleged debts from a person's tax return, their wages, or from other Centrelink payments. Given the known inaccuracies of the OCI / Robodebt Scheme from early in its implementation, and disregarding issues regarding the legality of Robodebts, individuals should not have been forced to bear the burden of disproving a Robodebt in order to avoid having their payments garnisheed, or have a garnishee lifted.

Obstructions impeding access to internal review of Robodebts

56. As noted above, several EJA member centres reported to EJA that when their clients with Robodebts had contacted Centrelink to query a Robodebt amount, or seek a formal internal review by an Authorised Review Officer (ARO), they were denied the right to review unless they provided pay slips for the period in question. That was also the experience of several EJA member centres when they tried to seek a formal internal review of an ARO decision on behalf of their clients. This meant that people with Robodebts were generally:
 - a. Not given an explanation of how the debt was calculated in their debt notice;

- b. Not provided with an explanation if they queried the calculation, other than that it was calculated “automatically” or “by the computer”;
 - c. Denied any opportunity to engage in a discussion regarding any administrative error playing a part in their debt; and
 - d. Refused any review of the amount, or recoverability of the debt, unless they provided “evidence”.
57. Social Security recipients include extremely vulnerable cohorts, which intersect - people living in poverty, people with psycho-social disability, age pensioners, single parents, carers, people who are homeless, Aboriginal and Torres Strait Islander people from regional and remote communities, and refugees and recently arrived migrants with limited English and limited understanding of Australia’s legal system.
58. The ultimate unfairness of the Robodebt scheme is the impact on vulnerable people who were unable to access the online system and potentially avert the raising of a Robodebt, who were then denied the right to appeal, or frightened of the repercussions of appealing and were exposed to contacts from external debt recovery contractors. These vulnerabilities can also serve as barriers to accessing legal advice from free legal services – especially for people with psych-social disability, and recent arrivals from countries with oppressive legal systems.
59. EJA members have provided EJA with several Robodebt case studies over the years for inclusion in EJA submissions and for consultations. The de-identified people in these case studies are among the more fortunate few who were able to obtain legal help for appealing from either a community legal centre with expertise in social security law, or Legal Aid. Most people with Robodebts did not have legal support to enable access to internal Centrelink review by an ARO, or an appeal to the Administrative Appeals Tribunal (AAT).

Inadequate debt explanations

60. In the experience of EJA Member Centres and their clients, Centrelink staff were often unable to explain the basis of why a debt had been raised and routinely referred clients to the MyGov app which contained minimal information that could be impossible to understand. This often resulted in EJA member centres

requesting the debt calculations and lodging Freedom of Information (FOI) requests on behalf of member centres to identify the cause of their client's social security debt, and establish whether any portion of the debt was attributable to administrative error. These inadequate notices are the basic component of the reversal of onus of proof, and prompt many people to appeal merely to get an explanation as to why the debt has been raised and how it was calculated. The lack of explanation regarding the cause of the debt, and its calculation, particularly disadvantages people facing systemic barriers to appealing (often the same issues that may have caused vulnerability to debt). This potentially undermines quality and rigor in decision-making, with systems errors – including those inherent to the OCI / Robodebt Scheme – unidentified and unchecked.

61. Issues stemming from inadequate debt notices were not confined to Robodebt notices. SA notices regarding social security and family assistance debts continue to include too little information, and EJA is actively engaged in ongoing discussions with SA regarding how they may be improved. At the very least social security debt notices need to meet the requirement prescribed by s1229 of the Social Security Act that a debt notice specify “the reason the debt was incurred, including a brief explanation of the circumstances that led to the debt being incurred”²². EJA contends that social security debt notices do not currently meet this statutory requirement – debt notices (and the MyGov screens to which people are referred) generally merely stating to the effect that: “you were paid \$A over the period YY to ZZ but were entitled to \$B, therefore you have debt amounting to the difference between what you were paid and what you were entitled to”. This is neither providing the person with the reason the debt was incurred, nor an explanation of the circumstances that led to it. While SA is currently undertaking a consultation with its Civil Society Advisory Group (of which EJA is a member), to present new iterations of its standard debt letters, we are concerned that systems constraints will mean that the revised templates will not meet statutory requirements.

²² A similar provision applies under the family assistance legislation

Absence of substantial changes to address fundamental flaws

62. In April 2017 the Commonwealth Ombudsman published “*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*”²³. As noted above, the report identified that some minor changes had been made to the administration of the system, which largely focused on improving communication with individuals and the user experience of the online employment income confirmation portal. These changes did not address the OCI / Robodebt Scheme’s fundamental flaws, however, and did nothing to introduce guaranteed oversight by human delegates in all cases, or reverse back the burden of proof.
63. As stated in the N SSRN Submission of 22 March 2017 to the Senate Community Affairs Reference Committee Inquiry into the Better Management of the Social System Initiative²⁴, EJA supported the eight recommendations made in the Ombudsman’s report and welcomed DHS’s agreement to implement those recommendations. We noted, however, that the recommendations failed to fully address the fundamental issues of principle at stake with the OCI / Robodebt Scheme - the legality and fairness of using automated computer systems to make complex or discretionary decisions.
64. The Ombudsman’s recommendations also did not address the critically important issues of principle for public administration raised by the use of an automated decision-making process which was raising debts on the basis of incomplete or inaccurate factual information (in certain instances, going back to 2010), and the shift of the burden of proof onto individuals to establish that a decision is wrong through reassessment or appeal.
65. EJA is unaware of any changes made by DHS / SA that would constitute substantive improvements to the OCI / Robodebt Scheme during its

²³ Accessible at https://www.ombudsman.gov.au/_data/assets/pdf_file/0022/43528/Report-Centrelinks-automated-debt-raising-and-recovery-system-April-2017.pdf

²⁴ Accessible at file:///C:/Users/LindaForbes/Economic%20Justice%20Australia/National%20Welfare%20Rights%20Network%20Team%20Site%20-%20NWRN%20Documents/STAFF%20FOLDERS/Linda/sub107_NSSRN.pdf

implementation, in terms of addressing its fundamental inaccuracy, unfairness, and unlawfulness. The Scheme was developed and implemented to enable raising of social security debts with minimal oversight, and while there were some changes to increase the level of human scrutiny, EJA is unaware of any changes to require that a human delegate actively considered whether each potential debt identified via ATO data matching was accurately calculated and found to be lawfully recoverable, before a debt was raised and a Robodebt notice issued.

Section 5: Further issues

Based on the experience of your Organisation, describe any additional concerns or insights you may have about the Robodebt Scheme which you have not covered in response to the questions above, for example:

- (a) the design, implementation, and operation of the Robodebt Scheme;*
- (b) the services provided by Centrelink and Centrelink staff to individuals affected by the Robodebt Scheme;*
- (c) the FOI process;*
- (d) the availability and effectiveness of review avenues, including via AROs, the AAT or Commonwealth Ombudsman;*
- (e) the impact on people affected by the Robodebt Scheme including the impact on particular cohorts of people; and redress.*

66. As outlined above, given EJA's view that the whole premise of the Robodebt Scheme was fundamentally flawed, EJA's primary recommendation in its September 2019 submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Centrelink compliance program, was that the system of averaging ATO reported annual income across fortnightly reporting periods immediately cease; and if not, while the Robodebt scheme continued to operate, that:
- a. Individuals who receive Centrelink debt notices be given more information about the basis of the debt, including copies of their debt schedule setting out their alleged overpayments across each fortnightly payment period;

- b. If there was insufficient evidence to prove the debt, that DHS refrain from raising a debt or taking any debt recovery action until such evidence is obtained by the Department using its power to request information directly from employers and financial institutions;
 - c. Recovery of old debts should not be pursued, especially where these debts allegedly accrued more than 6 years ago, particularly in cases where it is obvious that the person is of old age, suffering from ill health, living with disability, or in an obvious state of hardship;
 - d. The Robodebt scheme is not used for people Centrelink has flagged as vulnerability indicated;
 - e. Compliance Officers, and external debt collection agencies chasing recovery of social security debts, be trained in communicating with vulnerable people so they can demonstrate greater understanding and compassion when pursuing debts from vulnerable people; and
 - f. Centrelink be adequately staffed with permanent employees trained in social security policy and procedure, and that any performance targets based on raising debts be abandoned.
67. EJA made these recommendations, and supported the Ombudsman's 2017 recommendations, with the aim of improving the operation of a fundamentally flawed system so as to address some of its most harmful aspects, pending reform by way of dismantling the Scheme. As noted above, whilst the Department made some administrative changes to the Robodebt Scheme while it was in place, none of these was substantive and none of EJA's 2019 recommendations to the Senate inquiry were implemented.

The FOI process

68. FOI applications were a crucial component of EJA member centres' investigation of clients' Robodebts – crucial given the limited information contained in Centrelink debt notices, and Centrelink officers' inability to explain to a person on what grounds their Robodebt was raised, and how this calculation was made.
69. FOI applications in respect of Social Security and Family Assistance debts are time-consuming to compose, requiring a high level of expertise in Centrelink debt matters.

70. Robodebt matters have been particularly challenging in terms of taking instructions from clients, given the lack of information in debt notices and on MyGov regarding how the debt was calculated and whether earnings fluctuations were taken into account, and clients' and advocates' inability to obtain further verbal explanation from Centrelink.
71. The result of this dearth of information is that the FOI requests regarding Robodebts need to be all-encompassing, a request for all records relating to the decision (whether made by a human delegate or computer), for the whole relevant period – the period leading up to the commencement date of the debt and the whole period of the raised debt – including debt calculation records.
72. FOI releases for these all-encompassing requests, once met (obtaining all relevant documents can take repeated requests, with delays in release and multiple requests for specific documents), consist of swathes of documents which are mostly impenetrable for anyone other than a solicitor or advocate experienced in perusing social security debt FOI releases. This is extremely time consuming and resource-intensive.
73. In EJA's members' experience, the need for FOI requests for Robodebt cases severely constrained their capacity to represent clients in both internal and external appeals. Given the barriers to self-representation (as outlined above), it is unsurprising that relatively few Robodebt matters were appealed to the AAT.
74. Where EJA members are able to obtain and scrutinise relevant records under FOI they reported significant successes in internal reviews. For example, an EJA member obtained an ADEX Debt Schedule Report on behalf of a client who had a Robodebt raised against them. The schedule clearly showed that the client's income has been averaged over given periods, without taking into account periods for which they were not receiving Centrelink payments or the fact that they were working multiple jobs with inconsistent and fluctuating hours. Without that Schedule and without legal advocacy, the client would have had no idea of grounds for appeal, regarding the amount of the debt.
75. FOI requests are also generally required for advocacy in respect of AAT appeals regarding Social Security debts, especially in the case of Robodebts. For Robodebts, unless the ARO has examined all relevant records an FOI request is

needed to identify whether and when the client failed to accurately report earnings, and correlate this with data affecting the automated debt calculation. Cases such as these need careful preparation. Advocates cannot wait for AAT T-docs to undertake this scrutiny, especially given competing casework demands, limited resources and the need for the expert input from senior solicitors experienced in the scrutiny and interpretation of complex debt documentation.

ARO Review Issues

76. Fundamental to accessing review rights is being informed of the reasons for a decision but as outlined above, people with Robodebts faced many barriers to understanding why they had a debt and how it was calculated.
77. As noted above, EJA highlighted the inadequacy of SA debt notices which do not provide sufficient information to enable meaningful appeal, and the lack of access to a Centrelink officer who is able to explain how the debt was calculated. In the experience of EJA members, their clients' calls to Centrelink regarding debts are generally triaged to the debt recovery section even where a person is seeking a debt explanation or review. In EJA members' experience, clients seeking explanation or review often then get an "explanation" such as "it's just a reconciliation – we can work out a comfortable repayment arrangement"; or 'it's complicated – just look at MyGov"; or "it must be correct – it was worked out by the computer".
78. The intrinsic problem is that even in the rare cases where a person with a complex Social Security debt such as a Robodebt is referred to a Centrelink subject area expert with understanding of the complex and differing income tests applying to JobSeeker Payment, Parenting Payment, Youth Allowance, Austudy, Special Benefit and pensions (each with distinct income test thresholds and taper rates in respect of differentials such as age and relationship status), that officer is generally unable to provide an explanation. This is for the very same reason that EJA member centres need to lodge an FOI request to get to the bottom of most Robodebts – understanding the information and data used for the automated calculation of a debt requires scrutiny of complex online records.

79. In EJA members' experience, many people who seek their assistance in understanding and potentially seeking ARO review of a Robodebt are often very frustrated, angry and/or distressed. This further complicates advocates' efforts to tease out grounds for review of the existence and amount of the debt, and whether there may be grounds to waive recovery of the debt on the grounds of administrative error, or in the 'special circumstances' of the case. These cases are complex and time-consuming, and often require a FOI request to challenge the basis of the debt and/or seek debt waiver.

AAT Appeals - barriers to external review; whether DHS / SA acted as a model litigant

80. The model litigant principles in Appendix B of the *Legal Services Directions 2017* (Cth)²⁵ set out the criteria to guide the Commonwealth in meeting its obligation to maintain proper standards in litigation and behave as a model litigant in the conduct of litigation.
81. In EJA's view there were several systemic barriers to appealing Robodebts to the AAT, all intrinsically relevant to DHS's / SA's capacity to meet its model litigant commitments as Respondent in Robodebt AAT appeals:
- a. The dearth of information in Robodebt notices, especially the absence of any proper explanation regarding the cause and calculation of the debt – this effectively preventing people from seeking ARO review of Robodebts because they were unable to articulate the grounds for their appeal.
 - b. Compliance officers' advice to people querying the existence of a Robodebt, or amount of the debt, or alleging administrative error, that their case could not be referred for ARO review unless they were able to provide evidence of past earnings, such as payslips, bank statements or a letter from their employer detailing fortnightly earnings.
 - c. Some AROs' similar advice to prospective appellants that their appeal would not be considered unless they provided evidence of fortnightly earnings.

²⁵ Accessible at <https://www.legislation.gov.au/Details/F2018C00409>

- d. Often the need to obtain department records under FOI and the complexity associated with understanding and interpreting the documents obtained.
 - e. DHS / SA's practice not to appeal decisions made by the Social Services & Child Support Division of the AAT to set aside Robodebts on grounds of legality to the General Division thereby avoiding legitimate scrutiny and potential rulings on legality that may have wider application.
82. There is an urgent need for specialist social security legal services to be adequately resourced to meet unmet demand for legal assistance in AAT appeals. There are currently no specific funds for social security legal help provided under the National Legal Assistance Partnership, despite the number of people affected by adverse social security and family assistance decisions daily – many of whom in vulnerable cohorts, unable to self-represent in appeals.²⁶
83. Unmet need is most pronounced in regional and remote Australia. Some regional and remote areas of Australia have no funded specialist on-the-ground services providing social security legal advice and assistance. This leaves people without access to accessible information, advice and advocacy on social security and family assistance issues. The Northern Territory (NT) is the prime example: none of the non-profit legal services in the NT – neither Aboriginal Legal Services, Community Legal Centres nor the Legal Aid Commission receives specific funding to provide social security legal help.

Redress – the Class Action

84. The class action in the Federal Court provided limited redress for class action members. Whilst bringing the class action prompted the former Government to refund amounts recovered in respect of Robodebts, class action settlement provided limited redress – solely interest foregone on Robodebt amounts repaid, with no payments in respect of pain and suffering.
85. Apart from aggrieved class action members, there are also aggrieved people who were precluded from the class action because they provided payslips or other evidence of actual earnings at the request of Centrelink compliance officers or

²⁶ <https://www.ag.gov.au/legal-system/legal-assistance-services/national-legal-assistance-partnership-2020>

AROs and had their Robodebt cancelled. These people may have ended up with either no debt in respect of the Robodebt period or a new smaller debt, but their exclusion from the class action has left many in this group aggrieved.

86. We note that on 12 October 2022, the Minister for Social Services, Minister Rishworth, announced that there would be no further action in respect of new debt calculation for people whose Robodebt had been cancelled²⁷. EJA welcomes this announcement, but the redress afforded to this group is denied to the people who have already had new debts raised – which will likely compound their distress at being locked out of the class action.
87. Despite the refund process initiated in June 2020 and the \$1.2 billion class action settlement in November 2020, redress for victims of Robodebt has been limited. People who did what they were told, and provided their payslips to Centrelink when their Robodebt was raised by the system, have been essentially disadvantaged. This was anomalous – by giving Centrelink the means to recalculate their debt manually, their debts were no longer solely based on the automated averaging system and they could not access the refunds won through the class action.

Section 6: Further Changes needed

Identify any further changes which in your view would need to be made to income compliance processes to ensure they are fair, lawful, and appropriately designed and targeted to individuals receiving income support.

KEY POINTS

88. Income compliance processes must be designed with the understanding of the *people* they affect, and the vulnerabilities and disadvantages of many people who receive income support.

²⁷ ABC online report of 11 October 2022 accessible at: <https://www.abc.net.au/news/2022-10-11/robodebt-reviews-wiped-government-clears-final-remnants-scheme/101523702>

89. Especially in the social security context, the Government should bear the onus of proving that a person has been overpaid.
90. The basis on which any debt has been calculated must be clear, intelligible, and transparent to the person affected and any reviewer.

Centrelink officers should have the necessary skills and training to be able to assist people who challenge or seek an explanation for debts that have been raised against them.

91. Income compliance processes relying on automated systems must be rigorously tested and audited by an independent, expert agency prior to implementation, and routinely thereafter.
92. Efficient, fair, accessible, independent review of income compliance decisions must be available.

Discussion

Lawfulness

93. Any income compliance/audit process, which relies on a data source other than that held by SA/DSS, must only rely on data which matches (or is capable of being adjusted to match) social security income reporting periods. Matching annual income data against fortnightly social security income reported data under the OCI / Robodebt Scheme, resulted in an unacceptably high error rate.
94. The system designers arguably failed to take proper care in acknowledging and quantifying the margins of error associated with an averaging procedure used to estimate overpayment recovery amounts for welfare recipients.²⁸
95. It is difficult to know exactly how high the error rate was,²⁹ as some calculations only reported those who appealed debts and SA refused to provide data in

²⁸ Tiberio Caetano et al, 'Practical Challenges For Ethical AI: Gradient Institute White Paper' (3 December 2019) 3 <https://www.gradientinstitute.org/assets/gradientinst-whitepaper.pdf>

²⁹ See Senate Standing Committee on Community Affairs, *Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative* (Report, 21 June 2017) [2.85]-[2.93] https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Social_WelfareSystem/Report ('2017 Report').

response to other requests.³⁰ Data from DHS from the first 6 months of the scheme show that the error rate was around 26%.³¹ Other estimates are far higher. This unacceptably high error rate was inevitable and the obvious consequence of comparing ‘apples’ and “oranges”. An effective, independent testing process prior to the implementation of the Robodebt Scheme, and repeated routine auditing, would have identified this issue (see recommendations in response to question 7 below).

96. As discussed above, in sections 4 and 5, the Commonwealth must bear the burden of establishing that a person has been overpaid. The onus of proof should not be reversed.³²
97. Any income compliance process must have **appropriate**, **accessible** and adequate oversight, including the ability for individuals to seek an **independent** review. In order for review to be effective, information about how debts have been calculated must be provided in a format which can be understood by both the affected person and the reviewer (the AAT).³³ That is, data must be presented in a way that is comprehensible to people without any specialist skills or expertise³⁴ (see comments above, in sections 4 and 5, re FOI).
98. Independent oversight institutions, including the Ombudsman, Auditor-General and the AAT, must be adequately resourced to perform their functions efficiently and effectively, including inquiring into the lawfulness of income compliance processes.³⁵ Commonwealth departments and agencies must take seriously

³⁰ See, eg, Services Australia, Answer to Question on Notice 62 from Senate Community Affairs References Committee, *Centrelink’s Compliance Program* (24 February 2020).

³¹ <https://www.actcoss.org.au/news-events/media-release/media-release-numbers-confirm-robot-debt-epic-administration-fail>

³² For the reasons why it is unlawful under the *Social Security Act 1991* (Cth) to reverse the onus of proof see Peter Hanks, ‘Administrative law and welfare rights: a 40-year story from *Green v Daniels* to “robot debt recovery”’ (2017) 89 *AIAL Forum* 1.

³³ Australian Human Rights Commission (AHRC), *Human Rights and Technology* (Report, 2021) 65 <https://tech.humanrights.gov.au/downloads>.

³⁴ Which Carney argues did not happen in Robodebt reviews. See Terry Carney, ‘Robo-debt illegality: The seven veils of failed guarantees of the rule of law’ (2019) 44(1) *Alternative Law Journal* 4.

³⁵ Carney (n 34) 6. On the current under-funding of the Australian National Audit Office see: Katina Curtis, ‘Audit Office Funding Slashed, Renewing Calls for Integrity Commission’, The Sydney Morning Herald, 26 October 2020 www.smh.com.au/politics/federal/audit-office-funding-slashed-renewing-calls-for-integrity-commission-20201026-p568q5.html

reviews by those oversight institutions questioning the lawfulness and fairness of income compliance processes. Commonwealth departments and agencies should address systemic concerns raised by oversight institutions.

99. They must be conscientious in following the government's model litigant obligations, to avoid a situation where litigation or other government action is used in a way that has the effect of avoiding legitimate scrutiny and accountability, or inhibits systemic problems being identified or addressed.³⁶
100. It may be necessary to strengthen independent oversight of government adherence to the model litigant rules (see discussion above, section 5).

Fairness

101. Core to individual fairness (including the concept of procedural fairness or natural justice) is that a person knows, and has an adequate opportunity to respond to, the case against them. This includes having a fair opportunity to put their case.³⁷ Those affected by Robodebts were denied both. The basis on which debts were calculated was often not comprehensible; and in many cases disproving the debt involved an unreasonable, sometimes impossible burden, of obtaining income information from several years earlier.
102. Any income compliance regime must be designed such that the basis of an alleged debt is clear to an ordinary person - that is, an individual without specialist skills or expertise.³⁸ As discussed above, EJA members continue to see debt letters clients have received from Centrelink which contain little or no information that would provide our expert caseworkers and lawyers, let alone our vulnerable clients, with sufficient information to understand the basis of an alleged debt.
103. Social security recipients should not be asked to re-prove facts established and accepted many years previously. There should be a time bar (we suggest a

³⁶ On Services Australia's failure to follow model litigant processes during Robodebt, see Carney (n 34); Joel Townsend, 'Better Decisions? Robodebt and the Failings of Merits Review' in Janina Boughey and Katie Miller (eds), *The Automated State: Implications, Opportunities and Challenges for Public Law* (Federation Press, 2021) 52.

³⁷ See Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th edn, 2017) 397 ff.

³⁸ AHRC, n33, 65.

maximum of six years after any payment was received) on compliance audit processes. The legislation should be amended to reflect this.

104. Internal (ARO) and external (AAT) review mechanisms must be **independent, accessible and efficient** to ensure the fairness of income compliance processes as a whole (see section on lawfulness above, and sections 4 and 5). We note that there are currently serious concerns about the accessibility and independence of the AAT.³⁹
105. Income compliance processes must have regard to fairness at the *population level* as well as individual fairness. Regard must be had to the group affected by such measures, and the particular vulnerabilities of many social security recipients in the design of the process. For example, the disadvantage of many people in this population may mean they do not have easy access to certain information or data (e.g. payslips from several years previously). Debt recovery processes for this group (social security recipients) should not be harsher than processes targeted at other groups who have been overpaid (such as taxpayers, or companies which erroneously received JobKeeper payments).

Appropriate Design

106. The design of income compliance processes must take account of who is affected by the process and the particular disadvantages and vulnerabilities of those groups.⁴⁰ For example, certain groups of social security recipients will have less access to technology and lower technological literacy than others in the population. Certain groups of social security recipients will have high rates of mental illness, stress and distress, due to the circumstances which led them to seek social security payments. These vulnerabilities, and vulnerabilities common among young people, people with disability, elderly people, First Nations people, refugees, and newly arrived migrants, must be considered in communication and the design of income compliance systems.⁴¹

³⁹ See Senate Legal and Constitutional Affairs Committee, *The Performance and Integrity of Australia's Administrative Review System* (Report, March 2022).

⁴⁰ AHRC, n33, 42

⁴¹ The Commonwealth Ombudsman raised a range of concerns about messaging and communication in the Robodebt scheme: *Centrelink's Automated Debt Raising and Recovery System* (Report, April 2017) ('Robodebt Report')

107. Debt recovery fees are inappropriate in any scheme dealing with social security recipients, who are, by definition, on low incomes.
108. If the government uses contractors to perform any part of a compliance process, the contractors should be under the same obligations as the government to act fairly and reasonably in carrying out their functions, and protecting privacy. The use of contractors should not result in a loss of transparency or review rights⁴², or the passing on of social security information to third parties. There is a need for development of principles for SA debt recovery, along the lines of ACCC/ASIC guidelines⁴³.

Section 7: Protections in the use of Artificial Intelligence and Automated Decision Making

Identify any protections you consider should be applied to the use of AI (artificial intelligence) and ADM (Automated Decision Making) in the area of income support compliance.

KEY POINTS

109. The Australian Human Rights Commission (AHRC) and Commonwealth Ombudsman have issued recommendations and guidelines for achieving best practice in the use of technology (whether AI, ADM or however else described) by governments in decision making, and especially in administrative decision making. We support those recommendations and guidelines.
110. An independent agency (a newly-created AI Safety Commissioner, the Ombudsman or similar) should be given the function of reviewing all automated decision-making systems proposed to be used by government, to ensure

https://www.ombudsman.gov.au/_data/assets/pdf_file/0022/43528/Report-Centrelinks-automated-debt-raising-and-recovery-system-April-2017.pdf

⁴² Administrative Review Council, The Contracting Out of Government Services (Report 44, August 1998).

⁴³ Accessible at <https://www.accc.gov.au/publications/debt-collection-guideline-for-collectors-creditors>

compliance with best practice guidelines. This review should be mandatory and legislated.

111. Community legal centres must be adequately resourced to assist clients with income support compliance challenges and policy advocacy to raise systemic issues that arise.

Discussion

112. It has often been suggested that the use of an automated system was itself the problem with Robodebt, and the cause of the significant harms Robodebt led to. EJA disagrees. The use of automated systems by government in decision making is not, *in and of itself*, problematic. Indeed, automated systems have the potential to improve the efficiency and accessibility of government services. However, those systems must be carefully designed, independently tested and audited, and fully accountable in order to deliver these benefits.
113. Systems must also be fit for purpose. EJA has recently been liaising with the DSS and SA regarding the need for systems adjustments to ensure continuity of Special Benefit to people holding Temporary Protection Visas or Safe Haven Enterprise Visas. EJA understands that although systems changes could potentially be effected to ensure continuity of income support to people in this vulnerable cohort, and prevent harm, these would be prohibitively complex.
114. The Robodebt program resulted in significant harms which, due to the use of automation, were replicated at scale. The nature of the automated system resulted in debt notices being issued more quickly than if this process had been done by humans. In turn, this meant that harms resulting from a poorly-designed, and poorly-implemented system were rapidly scaled. It is important to emphasise that a system does not have to utilise automated decision making to cause serious harm; however, the use of automated technologies means that the speed at which systems are scaled is greatly increased. Errors are magnified, as are the resulting harms.
115. EJA strongly endorses the recommendations of the Australian Human Rights Commission (AHRC) in its *Human Rights and Technology Report*⁴⁴ and best

⁴⁴ AHRC, n33

practice guidelines issued by the Commonwealth Ombudsman in 2019.⁴⁵ An earlier (2007) version of the latter was in place at the time Robodebt was designed and implemented. Had those guidelines been followed, many of the problems that are emblematic of Robodebt almost certainly would have been avoided. The fact that it did therefore tells us that stronger oversight and enforcement mechanisms are required – government agencies and departments cannot be relied upon to always comply with best practice principles.

116. EJA's recommendation is that legislation be enacted requiring external testing and audit of all automated systems used by government in decision making. Testing and audits must be:
 - a. Mandatory under legislation;
 - b. Conducted prior to an automated system being rolled out;
 - c. Conducted by a body with appropriate expertise and adequate funding. The AHRC recommended the creation of an AI Safety Commissioner.⁴⁶ The Commonwealth Ombudsman may also be an appropriate agency to conduct these audits, but to do so would require a significant increase in funding in order to hire appropriately qualified staff. For simplicity, we refer to an AI Safety Commissioner hereinafter; and
 - d. Ongoing, to ensure that automated systems continue to work as intended and remain fit for purpose.
117. The AI Safety Commissioner's jurisdiction should be broad, covering *all* computer systems used in administering the law in a way which affects individual interests, benefits or obligations. This includes decision-making processes that are *partially* automated, if the automated component forms a material part of the ultimate decision. For example, where a human decision maker relies on a benefit calculator, even if the human is ultimately responsible for making the decision, the benefit calculator should be subject to rigorous testing and auditing.

⁴⁵ Commonwealth Ombudsman, *Automated Decision-Making Better Practice Guide* <https://www.ombudsman.gov.au/publications/better-practice-guides/automated-decision-guide>

⁴⁶ AHRC, n33, Recommendation 22.

118. There is a tendency in government to see automated systems used in only part of a decision-making process as “business tools” for government, or services to government, and to ignore their impact on individual interests. For example, a recent decision of the NSW Civil and Administrative Tribunal found that the software used by the NSW Government to calculate rental subsidies was a service provided to government to “fulfil their own business functions” and not an input into the decision-making process, despite the fact that this software was relied on to calculate a benefit.⁴⁷
119. The result is that information about how rental benefits are calculated is not available under the *Government Information (Public Access) Act 2009* (NSW). Similar ways of thinking about automated systems used as part of decision-making processes are evident at the Commonwealth level.⁴⁸
120. In addition to this key recommendation, we also draw the Royal Commission’s attention to the following particular protections required at the stages of suitability, design, implementation, and oversight/review.

Suitability

121. Government agencies and the proposed AI Safety Commissioner must ensure that the use of any type of AI or automated system is *suitable* to the task and decision to be made. The Ombudsman’s guidelines set out a guide to determine suitability. In addition, we note that a desire to automate should not drive the design of government schemes and programs at the expense of fairness and equity. The UK’s Universal Credit system is an example. As Bennett Moses, Boughey and Crawford explain:

“The relevant regulations set strict monthly dates for the calculation of benefits so that the system could be administered automatically. The

⁴⁷ *O’Brien v Secretary, Department Communities and Justice* [2022] NSWCATAD 100, [89].

⁴⁸ See Boughey’s discussion of the Department of Immigration’s plan to automate visa decision-making in Janina Boughey, ‘Outsourcing Automation: Locking the ‘black box’ inside a Safe’ in Nina Boughey and Katie Miller (eds), *The Automated State: Implications, Opportunities and Challenges for Public Law* (Federation Press, 2021) 139-40.

Secretary of State for Work and Pensions gave evidence that adding exceptions to take account of the ‘huge number of factors covering every aspect of a claimant’s family and financial circumstances’ would have been complex, costly and defeated the goal of delivering the scheme automatically. But some people who were paid a regular monthly salary did not receive that salary within the calculation period in certain months because their pay date fell on a weekend or public holiday. Hence, they would receive no pay in some months, and double pay in others. The result was that their universal credit entitlements varied dramatically from month to month and had odd and arbitrary consequences. The Court held that Secretary’s failure to enact an exception for this group was irrational.”⁴⁹

Design

122. Any automated system used in government decision making must be designed to deliver fundamental public law values including lawfulness, fairness, transparency and equity. As the AHRC emphasises, this is necessary to ensure public trust in government administration.⁵⁰
123. The experiences of those who would be subject to Robodebt were not taken into account, or at least they were given inadequate consideration, when the system was designed. In the report “Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative”, the Senate’s Community Affairs References Committee concluded that:

“Due to the application of the income test, averaging income is particularly problematic for recipients who have inconsistent working hours or who have received Centrelink payments ‘on-and-off’ throughout a year as

⁴⁹ Lyria Bennett Moses, Janina Boughey and Lisa Burton Crawford, ‘Laws for Machines and Machine-made Laws’ in Janina Boughey and Katie Miller (eds), *The Automated State: Implications, Opportunities and Challenges for Public Law* (Federation Press, 2021) 240-41 (citations omitted). See *Secretary of State for Work and Pensions v Johnson* [2020] EWCA Civ 778, [77]-[83].

⁵⁰ AHRC, n33, 28. See also AHRC, *The Essential Report–Human Rights Commission* (29 July 2020).

*averaging their annual income over 26 fortnights will not reflect the 'peaks and troughs' of the recipient's income throughout the year.'*⁵¹

124. We note that the people who were adversely affected by Robodebt were some of Australia's most vulnerable. Vulnerability may be precipitated by a lack of financial stability, or conversely, may be the cause of financial instability. Given this, it is absurd to consider that the Robodebt scheme was designed without considering how people without stable income (either through paid work, or through Centrelink payments) or consistent working hours would be impacted by the design of the averaging procedure.
125. This issue speaks to a major issue in the design of Robodebt: it was not done with appropriate consultation, or consideration of the people that the system would affect. We support the Ombudsman's conclusion that:

*"[T]he risks could have been mitigated through better planning and risk management arrangements at the outset that involved customers and other external stakeholders in the design and testing phase."*⁵²

126. As noted by Mental Health Australia's submission to the Community Affairs References Committee, a co-design process could have provided an avenue for user input and testing.⁵³ There is no evidence to suggest that a co-design process was undertaken in the design of the Robodebt scheme, nor that extensive testing was carried out prior to the system's rollout.⁵⁴
127. An additional issue that must be considered is the burden that any automated system design places on individuals. The burden of challenging a decision issued through the Robodebt scheme, for instance, relied on an individual having:

⁵¹ Senate Community Affairs Committee, *2017 Report* (n 2) [2.97].

⁵² Commonwealth Ombudsman, *Robodebt Report* (n 14) 26.

⁵³ Commonwealth Ombudsman, *Robodebt Report* (n 14) 51

⁵⁴ Senate Community Affairs Committee, *2017 Report* (n 2) [3.92].

- a. A thorough understanding of the English language, or access to a translation service;⁵⁵
 - b. An understanding of government systems and processes (for example, seeking redress through the Administrative Appeals Tribunal);
 - c. Access to technology;
 - d. Ability to use technology;⁵⁶
 - e. Time to challenge the decision; and
 - f. Capability to challenge the decision.⁵⁷
128. People experiencing vulnerability are likely to experience many disadvantages simultaneously and may not meet the above criteria that is required to challenge a decision made using an automated system. From the evidence presented through inquiries into the Robodebt scheme, it is clear that very little consideration was given to assisting people with different needs.
129. We recommend that the following approaches, as outlined by the AHRC, should be considered when designing AI and ADM technologies with significant human impact:
- a. **Universal design** aims for products and services that are usable by all people, including people with disability, to the greatest extent possible, without the need for adaptation or specialised design.
 - b. **Accessible design** aims for independent use, specifically by people with disability, and has internationally recognised standards considering a range of disabilities.
 - c. **Inclusive design** considers the full range of human diversity with respect to characteristics such as ability, language, gender and age, aiming for outcomes usable by all people.

⁵⁵ Senate Community Affairs Committee, *2017 Report* (n 2) [3.49]-[3.51].

⁵⁶ Senate Community Affairs Committee, *2017 Report* (n 2) [3.13].

⁵⁷ Senate Community Affairs Committee, *2017 Report* (n 2) [2.106] notes that 'people were simply overwhelmed by the possibility of repaying thousands of dollars'.

- d. **Co-design** focuses on the inclusion of people with disability in all design phases with the goal of producing greater accessibility in the final product. This can involve people with disability being employed or consulted in the design process.
 - e. **Safety by design** aims to put user safety and rights at the centre of the design, development and release of online products and services.⁵⁸
130. Appropriate resourcing and support must be allocated to supporting users of any AI and ADM systems that progress to implementation phase, with particular attention to people with disability, culturally and linguistically diverse communities, people experiencing vulnerability, and other groups that are likely to experience challenges in relation to these systems.

Implementation

131. The AHRC found that “automated decision-making systems that do not include provision for rigorous human oversight of the decision-making process, and the decisions actually being made, are more prone to error”.⁵⁹ The Ombudsman’s best practice guidelines also emphasise the importance of human oversight.
132. In our view, including “humans in the loop” - that is, in a capacity that provides oversight over the application of AI or ADM technologies - is necessary but not, in itself, sufficient to protect people from harm. In the case of Robodebt, the Commonwealth Ombudsman found that:
- a. DHS did not adequately prepare its call centre and local service centre staff to respond to OCI enquiries;
 - b. DHS did not devote sufficient resources to telephone services;
 - c. DHS’ communication and training strategy for staff was not adequate; and

⁵⁸ AHRC Report, n33, 80-81.

⁵⁹ AHRC, Submission to Senate Community Affairs Committee (19 September 2019) <https://humanrights.gov.au/our-work/legal/submission/centrelinks-compliance-program>

- d. DHS staff were, in some cases, provided confusing and inconsistent information to customers, and/or lacked sufficient knowledge to fully advise customers.⁶⁰
133. Justice Melissa Perry and others have also noted the “human tendency to trust the reliability of computers”.⁶¹ The UK Post Office Scandal, provides a chilling reminder of the consequences of relying, without question, on the accuracy of information produced by a computer system, and ignoring evidence which suggests that the system may be flawed.⁶² Over 700 sub-postmasters and post-office staff were prosecuted, relying on an accounting system with known “bugs, errors and defects”.⁶³ People lost their jobs, businesses, and in some cases their freedom.
134. Each “human in the loop” must be appropriately trained, informed, and empowered to identify and correct individual and systemic errors. Had this occurred in Robodebt, it would have significantly improved the OCI system. In other words, if the relevant DHS staff had been appropriately trained, with sufficient oversight over individual decisions, such that they could assess each individual's case afresh and, where there was an error, correct this error, this would have reduced the rate of errors experienced by individuals.
135. Moreover, if DHS / SA staff had had the tools to identify and communicate within the Department concerns about systemic errors, this too would have improved the overall design of this decision-making system.

Transparency and accountability

136. Both the Ombudsman’s guidelines and AHRC, along with other international equivalent reports and guidelines,⁶⁴ emphasise the importance of transparency and accountability in government use of automated systems. This is necessary

⁶⁰ Commonwealth Ombudsman, *Robodebt Report* (n 14) 18-19.

⁶¹ The Hon Justice Melissa Perry, ‘iDecide: Digital Pathways to Decision’ in Janina Boughey and Katie Miller (eds), *The Automated State: Implications, Opportunities and Challenges for Public Law* (Federation Press, 2021) 8.

⁶² See generally <https://www.postofficehorizoninquiry.org.uk/>

⁶³ *Bates v the Post Office Ltd (No 6: Horizon Issues)* [2019] EWHC 3408.

⁶⁴ Eg OECD, *AI Principles* <https://oecd.ai/en/ai-principles>.

both for public trust, and to enable oversight mechanisms to work.⁶⁵ Government must be transparent not only about the fact that automated systems are used, but also in *how* those systems operate. This is currently a significant problem with the government's use of automated systems, for a number of reasons.

137. Transparency is a well-known and well-explored challenge of automated systems generally.⁶⁶ Not all types of automated systems are capable of explaining how decisions are reached (e.g. those using machine learning), resulting in them frequently being described as a “black box”. Even where systems are capable of providing transparent explanations, the form of that explanation may be different from the explanation demanded by public law.
138. Public law justifications will usually require explanations of the legislative basis, or framework for the decision, the material facts considered, the connections and conclusions that a decision-maker has drawn from the relevant facts and the weight given to competing factors.⁶⁷ By contrast, in human terms, the explanation provided by a computer would be tantamount to describing:

“[T]he interaction between the neurological activity of the caseworker’s brain and the manipulation of keyboard tabs leading to the text being printed out, first on a screen, then on paper, and finally sent to the citizen as an explanation of how the decision was made.”⁶⁸

139. The use of contractors adds another layer to this transparency deficit.⁶⁹ As Boughey has explained, governments have refused to release information about the operation of automated systems under freedom of information laws, relying on

⁶⁵ See Janina Boughey, ‘The Culture of Justification in Administrative Law: Rationales and Consequences’ (2021) 54(2) *University of British Columbia Law Review* 403.

⁶⁶ See, eg, Frank Pasquale, *The Black Box Society: The Secret Algorithms that Control Money and Information* (Boston: Harvard University Press, 2015); Henrik Palmer Olsen et al, ‘What’s in the Box: the Legal Requirement of Explainability in Computationally-Aided Decision-making in Public Administration’ in Hans W Micklitz et al (eds), *Constitutional Challenges in the Algorithmic Society* (Oxford: Oxford University Press, 2021) 219; Monika Zalnieriute, Lyria Bennett Moses, and George Williams, ‘The Rule of Law and Automation of Government Decision-Making’ (2019) 82(3) *Modern Law Review* 425.

⁶⁷ *Wingfoot Australia Partners v Kocak* (2013) 252 CLR 480, 498–501 [44]–[55].

⁶⁸ Olsen et al (n 38).

⁶⁹ Boughey, ‘Outsourcing Automation’ (n 20).

commercial-in-confidence/trade secrets exemptions.⁷⁰ Yet information about how an automated decision-making system works is critical to understanding whether a decision has been made lawfully, fairly, reasonably etc. Without this information (in comprehensible form), review institutions such as tribunals and courts are unable to fulfil their functions of ensuring that decisions made with the assistance of automated systems are ‘correct and preferable’ and lawful respectively.

140. We recommend that all automated systems used by government in administering the law to determine individual interests, entitlements, benefits and obligations must be fully transparent and explained in a way that is comprehensible to the public. This may mean that certain types of AI which cannot be made “explainable”, such as systems using machine learning, are not suitable to be used by governments in decision-making.

Adequate resourcing of community legal centres

141. Finally, EJA draws attention to a systemic problem that has exacerbated the harms felt by victims of Robodebt—the under-resourcing of legal aid and advocacy. This is best articulated by Prof Terry Carney, who writes:

“Shrinking levels of real funding for legal aid and advocacy, lack of long-term funding security, and imposition of conditions or policies to discourage ‘political’ advocacy, all serve to undermine their capacity to fully pursue more strategic systemic change objectives, such as running test cases or vigorously advocating for reform. There is I suggest an acutely chilling effect and ongoing legacy of provisions such as the Commonwealth in 2014 removing ‘law reform’ and ‘legal policy’ from the core activities funded for CLCs. This too calls for considered debate, where a leaf might be taken from welcome initiatives of the NSW government to significantly boost CLC funding and put funding onto a three-year cycle.”⁷¹

⁷⁰ For a recent example see *O’Brien v Secretary, Department Communities and Justice* [2022] NSWCATAD 100.

⁷¹ Carney (n 34) 8.

142. The harms caused by the OCI / Robodebt Scheme should never have occurred, and it is crucial that the lessons learned from multiple inquiries, and finally, the Robodebt Royal Commission, must ensure that future instances of technologically-facilitated harm never occur through a government system. In saying this, EJA maintains that if and when issues such as this occur, community legal centres must be appropriately resourced to support their clients to respond to challenges in a timely manner and achieve positive outcomes for our clients.

Signed:

Date:

Witness:

Date:

