3 February 2023
Economic Justice Australia

# SUMMARY OF EJA'S ROBODEBT SUBMISSION

The following is a **summary** of the key points and recommendations made in EJA's primary submission to the Royal Commission into the Robodebt Scheme.

## ABOUT EJA

Economic Justice Australia (EJA) is the peak organisation for community legal centres (CLCs) providing specialist advice regarding social security issues and rights. Our members across Australia have provided free and independent information, advice, education and representation in the area of social security for over 30 years.

EJA draws on its members' casework experience to identify systemic policy issues and provide expert advice to government on reforms needed to make the social security system more effective and accessible. Our law and policy reform work:

- strengthens the effectiveness and integrity of our social security system;
- educates the community; and
- improves people's lives by reducing poverty and inequality.

## EJA'S ADVOCACY ON ROBODEBT

EJA's analysis of the legal and ethical issues related to the OCI system / Robodebt scheme has been set out in submissions to various inquiries and consultations, including:

- National Social Security Rights Network (NSSRN)[1] Submission to the Senate Community Affairs References Committee *Inquiry into the Better Management of the Social System Initiative*[2] (lodged 22 March 2017).

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[1] Economic Justice Australia changed its name from National Social Security Rights Network (NSSRN) in 2020. References to the organisation hereafter in this submission will be to Economic Justice Australia.

[2] EJA, Submission to Senate Community Affairs References Committee, *Inquiry into the Better Management of the Social Welfare System Initiative* (22 March 2017) https://www.ejaustralia.org.au/nssrn-submission-better-management-ofhttps://www.ejaustralia.org.au/nssrn-submission-better-management-of-the-social-welfare-system-initiative-inquiry-final/the-social-welfare-systemwas previously named National Social Sec-initiative-inquiry-final/.

- NSSRN Submission to the Australian Human Rights Commission's (AHRC) *Human Rights and Technology Report*[3] (lodged 11 October 2018).
- NSSRN submission to the Senate Legal and Constitutional Affairs Committee *Inquiry into Centrelink's Compliance Program*[4] (lodged 27 September 2019).
- NSSRN Submission in Relation to the Social Services and Other Legislation Amendment[5] (Simplifying Income Reporting and Other Measures) Bill 2020 (lodged 14 February 2020).
- EJA submission to the Senate Community Affairs References Committee *Inquiry into Centrelink's compliance program*[6] (lodged 2 October 2020).
- EJA Pre-Budget Submission 2021-2022[7] (lodged 28 January 2021).

EJA also highlighted its concerns regarding the Robodebt scheme via forums such as meetings with the Department of Social Services (DSS) and the former Department of Human Services (DHS), participation in the Welfare Payment Infrastructure Transformative Civil Society Advisory Group, and during informal contacts with the DHS Online Compliance team.

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.*[8] The report identified that some changes had been made to the administration of the OCI system, changes largely aiming to improve communication with individuals and the user experience of the system's online employment income confirmation portal.

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[3] EJA, Submission to Australian Human Rights Commission, *Inquiry into the Human Rights and Technology Project* (11 October 2018) https://www.ejaustralia.org.au/human-rights-technology/.

[4] EJA, Submission to Senate Legal and Constitutional Affairs, *Inquiry into Centrelink's compliance program* (27 September 2019). https://www.ejaustralia.org.au/submission-to-centrelink-complian-programhttps://www.ejaustralia.org.au/submission-to-centrelink-complian-program-inquiry/inquiry/.

[5] EJA, Submission to Senate Community Affairs Legislation Committee, *Inquiry into the Social Services and Other Legislation Amendment (Simplifying Income Reporting and Other Measures) Bill 2020* (14 February 2020) https://www.ejaustralia.org.au/submission-in-relation-to-the-social-services-and-other-legislation-amendment-simplifying-income-reporting-and-other-measures-bill-2020/

[6] EJA, Submission to Senate Community Affairs References Committee, *Inquiry into Centrelink's compliance program* (2 October 2020) https://www.ejaustralia.org.au/inquiry-into-centrelinks-compliance-program/.

[7] EJA, Submission to Treasury Committee, *Inquiry into the Federal Budget 2022* (15 February 2021) https://www.ejaustralia.org.au/pre-budget-submission-2021-2022/

[8] Commonwealth Ombudsman, Submission No 2 to Department of Human Services, *Inquiry into Centrelink's automated debt raising and recovery system* (April 2017) https://www.ombudsman.gov.au/__data/assets/pdf_file/0022/43528/Reporthttps://www.ombudsman.gov.au/__data/assets/pdf_file/0022/43528/Report-Centrelinks-automated-debt-raising-and-recovery-system-April-2017.pdfCentrelinks-automated-debt-raising-and-recovery-system-April-2017.pdf.

EJA supported the eight recommendations made in the Ombudsman's report and welcomed DHS's agreement to implement those recommendations. Unfortunately, however, the recommendations failed to address the key issues of principle for public administration raised by the use of an automated decision-making process to raise debts on the basis of incomplete or inaccurate data. This was despite it being abundantly clear by 2017 that a significant proportion of the Robodebts being raised were inaccurate (or non-existent), and that the OCI System was fundamentally flawed.

EJA's submission consolidates and builds on issues raised in the witness statement provided to the Commission by the EJA Chair, Genevieve Bolton, on 20 October 2022.

## KEY POINTS

**SETTING THE RECORD STRAIGHT: INCOME AVERAGING ≠ AUTOMATED DECISION-MAKING**

DHS were aware that the Robodebt scheme was producing inaccurate debt notices prior to ceasing Robodebt in 2019

- There is ongoing debate about when DHS became aware that the Robodebt scheme was likely to be unlawful. This may distract from the crucial point that DHS was aware that the automated OCI system was resulting in the raising and recovery of inaccurate or non-existent debts at scale.

- Audits and analysis of Centrelink internal review outcomes and Tier 1 Administrative Appeals Tribunal (AAT) decisions would have provided DHS with ample evidence of fundamental flaws in the Robodebt scheme.

- Despite it being clear that the Robodebt scheme was fundamentally flawed, DHS continued to implement it without making substantive changes. At the same time, systemic barriers to review of Robodebts were reinforced rather than addressed.

The Robodebt scheme was different in kind to other standard debt-raising processes that utilise Australian Taxation Office (ATO) data

- Unlike the process under the Robodebt scheme, debt-raising as a result of routine ATO-DHS data-matching generally involved, and still involves, active scrutiny by a human delegate.

- Social security income support payments are subject to fortnightly income tests. Accordingly, standard review and debt calculation procedures include establishing the person's fortnightly gross earnings from their employer(s) over the period(s) of the apparent discrepancy, and consideration of whether the person met their reporting obligations.

- These procedures mean that the onus of proof for raising a social security debt as a result of an ATO-DHS/Services Australia (SA) data match has appropriately rested with the DHS / SA delegate.

- By contrast, the OCI system's identification of apparent discrepancies between ATO and DHS earnings data for a person did not trigger review by a human delegate – it triggered the automated raising of debts and required Centrelink recipients to search for and provide their payslips.

- Where people with alleged Robodebts could not provide payslips, DHS/ SA refused to exercise its statutory powers to require provision of payment information by a third party.

- The Robodebt scheme thereby reversed the burden of proof, requiring people to disprove the allegation of a debt.

**WHY THE ADMINISTRATIVE REVIEW SYSTEM DIDN'T STOP ROBODEBT**

There were systemic obstructions impeding access to internal and external review of Robodebts

- Robodebt debt notices were inadequate – they provided no detail about how the debt was incurred and calculated. They failed to meet statutory requirements for debt notices under the *Social Security Act 1991* (Cth) (Social Security Act).

- Centrelink compliance staff responding to queries about Robodebts were generally unable to explain the basis of the Robodebt calculation and were often entirely unhelpful.

- Recipients of Robodebt notices were generally left in the dark regarding grounds for appealing the existence or amount of their debt and many did not attempt to challenge decisions – including on the grounds that the debt was caused by administrative error, or that there were grounds not to recover the debt in the 'special circumstances' of the case.

- EJA members had to resort to obtaining Freedom of Information requests to obtain specific documentation to establish whether income averaging had been used to calculate a client's debt. People with Robodebts should not have been forced to resort to Freedom of Information requests to find out basic information such as why they had a social security debt, or to access debt calculations.

- Authorised Review Officers (AROs) routinely denied Robodebt recipients the right to a review of the decision to raise and recover a Robodebt unless they provided payslips for the period(s) in question (which many Robodebt recipients were unable to do).

- Where the AAT Tier 1 made decisions to set aside Robodebts because they were not lawfully raised, it was the practice of SA not to appeal to the General Division. As a result, legitimate scrutiny of the Robodebt scheme was avoided, as was consideration of issues relating to automated decision-making that had wider systemic application.

- All of the above indicates that DHS/SA failed to meet the Commonwealth's obligation to act as a model litigant in the conduct of litigation.

The Robodebt cohort faced particular barriers to disputing Robodebts

- Social security recipients include extremely vulnerable cohorts, who faced barriers to understanding and disputing Robodebt notices.
- The reversal of the burden of proof for these cohorts was exacerbated by their vulnerability and a cause of distress and fear for many.
- Robodebt recipients were also exposed to increasingly coercive threats made by Centrelink debt recovery staff and by externally contracted debt collectors.

## THE CLASS ACTION PROVIDED ONLY LIMITED REDRESS FOR SOME ROBODEBT VICTIMS

- 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.
- The settlement solely provided interest foregone on Robodebt amounts repaid, with no payments in respect of pain and suffering.
- The settlement precluded redress for those who provided payslips or other evidence of actual earnings which gave DHS /SA the means to recalculate their debt. Therefore many of those who went to great lengths to comply were excluded from receiving redress.

## LOOKING FORWARD – WHAT NEEDS TO CHANGE TO AVOID ANOTHER ROBODEBT

- All administrative systems, including those that utilise automated-decision making (ADM) and artificial intelligence (AI), must accord with the rule of law, public law principles and human rights.
- These principles and human rights standards must be applied when considering the suitability of the use of ADM and AI in administrative systems, and inform the design and implementation of those systems.
- Social security income reporting compliance processes must be designed to take into account the people they affect, and the vulnerabilities and disadvantages of many people who receive income support.
- Services Australia must meet its obligation to bear the onus of proving that a person has been overpaid a social security payment.
- The basis on which any Centrelink debt has been calculated must be explained to the person affected and to any reviewer in a way that is clear, intelligible, and transparent.

- Income reporting compliance processes relying on automated systems must be rigorously tested and audited by an independent, expert agency prior to implementation, and routinely thereafter.

- Administrative systems that utilise ADM and AI must be implemented with appropriate human oversight and accompanied by training for staff that maintains the level of skill required to provide effective oversight. Centrelink officers should have the necessary skills to assist people who challenge or seek an explanation for debts, and to communicate with legal and welfare advocates acting on their behalf.

- All automated systems used by government in administering the law to determine individual legal interests, obligations and rights must be fully transparent and explained in a way that is comprehensible to the public.

- Efficient, fair, accessible and independent review of income reporting compliance decisions must be available. Barriers affecting access to internal and external review of compliance decisions should be identified and addressed.

- People affected by income reporting compliance decisions should have access to free and independent specialist social security legal assistance. Community legal centres must be adequately resourced.

- Services Australia must meet its model litigant commitments in AAT matters involving social security income reporting compliance matters.

- Existing debt recovery practices must be reformed, through the introduction of a time bar, the abolition of debt recovery fees, and placing obligations on third party debt collectors to act in accordance with public sector standards.

## RECOMMENDATIONS

1. **Establish a Social Security Commission, or empower the Economic Inclusion Advisory Committee, to undertake an examination of all areas of social security for compliance with public law principles and human rights standards, including regarding the use of AI / ADM. This work should be undertaken in consultation with technology experts.**

2. **Implement the recommendations and guidelines of the AHRC and Commonwealth Ombudsman 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.**

3. **Establish an independent agency (a newly created AI Safety Commissioner, the Ombudsman or similar) with the function of reviewing all automated decision-making systems proposed to be used by government, to ensure compliance with best practice guidelines. This review should be mandatory and legislated. The independent agency should also advise the proposed Social Security Commission or the Economic Inclusion Advisory Panel on the use of AI/ADM in social security systems.**

4. **Require consultation and co-design processes in the development of compliance systems that introduce ADM or other AI systems to ensure social security and family assistance income reporting compliance processes are designed with a practical understanding of the people they affect, and the vulnerabilities and disadvantages of many people who receive income support.**

5. **Ensure compliance of debt notices with legislative requirements, specifying the reason the debt was incurred, and how it was calculated, including a brief explanation of the circumstances that led to the debt being incurred, in a manner that can be understood by an individual without specialist skills or expertise.**

6. **Fully restore the onus of proof on Services Australia to establish a social security debt exists and consider amending the Social Security Act to ensure that this onus of proof is not reversed in the future.**

7. **Build genuine consultation processes and channels for feedback from civil society into Services Australia's operations, so that early warnings of systemic issues can be effectively raised and are acted upon by government.**

8. **Enact legislation requiring external testing and auditing of all automated systems in development for government, at an appropriate scale relative to the nature and implications of the proposed system. Testing and auditing should be mandatory and conducted prior to an automated system being rolled out by a body with appropriate expertise. Ongoing funding should be provided to enable testing and auditing on an ongoing basis.**

9.  Ensure that there is a 'human in the loop' where ADM is in use to make a decision affecting an individual's legal interests, entitlements, benefits, obligations or rights, to provide oversight and accountability.

10. Train, inform and empower Services Australia staff and whole of government to identify and correct individual and systemic errors.

11. Develop processes within Services Australia and all government departments to enable staff to raise and circulate systemic concerns to senior departmental officials.

12. Ensure all automated systems used by government in administering the law to determine individual legal interests, entitlements, benefits, obligations and rights are fully transparent and explained in a way that is comprehensible to the public. If this cannot be done, the system should not be used.

13. Ensure that internal (ARO) and external (currently, the AAT) review mechanisms are independent, accessible and inspire confidence in administrative review in terms of the quality and timeliness of decision-making.

14. Adequately resource independent oversight institutions, including the Ombudsman, Auditor-General and the replacement to the AAT, to perform their functions, including inquiring into the lawfulness of income compliance processes. Ensure Commonwealth departments and agencies address systemic concerns raised by oversight institutions promptly.

15. Publish select AAT1 (or equivalent) decisions.

16. Adequately resource community legal centres to assist clients with income support compliance challenges and undertake policy advocacy to raise systemic issues that arise.

17. Reform debt recovery practices by:
    • Providing a legislative time bar on compliance audit processes, of a maximum of six years after any payment was received.

- **Abolishing debt recovery fees by repealing s 1228B of the Social Security Act.**
- **Requiring debt collection agencies to comply with the same obligations as the Government to act fairly and reasonably in carrying out their functions and protect privacy.**
- **Developing principles for Services Australia debt recovery based on ACCC/ASIC guidelines.**

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