3 February 2023

GPO Box 546 Brisbane 4001
Robodebt Royal Commission

By electronic submission

Dear Commissioner,

Economic Justice Australia Submission to the Royal Commission into the Robodebt Scheme

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 welcomes the opportunity to make this submission to the Royal Commission into the Robodebt Scheme, in which we consolidate and build on issues raised in the witness statement provided to the Commission by the EJA Chair, Genevieve Bolton, on 20 October 2022.

EJA'S ADVOCACY ON ROBODEBT

EJA'S FEEDBACK TO GOVERNMENT REGARDING THE OCI / ROBODEBT SCHEME SINCE ITS INCEPTION

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).
- 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

[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/.
[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)

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.

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.

In this submission we provide information about the nature of the Robodebt scheme; highlight key lessons learned from the failures that occurred; and set out a number of forward-looking recommendations for reform of social security and administrative systems.

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**

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.

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.**

SETTING THE RECORD STRAIGHT: INCOME AVERAGING ≠ ADM

KEY POINTS

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.

CONFLATION OF ISSUES RE INCOME AVERAGING AND AUTOMATED DECISION-MAKING

Validity of use of income averaging for debt calculation

A focus of the Robodebt Royal Commission hearings has been to establish when DHS and DSS first obtained legal advice - internal and external - regarding the OCI system, particularly advice on whether there was any need for legislative amendments to enable averaging of ATO employment income data for the calculation and raising of social security[9] debts; and when the Government was advised of potential issues regarding the legal status of the debts raised. Witnesses have given varying accounts about what advice was sought by which Department, and the fate of the legal advice provided.

The report of the Royal Commission will clarify what occurred but it is already patently clear that it was not until the Federal Court's decision in *Deanna Amato v the Commonwealth of Australia*[10] [11] (Amato) that a decision was made to cease implementation of the OCI program.

In *Amato* the Federal Court considered the demand for payment of an alleged debt that was determined on the basis of the averaged ATO annual income data. The Court held that the demand was not lawfully made because the information before the decision-maker was not capable of satisfying them that the debt was owed, in accordance with the scope of the relevant sections of the *Social Security Act 1991* (Social Security Act) (ss 1222A(a) and 1223(1)).

The conclusion that the applicant owed a debt was not open on the material before the decision-maker because:

[9] In this submission we refer solely to social security debts, given that these are the subject of this inquiry. It should be noted that the same principles regarding onus of proof, debts notices, litigation practices, etc, also apply in respect of Family Assistance debts.

[10] Federal Court of Australia, VID611/2019, 11 November 2019.

[11] See also *Prygodicz* and *Commonwealth of Australia* (No 2) [2021] FCA 644; (2021) 173 ALD 277.

- *the assumption underlying the use of the averaged ATO income data was that [the applicant's] annual income was earned in equal fortnightly amounts*
- *there was no probative material before the decision-maker to support that assumption*
- *there was probative material, being [the applicant's] declared income, which indicated that she had not earned her income in equal fortnightly amounts.*

In the circumstances, there was no material before the decision-maker capable of supporting the conclusion that a debt had arisen under the Social Security Act and, therefore, the conclusion was irrational.[12]

We note that there has been some commentary in the media and from Departmental and Government witnesses appearing before the Royal Commission suggesting that until the Federal Court's decision in *Amato*, DHS had no reason to question the legal status of the OCI system. Some commentators have been at pains to point out that income averaging was not new, had been going on for years,[13] and given this, there was no reason to question the legality of raising and recovering debts based on averaging of earnings data provided by the ATO. It was also pointed out that ATO-DHS data matching was not new – debt raising prompted by ATO data matching had been in place since 1991.

Averaging of earnings for debt calculation is indeed not new; however, we understand that averaging has not generally been used for debt calculations in respect of PAYE employment income. EJA understands that averaging of earnings to arrive at a fortnightly rate has been used, quite legitimately, for calculation of earnings debts for other types of income - such as income from sole trading. Fluctuating casual earnings may at times be averaged for the purpose of debt calculation where evidence of factual fortnightly earnings cannot be obtained for a debt calculation, but in those cases averaging periods are identified by a human delegate, and not based on annual income as assessed by the ATO. Where averaging is applied it is with human oversight, taking into account various factors to which the OCI system algorithm had no regard.

[12] 'Legal Aid 'An in-depth look at our robo-debt test case' *Victoria Legal Aid*, (Web Page, 14 April 2020) <https://www.legalaid.vic.gov.au/depth-look-our-robo-debt-test-case>.

[13] See, eg, Paul Karp, 'Centrelink debts have been collected based on income-averaging for '20 to 30 years', minister reveals' *The Guardian* (Web Page, 7 July 2020) <https://www.theguardian.com/australia-news/2020/jul/07/centrelink-debts-have-been-collected-based-on-income-averaging-for-20-to-30-years-minister-reveals>.

The OCI system introduced the automation of the averaging for periods of apparent ATO-DHS earnings data discrepancies, on the basis of annual ATO income PAYE data, with:

- no human scrutiny of actual gross earnings paid by particular employers for specific periods,
- no examination of what the person declared to Centrelink,
- no examination of periods when the person was and was not in receipt of Centrelink payments, and
- no consideration of any administrative error causing the under-assessment of earnings by Centrelink.

It is clear that Robodebts continued to be raised and recovered despite DHS's awareness that the automated OCI System was resulting in the raising and recovery of inaccurate or non-existent debts.

It is also clear that despite some initial testing of the system prior to it being rolled out, there were no periodic quality assurance audits or formal evaluations of the OCI system. Former DHS staff involved in Robodebt-related compliance activities have outlined to the Royal Commission their frustration at the lack of oversight.

Audits and analysis of Centrelink internal review (ARO) outcomes and AAT Social Security and Child Support Division (AAT Tier 1) decisions, would also have provided DHS with ample evidence of fundamental flaws in the OCI system. Instead, DHS continued to implement the OCI system without making substantive changes, and, at the same time, systemic barriers to internal review of Robodebts were reinforced rather than addressed (as outlined below). As highlighted by witnesses appearing at the Royal Commission, AAT Tier 1 decisions to set aside Robodebts were not appealed to the General Division of the AAT – indicating a desire to avoid legal scrutiny and an awareness that such an appeal would likely fail.

Use of routine ATO data matching as a trigger for compliance reviews

It is important to appreciate that unlike the process under the OCI system, debt-raising as a result of routine ATO-DHS data-matching[14] generally involved, and still involves (under SA procedural guidelines), active scrutiny by a human delegate.

[14] The introduction of the Singe Touch Payroll (STP) means that the ATO's sharing of employment earnings data with Services Australia is now effectively immediate, through the tax year; ATO, 'Single Touch Payroll Phase 2', Business (Web Page, 22 December 2022) – see <https://www.ato.gov.au/Business/Single-Touch-Payroll/Expanding-Single-Touch-Payroll-(Phase-2)/> . In this submission, reference to ATO-DHS/SA data matching relates to the sharing of annual data on assessable income declared by individuals to the ATO – not to data shared via STP processes.

Unlike under the OCI System, if a routine ATO-DHS data match indicates a possible discrepancy between gross employment earnings assessed by Centrelink for a person and gross PAYE employment earnings assessed by the ATO, this triggers a review to establish whether the person has been overpaid social security entitlements for that tax year. This includes examination of the date of commencement, and the end-date of employment periods, for each employer over that tax year as well as checking dates the person was in receipt of an income support payment during the tax year. Compliance reviews regarding apparent discrepancies going back several years also necessarily take into account that income assessment and income reporting obligations for social security income support payments have changed over the years. These changes relate to legislative differences, and changing mechanisms for reporting employment income. Automated income averaging under the OCI system failed to take into account these variations.

If earnings fluctuations are unclear and the person is unable to provide details of their income over the period in question, the compliance unit obtains the information from the person's employer or financial institution—generally by issuing a notice under s 196 of the *Social Security Administration Act 1999* (which can be invoked to require that information be provided by a third party).

Most importantly in terms of the Federal Court's decision in *Amato*, the processes for debt calculation as a result of standard data matching generally[15] involves identifying the person's fortnightly gross earnings from each of their employers over the period(s) of the apparent discrepancy, and consideration 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. This was the practice for ATO-DHS data matching discrepancy compliance reviews until the introduction of the OCI system in 2015; and this has continued to be the practice since cessation of the OCI system in 2019.

These procedures mean that the onus of proof for the raising and recovery of a social security debt has appropriately rested with the Departmental delegate – in accordance with the Federal Court's finding in *Amato* that for a debt to be recoverable under social security law, a decision-maker acting on behalf of the Department, i.e. a human delegate, must be satisfied that there is sufficient proof of a debt under s 1223(1) of the Social Security Act before a debt notice is issued.

[15] In the absence of information regarding fortnightly gross earnings, debt calculation can at times involve averaging pr apportionment of gross earnings over defined periods – see Commonwealth Ombudsman Office project team, *Lessons learnt about digital transformation and public administration: Centrelink's online compliance intervention*, 3 <https://www.ombudsman.gov.au/__data/assets/pdf_file/0024/48813/AIAL-OCI-Speech-and-Paper.pdf>.

Automated debt raising under the OCI system

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 calculation and raising of a debt. Unless the person was able to produce evidence to dispute the debt, a notice was issued requiring that the person repay that amount.

As witnesses have outlined to the Royal Commission, the flawed OCI algorithm could produce inaccurate overpayment amounts, at times assessing gross earnings as if they had been earned at a consistent fortnightly rate during the tax year, rather than applying the precise amount of gross earnings in respect of each fortnight in which the income was actually earned. The result was that Robodebts at times covered periods that the person had no earnings whatsoever. In some cases OCI system averaging of ATO data produced debt calculations that took into account employment earnings for periods during which the person was not claiming a social security payment.

Reversal of the onus of proof

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, such that people were required to disprove what was essentially an allegation of existence of a debt; and that the Kafkaesque system was such that people seeking to disprove a Robodebt were faced with insurmountable barriers to providing proof and challenging the debt – the larger the debt, and the further back in time the period under review was, the greater the challenges.

Through the OCI process, where the system identified an apparent discrepancy between earnings declared to the ATO, and earnings assessed by Centrelink for a particular tax year or multiple tax years, the system automatically sent a letter to the person that alerted them to the discrepancy. The letter invited the person to go online to confirm or to update the information via the OCI online portal by a certain date. There was also, subsequently, a reminder letter.

As noted above there were some improvements made to the online OCI interface between 2017-2019[16] but these changes in no way addressed the reversal of the onus of proof. EJA member centres report that many of the letters inviting people to check the OCI earnings information online were misunderstood or disregarded by recipients, either due to confusing

[16] Tapani Rinta-Kahila et al, 'Algorithmic decision-making and system destructiveness: A case of automatic debt recovery' *European Journal of Information Systems* (2021) 31(3) 313.

wording, or because they had no way of accessing the online portal – or they accessed the portal but did not understand its content, or did not have any documentation to dispute the information presented. This total lack of accessibility was especially problematic in light of the vulnerabilities experienced by the social security cohort. Our members note that many social security recipients are entirely computer illiterate and have struggled greatly with the use of digital platforms to simply access payments and report on their earnings, let alone disproving debts.

As has been made clear in evidence to the Royal Commission, a significant percentage of Robodebt notice recipients ignored the request to access the portal and/or contact Centrelink regarding the apparent discrepancy between ATO and Centrelink earnings data. As highlighted by witnesses appearing at the Royal Commission, many of these letters were not received – often because people were no longer in receipt of Centrelink payments and they had changed address. In other cases, people ignored them simply because they were confused, overwhelmed and distressed by the allegation. In many cases people were unaware that a debt had been raised until they were contacted by a debt collector. We are also unaware of any steps taken to ensure that individual's credit history and financial record were not adversely impacted by non-repayment of inaccurate Robodebts.

In EJA member centres' experience, and as compellingly outlined by witnesses giving evidence to the Royal Commission, many recipients of Robodebt notices knew that they either had no debt or that the debt raised was excessive, and approached Centrelink to point out that a mistake had been made. As has been outlined by witnesses, many people trying to dispute Robodebts (either in response to the initial letter or later), were told by Centrelink teleservice and compliance officers that the computer calculation 'would be correct'. In some cases, even where the person asserted that the debt covered periods where they had no earnings, they were advised that to dispute the debt they would need to provide pay slips covering the entire period of the debt.

This task of gathering payslips was onerous if not impossible for debts covering long periods, sometimes going back several years, especially for people with intermittent casual earnings from different employers. It is not common for people to retain payslips for years, and for those who had retained them or were able to contact and persuade past employers to provide records of fortnightly gross earnings paid, uploading these records was challenging, even for people with the requisite technology skills – often prohibitively so.

This reversal of the burden of proof from DHS to the alleged debtor is especially problematic given Centrelink's broad debt recovery powers – including garnishee powers that allow

Centrelink to recover debts from a person's tax refund, wages, or via withholdings from Centrelink payments, and through imposing recovery fees. Given the known inaccuracies of the OCI/Robodebt Scheme from early in its implementation, individuals should not have been forced to bear the burden of disproving a Robodebt to avoid having their payments garnisheed, or to have a garnishee lifted.

WHY THE ADMINISTRATIVE REVIEW SYSTEM DIDN'T STOP ROBODEBT

KEY POINTS

<u>There were systemic obstructions impeding access to internal and external review of Robodebts</u>

- 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 (FOI) 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 FOI 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.

<u>The Robodebt cohort faced particular barriers to disputing Robodebts</u>

- 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.

SYSTEMIC OBSTRUCTIONS IMPEDING ACCESS TO INTERNAL REVIEW OF ROBODEBTS

Inadequate debt notices

Robodebt notices advising of the decision to raise a debt and requiring repayment, provided no detail of how the debt was incurred or how the automated OCI system averaged gross earnings to calculate the debt. This means that the notices failed to satisfy the requirement under s 1229(1) of the Social Security Act which states that a notice of a decision made under the Social Security Act must specify 'the reason the debt was incurred, including a brief explanation of the circumstances that led to the debt being incurred' as well as the following:

- the date on which it was issued
- the period to which the debt relates
- the outstanding amount of the debt at the date of the notice
- the day on which the outstanding amount is due and payable
- the effect of sections 1229A and 1229B (related to the charging of interest)
- that a range of options is available for repayment of the debt
- the contact details for inquiries concerning the debt.

As has been outlined by several Royal Commission witnesses, Robodebt notices also initially failed to provide a contact phone number for people seeking such information. Instead the notices focused on encouraging contact to initiate repayment of the debt and pointing out the consequences of failing to initiate repayment. The notices provided only basic information on

appeal rights, with no indication that social security debts may be waived if solely caused by administrative error and received in good faith, or in the 'special circumstances' of the case.[17]

In the experience of EJA member centres and their clients, Centrelink compliance staff responding to queries about Robodebts were generally unable to explain the basis of the Robodebt calculation. It is extremely difficult to challenge a decision where the reasons for a decision are apparently not available even to the responsible decision-maker. DHS frontline staff generally urged repayment, and referred individuals to MyGov for further information - however, myGov contained minimal additional detail.

This lack of information resulted in EJA member centre advocates needing to request documentation of the Robodebt calculations under FOI, merely to identify the cause of their client's social security debt, check the period of the debt, establish whether the fortnightly gross earnings data used for its calculation was accurate, and consider whether any portion of the debt was attributable to administrative error.

EJA member centres report that when clients with Robodebts contacted Centrelink to query their debt, or seek a formal internal review by a DHS Authorised Review Officer (ARO), they were routinely denied the right to review unless they provided payslips for the period(s) in question.

This was also a common experience of EJA member centre solicitors and caseworkers when they contacted Centrelink to seek further information regarding the grounds for raising the debt and the calculation of the overpayment. Centrelink was generally unable to refer advocates to an officer who could provide any meaningful information as to how the debt was calculated and whether the person's fortnightly earnings declarations had been examined. Even where legal advocates contacted Centrelink for information to advise their client on potential grounds to dispute the debt amount, or seek waiver, they were generally referred to officers who lacked policy and procedural knowledge about the OCI system, and how it applied to the client. Requests that Centrelink use its information gathering powers to require that the employers provide the information were refused.

This meant that there were multiple obstructions impeding access to internal review of Robodebts which compounded the reversal of the onus of proof. EJA members' observation is that internal processes relating to the OCI System effectively ensured that recipients of Robodebt notices were left in the dark regarding grounds for appealing the existence or amount of their debt.

[17] *Social Security Act 1991* (Cth) ss 1237A, 1237AAD, 1236.

Vulnerable cohorts less likely to dispute Robodebts

Social Security recipients include extremely vulnerable cohorts, which intersect, including:

- people living in poverty
- people who are homeless
- people with psycho-social disability, including clinical depression and chronic anxiety
- people with cognitive impairment
- frail elderly people
- single parents
- people with chronic health conditions
- First Nations people from remote communities
- refugees
- recently arrived migrants with limited English and limited understanding of Australia's legal system
- victim/survivors of family and domestic violence
- carers.

People among these intersecting cohorts are known to have disproportionately high rates of social security debt, and are known to face systemic barriers to both internal and external review of decisions to raise and recover debts. They also often require accessibility measures to ensure they understand how the system operates and the nature of their obligations.

The ultimate unfairness of the Robodebt scheme and its reversal of the onus of proof is the impact on vulnerable people who were unable to access the online system and potentially avert the raising of a Robodebt, and who were then denied the right to appeal, or frightened of the repercussions of appealing – these fears being apparently borne out when they were exposed to increasingly coercive threats made by Centrelink debt recovery staff and external debt recovery contractors. As has been outlined at Royal Commission hearings, these threats included being barred from leaving Australia unless repayments were made. The fact that DHS allowed or even, it seems, encouraged such tactics on the part of contracted debt collection agencies, represented a breach of the Department's duty of care to the vulnerable cohorts it serves.

ARO Review Issues

Section 129(1) of the *Social Security (Administration) Act* provides that a person affected by a decision can request a review of that decision, with no requirement that they provide evidence to support their grounds for seeking review.

As discussed, AROs routinely required proof of income prior to reviewing a person's Robodebt. EJA is unaware of any Departmental instructions to Centrelink AROs that Robodebts not be reviewed unless proof of their income was provided. The Royal Commission may be able to establish whether or not such an instruction was issued but we note that in our members' experience, refusal by an ARO to undertake a duly requested review of a debt (or of any decision) is highly unusual.

Failing to inform a person of the reasons for a decision fundamentally undermines their access to review rights. Robodebt notices did not provide sufficient information to enable people to obtain advice about the decision and/or to make an informed decision about whether to request a review. When individuals called Centrelink to seek a debt explanation or review, they were generally triaged straight to the debt recovery section. In EJA members' experience, clients would 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'.

The intrinsic problem is that even in the rare cases where a person with a Robodebt was referred to a Centrelink Subject Matter Expert with understanding of the complex and differing income tests applying to Newstart Allowance/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 was generally unable to provide an explanation of how the person's Robodebt was calculated. This is for the same reason that EJA member centres needed 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 by the OCI system requires scrutiny of complex online records.

In EJA members' experience, many people who sought assistance in understanding and potentially requesting ARO review of a Robodebt were very frustrated, angry and/or distressed. This further complicated advocates' efforts to tease out grounds for review of the existence and amount of the debt, and whether there may be merits to seeking a waiver of recovery of the debt on the grounds of administrative error,[18] or in the 'special circumstances' of the case.[19]

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 the calculation was made. It is contrary to principles of open and transparent

[18] *Social Security Act 1991* (Cth) s 1237A.
[19] *Social Security Act 1991* (Cth) s 1237AAD.

government that a person must undergo an FOI process to obtain reasons for a decision that directly affects them.

THE FOI PROCESS

The volume of FOI requests in respect of Social Security debts that member centres had to make, and the subsequent effort to review the documents received, was very time-consuming and required a high level of expertise in Centrelink debt matters. The result of the lack of information regarding the calculation of Robodebts, meant that if some or all payslips had been provided, and the client was still questioning the debt, the advocate had to request all the documents related to the debt 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.

FOI releases for these all-encompassing requests, once met (obtaining all relevant documents for Robodebt cases could take repeated requests, with delays in release and multiple requests for specific documents), could consist of swathes of documents which were unfathomable for anyone other than a solicitor or advocate highly experienced in perusing social security debt FOI releases. It also required the manual checking of calculations. This was extremely time consuming and resource-intensive.

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 these constraints, and the barriers to self-representation in both internal and external appeals, it is unsurprising that relatively few Robodebt matters were appealed to the AAT.

EJA members advise that where they were able to obtain and scrutinise relevant records under FOI, they had significant successes in internal reviews. For example, an EJA member obtained an ADEX Debt Schedule Report [20]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. If not for that Schedule and the centre's legal advocacy, the client would have had no idea of grounds for appeal and would likely have been prevented from seeking ARO review unless they were able to provide payslips.

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

[20] A spreadsheet showing income declared, Social Security payments, and amounts taken into account for the debt calculation.

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 the AAT to provide Centrelink records 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.

AAT APPEALS

Whether DHS / SA acted as a model litigant

The model litigant principles in Appendix B of the *Legal Services Directions 2017* (Cth)[21] 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.

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 the Respondent in Robodebt AAT appeals:

- The lack of information in Robodebt notices, especially the absence of any proper explanation regarding the cause and calculation of the debt. This effectively prevented people from seeking ARO review of Robodebts because they were unable to articulate the grounds for their appeal, which in turn meant they had no right of appeal to the AAT.
- 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.
- Some AROs' similar advice to prospective appellants that their appeal would not be considered unless they provided evidence of fortnightly earnings.
- DHS/SA's refusal to exercise its powers under Part 5 of the *Social Security (Administration) Act 1999* to require provision of information by a third party.
- The need to obtain Departmental records under FOI to identify any grounds for appealing a Robodebt, and the complexity associated with understanding and interpreting the documents obtained.

[21] *Legal Services Directions 2017* (Cth).

Lack of Departmental appeals to the AAT General Division

- DHS/SA's practice was not to appeal decisions made by the Social Services & Child Support Division of the AAT (Tier 1) to set aside Robodebts on grounds of legality to the General Division. This meant that legitimate scrutiny and potential rulings on Robodebts was avoided, as was consideration of issues relating to automated decision-making that may have wider application.

THE CLASS ACTION PROVIDED ONLY LIMITED REDRESS FOR SOME ROBODEBT VICTIMS

KEY POINTS

- 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.

Redress – the Class Action

The class action in the Federal Court provided limited redress for class action members. While the class action prompted the former Government to refund amounts recovered in respect of Robodebts, the class action settlement solely provided interest foregone on Robodebt amounts repaid, with no payments in respect of pain and suffering. Many victims of Robodebt were disappointed to find that they received a settlement amount of only a few cents.

Apart from class action members, there are also 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 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.

Before the Robodebt scheme was suspended, there remained 124,000 people who had been told their debts were being reviewed, while another 73,000 were not alerted that theirs was

under review. The reviews were suspended once the scheme was put on hold in 2019. We welcomed the announcement on 12 October 2022 that the Minister for Social Services, Minister Rishworth, that there would be no further action in respect of new debt calculation for people whose Robodebt had been cancelled.[22] However, people who have already had new debts raised since the scheme was put on hold in 2019 will not benefit from this redress, which will likely compound their distress at being locked out of the class action.

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.

LOOKING FORWARD – WHAT NEEDS TO CHANGE TO AVOID ANOTHER ROBODEBT (COMPLIANCE PROCESSES AND ADM)

KEY POINTS

- 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.

[22] Matthew Doran, 'Robodebt cases dumped and debts wiped amid royal commission into controversial scheme', ABC News (online, 11 October 2022) https://www.abc.net.au/news/2022-10-11/robodebt-reviews-wiped-government-clears-final-remnants-scheme/101523702.

- 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.

OVERARCHING PRINCIPLES: COMPLIANCE SYSTEMS, INCLUDING AUTOMATED SYSTEMS, MUST ACCORD WITH THE RULE OF LAW, PUBLIC LAW PRINCIPLES AND HUMAN RIGHTS

Government must comply with the rule of law, public law principles and human rights standards when developing policy and making administrative decisions. These standards apply regardless of how a system operates or the kind of technology that is used in the decision-making process. Automated decision-making (ADM) and artificial intelligence (AI) informed decision-making should not be used as a shortcut around fulfilling these standards. Social security compliance systems must be lawful, fair, transparent and equitable. They must not arbitrarily interfere with a person's human rights, and they must be non-discriminatory.

The Australian Government has legislative and human rights obligations to provide financial assistance to individuals that are in need, through the provision of social security. The social security system must be administered fairly and effectively to realise these obligations. The Social Security Act sets out specific requirements for lawful decision-making in this context.

Rule of law and public law principles further provide that decision-making affecting a person's rights and legal interests must be procedurally fair. The basis for administrative decision-making must be established in law, and must be accessible and foreseeable to individuals. A person affected by a decision should understand why the decision was made, and there should be pathways for review of these decisions that are accessible to them. Access to justice standards further require that adequate support is provided to individuals, including vulnerable individuals, to exercise their right of review and to challenge decisions.

Australia must also comply with human rights obligations, including those in the International Covenant on Economic, Social and Cultural Rights (ICESCR).[23] As noted by the AHRC,[24] the use of AI and ADM in delivering government services can engage human rights including the right to social security and an adequate standard of living,[25] the right to non-discrimination and equality,[26] and the right to an effective remedy.[27] As a party to ICESCR, Australia is obligated provide a social security system, within the government's maximum available resources.[28] The right to social security also imposes an obligation on governments that any 'withdrawal, reduction or suspension' of social security benefits should be circumscribed and 'based on grounds that are reasonable, subject to due process, and provided for in national law'.[29] The right to social security is integral to the protection of human dignity.[30]

Human rights law also requires the consideration of the implications of policies and administrative decision making for vulnerable populations, including those experiencing

[23] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (*ICESCR).*
[24] Australian Human Rights Commission (AHRC), *Human Rights and Technology* (Report, 2021) 59 https://tech.humanrights.gov.au/downloads.
[25] *ICESCR* art 9, art 11.
[26] Australian Human Rights Commission, Human Rights and Technology (Report, 2021) 59 citing Tendayi Achiume, *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, UN Doc A/HRC/44/57 (18 June 2020) [41]-[43].
[27] *International Covenant on Civil and Political Rights, opened for signature 16 December 1966,* 999 UNTS 171 (entered into force 23 March 1976) art 2(3).
[28] Committee on Economic, Social and Cultural Rights, *General Comment No 19: The Right to Social Security (Art. 9*), 39th sess, UN Doc E/C.12/GC/19 (4 February 2008, adopted 3 November 2007) [4].
[29] Committee on Economic, Social and Cultural Rights, *General Comment No 19: The Right to Social Security (Art. 9*), 39th sess, UN Doc E/C.12/GC/19 (4 February 2008, adopted 3 November 2007) [24].
[30] Phillip Alston, 'Report by of the Special Rapporteur on extreme poverty and human rights' (2019), UN Doc A/74/493 (1 October 2019) [50].

marginalisation and discrimination. Particular steps must be taken to meet the needs of certain groups, such as accessibility measures for people with disability.[31]

The use of ADM and AI in the social security context has particular human rights implications, and it is important to guard against the erosion of the rights of vulnerable people, who are the primary cohort affected by these systems. In this regard, the Special Rapporteur on Extreme Poverty, Phillip Alston, has observed that:

> *The processes of digitization and the increasing role played by automated decision-making through the use of algorithms and artificial intelligence have, in at least some respects, facilitated a move towards a bureaucratic process and away from one premised on the right to social security or the right to social protection. Rather than the ideal of the State being accountable to the citizen to ensure that the latter is able to enjoy an adequate standard of living, the burden of accountability has in many ways been reversed.*[32]

EJA has long supported ACOSS's call for a Social Security Commission to advise the Parliament on payment rates and other settings. EJA welcomes the establishment of the Economic Inclusion Advisory Committee. It suggests that this Committee, or a distinct Social Security Commission, could undertake a broader role of examining all areas of social security for compliance with public law principles and human rights standards, including with a focus on the use of AI / ADM in these systems. This body could engage with technology experts in the course of this process.

Recommendation 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.**

[31] Australia has obligations to this effect under the *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).
[32] Phillip Alston, 'Report by of the Special Rapporteur on extreme poverty and human rights' (2019), UN Doc A/74/493 (1 October 2019) [50].

APPLYING THE ABOVE PRINCIPLES TO THE USE OF AUTOMATED DECISION-MAKING IN ADMINISTRATIVE SYSTEMS.

ADM and AI are simply tools that can be used for many different kinds of purposes, including to improve the efficiency and accessibility of government services.

However, ADM and AI must be targeted for use in the areas where it is well suited. In addition, a desire to automate should not drive the design of government schemes and programs at the expense of fairness, equity and human rights standards.

ADM and AI tools are inherently rigid, and are unsuited to making discretionary decisions or taking into account individual circumstances. The Parliamentary Joint Committee on Human Rights suggested that laws enabling automated administrative decisions could disproportionately affect human rights where the decision involves the exercise of discretion.[33]

In its 2019 Guidance on ADM, the Commonwealth Ombudsman outlined that automating a part of a government decision-making process will not be suitable where it would:

- *contravene administrative law requirements of legality, fairness, rationality and transparency*
- *contravene privacy, data security or other legal requirements (including human rights obligations)*
- *compromise accuracy in decision making, or*
- *significantly undermine public confidence in government administration.*[34]

To this list we would add that ADM will not be suitable where there is a high level of vulnerability in the affected cohort, and a risk of harm to that cohort through the use of automation. The experience of our member centres indicates that this consideration is of utmost importance. As Phillip Alston observes,

> *the introduction of various new technologies that eliminate the human provider can enhance efficiency and provide other advantages, but might not necessarily be satisfactory for individuals who are in situations of particular vulnerability…The*

[33] See Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report 7 of 2018* (14 August 2018) 12; Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report 11 of 2018* (16 October 2018) 78, as discussed in Australian Human Rights Commission, Human Rights and Technology (Report, 2021) 81.
[34] Commonwealth Ombudsman, *Automated Decision-making Better Practice Guide* (2019) 8.

> *assumption that there is always a technological fix for any problem is highly likely to be misplaced in various aspects of a humane and effective system of social protection.*[35]

This point is discussed further below.

The Robodebt scheme arguably failed on all of these criteria – highlighting the importance of ensuring that these standards are considered *prior* to the adoption of any form of ADM or AI in administrative system.

The risks of using ADM are exacerbated when there is no human oversight of the decisions (or 'human in the loop') to mitigate error and take into account outliers or individual circumstances.

Unfortunately, Phillip Alston has observed that

> *the reality is that such decisions [to automate] are all too often taken in the absence of sophisticated cost-benefit analyses. And when such analyses are undertaken, they consist of financial balance sheets that ignore what might be termed the fiscally invisible intangibles that underpin human rights. Values such as dignity, choice, self-respect, autonomy, self-determination, privacy, and a range of other factors are all traded off without being factored into the overall equation, all but guaranteeing that insufficient steps will be taken to ensure their role in the new digital systems.*[36]

It is essential that careful consideration and planning processes are undertaken before automated systems are deemed suitable and adopted by government in administrative decision-making. Rule of law, public law principles and human rights must be at the *forefront* of decisions to adopt AI and ADM.

Where ADM and AI tools are judged suitable for use, they must then be carefully designed to be lawful, fair, transparent, equitable and non-discriminatory. This must include early consideration of rights impacts, consultation, testing, as well as human oversight, reviews and audits in the implementation phase – to mitigate risks and avoid unforeseen issues. As the AHRC emphasises, this is necessary to ensure public trust in government administration.[37]

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[35] Phillip Alston, 'Report of the Special Rapporteur on extreme poverty and human rights', UN Doc A/74/493 (1 October 2019) [50].
[36] OHCHR 'Report by Special Rapporteur Phillip Alston on extreme poverty and human rights' (2019) UN Doc A/74/493 [63].
[37] Australian Human Rights Commission, *Human Rights and Technology* (Final Report, March 2021) 28. See also AHRC, *The Essential Report–Human Rights Commission* (29 July 2020).

Additionally, where ADM and AI systems are adopted for administrative decision-making, it is essential that they have a basis in, and comply with, the law. In its 2019 Guidance the Commonwealth Ombudsman advised that:

> *It is possible for an automated system to make decisions by using pre-programmed decision-making criteria without the use of human judgement at the point of decision.* ***The authority for making such decisions will only be beyond doubt if specifically enabled by legislation****.*[38]

The experience of our member CLCs points to 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 rights and interests. ADM and AI systems should not be viewed purely as a tool to aid administration. They can in fact have a transformative impact on government systems with significant legal and policy repercussions. A legislative basis is necessary not only to ensure that there is clear authority for making decisions, but also to ensure that the system meets legality standards – namely that the basis for decision-making is transparent, accessible and foreseeable to affected individuals.

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.[39]

The result is that information about how rental benefits are calculated is not available under the *Government Information (Public Access) Act 2009* (NSW). We propose that similar ways of thinking about automated systems used as part of decision-making processes are evident at the Commonwealth level.[40]

We note that evidence to the Robodebt Royal Commission has focused significantly on the lawfulness of the Robodebt scheme. While this is important, legislative basis should never be the *sole* criteria to determine whether the use of AI and ADM is acceptable in a particular context – human rights implications and natural justice standards are equally critical. As

[38] Commonwealth Ombudsman, *Automated Decision-making Better Practice Guide* (2019) 9 (emphasis added).
[39] *O'Brien v Secretary, Department Communities and Justice* [2022] NSWCATAD 100, [89].
[40] 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.

noted by the AHRC, 'introducing legislation to enable AI to be used in a particular area of administrative decision making does not necessarily make it *desirable* to use AI, even where the legislation includes safeguards.'[41] Beyond legal compliance, it is worth aspiring to a higher ethical standard.

EJA strongly endorses all the recommendations of the AHRC in its Human Rights and Technology Report,[42] and best practice guidelines issued by the Commonwealth Ombudsman in 2019.[43]

Of the AHRC recommendations, EJA draws attention to the recommendation that would require the undertaking of a 'Human Rights Impact Assessments' before the use of AI/ADM in administrative decisions is adopted, as follows:

> The Australian Government should introduce legislation to require that a human rights impact assessment (HRIA) be undertaken before any department or agency uses an AI-informed decision-making system to make administrative decisions.
>
> An HRIA should include public consultation, focusing on those most likely to be affected. An HRIA should assess whether the proposed AI-informed decision-making system:
>
> a) complies with Australia's international human rights law obligations
> b) will involve automating any discretionary element of administrative decisions, including by reference to the Commonwealth Ombudsman's *Automated decision-making better practice guide* and other expert guidance
> c) provides for appropriate review of decisions by human decision makers
> d) is authorised and governed by legislation.

We understand that the Department of Employment and Workplace Relations is developing a digital protections framework for employment service programs. This is a useful step, and if executed properly, should improve data protection and transparency in that context. Ideally there should be overarching data protection and AI/ADM legislation that applies across all government services.

As will be discussed further below, best-practice standards must be accompanied by oversight and enforcement mechanisms, as well as accessible review processes for affected individuals. EJA supports the introduction of an independent agency to be given the function

[41] Australian Human Rights Commission, Human Rights and Technology (Report, 2021) 82.
[42] Australian Human Rights Commission, *Human Rights and Technology* (Final Report, March 2021).
[43] Commonwealth Ombudsman, *Automated Decision-Making Better Practice Guide* https://www.ombudsman.gov.au/publications/better-practice-guides/automated-decision-guide; AHRC Recommendation 22.

of reviewing all automated decision-making systems proposed to be used by government, to ensure compliance with best practice guidelines. It notes that such an agency could take into account specific considerations regarding vulnerability and the administration of social security by engaging with the Economic Inclusion Advisory Panel or a newly created Social Security Commission (as discussed above).[44]

Recommendation 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.**

Recommendation 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 Economic Inclusion Advisory Panel or the proposed Social Security Commission on the use of AI/ADM in social security systems.**

COMPLIANCE SYSTEMS MUST BE DESIGNED TO TAKE INTO ACCOUNT THE VULNERABILITY OF THE AFFECTED COHORT

The vulnerable cohort that makes up social security recipients should be a core consideration for DHS/SA across all of its operations, including systems that utilise AI and ADM. Income compliance processes must have regard to fairness at the population level as well as individual fairness. In the design of the process regard must be had to the group(s) affected by such measures, and the particular vulnerabilities of certain cohorts of social security recipients.

Additionally, debt recovery processes for social security recipients should not be harsher than compliance processes targeted at other groups (for example taxpayers, or companies that erroneously received JobKeeper Payments). Experimental and burdensome schemes such as Robodebt would likely not have been deemed acceptable had they been utilised in these

[44] Australian Council Of Social Services, 'ACOSS warmly welcomes the Economic Inclusion Advisory Panel' (Media Release, 27 November 2022) <https://www.acoss.org.au/media-releases/?media_release=acoss-warmly-welcomes-economic-inclusion-advisory-panel>.

contexts, affecting more powerful segments of the population, rather than the most vulnerable.[45]

Lack of consideration of the affected cohort

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. 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 averaging their annual income over 26 fortnights will not reflect the 'peaks and troughs' of the recipient's income throughout the year.*[46]

Consideration of the affected cohort and an earlier stage would have also pointed to the additional burdens that would be placed upon individuals. This includes the insurmountable barriers many faced to obtaining information or data (e.g., payslips or bank statements from several years previously) or as made clear by witnesses at the inquiry, a lack of capacity to provide the evidence digitally. Similarly, the burden of challenging a decision issued through the Robodebt scheme, relied on an individual having:

- a thorough understanding of the English language, or access to a translation service;[47]
- an understanding of government systems and processes (for example, seeking redress through the AAT);

[45] See e.g.Virginia Eubanks, *Automating Inequality: How High-Tech Tools Profile, Police and Punish the Poor* (St Martin's Press, 2018).

[46] Senate Community Affairs Committee, Parliament of Australia, *Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative (*Report, June 2017) [2.97] <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/SocialWelfareSystem/Report>.

[47] Senate Community Affairs Committee, Parliament of Australia, *Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative* (Report, June 2017) [3.49]-[3.51] <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/SocialWelfareSystem/Report> .

- access to technology;
- ability to use technology;[48]
- time to challenge the decision; and
- capability to challenge the decision.[49]

Proper consideration of the affected cohort would have indicated that many would not meet the above criteria that is required to challenge a decision made using an automated system.

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]

Co-design processes are a key means of accounting for the experiences of vulnerable populations. 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.[50] 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.[51]

EJA proposes that the following approaches to ADM and AI design, as outlined by the AHRC in relation to disability inclusion, should be considered when designing AI and ADM technologies with a significant human impact.[52]

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.

[48] Senate Community Affairs Committee, Parliament of Australia, *Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative* (Report, June 2017) [3.13] <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/SocialWelfareSystem/Report> .
[49] 'People were simply overwhelmed by the possibility of repaying thousands of dollars': Senate Community Affairs Committee, Parliament of Australia, *Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative* (Report, June 2017) [2.106].
[50] Commonwealth Ombudsman, *Centrelink's Automated Debt Raising and Recovery System* (Report, April 2017) 51.
[51] Senate Community Affairs Committee, Parliament of Australia, *Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative* (Report, June 2017) [3.92] <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/SocialWelfareSystem/Report>.
[52] Australian Human Rights Commission, *Human Rights and Technology* (Final Report, 2021) 263.

Accessible design aims for independent use, specifically by people with disability, and has internationally recognised standards considering a range of disabilities.

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.

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.

Safety by design aims to put user safety and rights at the centre of the design, development and release of online products and services.[53]

If there were a requirement for a Human Rights Impact Assessment as noted above, the process of making this assessment could help identify who the affected cohort is, and inform consultation and co-design approaches.

Appropriate resourcing must also be allocated to supporting users of all 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.

Recommendation 4:

- **Require consultation and co-design processes in the development of compliance systems that introduce automated-decision making 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.**

[53] Australian Human Rights Commission, Human Rights and Technology (Final Report, March 2021) 80-81

COMPLIANCE SYSTEMS MUST BE LAWFUL UNDER THE SOCIAL SECURITY ACT AND MEET PROCEDURAL FAIRNESS STANDARDS

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.[54] Those affected by Robodebts were denied both. As outlined above, 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.

Debt notices

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.[55]

Current SA notices regarding social security debts continue to include too little information, that would not provide expert caseworkers and lawyers, let alone vulnerable clients, with sufficient information to understand and challenge the basis of an alleged debt. 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 s 1229 of the Social Security Act (outlined above) 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.'[56] This standard applies regardless of whether the debt notices were generated through an automated system.

EJA members provide examples of social security debt notices from their clients that do not currently meet this statutory requirement. Debt notices (and the MyGov screens to which people are referred) merely state the amount a person was over-paid over a specific period, the amount that they were actually entitled to, and the difference that they owe. For example:

> *Information about your Family Tax Benefits Assessment for 2019-2020 financial year:*
>
> *You received $6500 based on your estimated family's income of $60,000. However, as your actual family's income was $80,000 you were only entitled to $5000. The excess amount of $1500 is a debt you owed us.*

[54] See Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th edn, 2017) 397.
[55] Australian Human Rights Commission, Human Rights and Technology (Final Report, March 2021) 80-81.
[56] A similar provision applies under the family assistance legislation

This is neither providing the person with the reason the debt was incurred, nor an explanation of the circumstances that led to it. See the **Appendix** for de-identified examples of debt letters received by EJA clients.

EJA members have observed that clients receiving debt notices are often confused and bewildered as they cannot understand why they have a debt. However, once the reason for the debt is clearly explained, clients are more likely to accept if a legal debt exists.

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 result in revised templates which continue to fail in meeting statutory requirements. For example, we have been informed by SA that the system is such that text for debt notices cannot include more detailed or more personalised information regarding the cause of the debt, such as reference to any administrative error; and that the standard text outlining appeal rights 'if you think the decision is wrong' cannot be adjusted to include reference to seeking debt waiver 'if you think the decision is unfair'. It appears that SA's increasing reliance on the automated generation of decision notices, including decisions to raise debts, is serving to ensure that a fundamental aspect the Robodebt scheme persists – inadequate debt notices.

EJA previously attended bi-annual meetings with SA's predecessor, DHS, where matters such as problems with debt letters could be addressed on a regular basis with senior managers responsible for the design and implementation of such programs. Biannual meeting with EJA were included in the deliverables for EJA in its grant funding agreement with DSS in recognition of the unique specialist social security legal expertise and experience that EJA members hold from their case work. Since being rolled into the CSAG process, EJA's ability to effectively engage with SA has been diminished.

<u>Onus of proof</u>

As discussed above, the Commonwealth must bear the burden of establishing that a person has been overpaid a social security payment under social security law.[57]

Recommendation 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.**

[57] 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.

Recommendation 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.**

Recommendation 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.**

SYSTEMS MUST BE RIGOROUSLY TESTED TO AVOID ERRORS AND INJUSTICES

Ensuring suitability of data sources

Any income reporting 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 Robodebt scheme resulted in an unacceptably high error rate.

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.[58] It is difficult to know exactly how high the error rate was,[59] as some calculations only reported those who appealed debts and SA refused to provide data in response to other requests.[60]

Data from DHS from the first 6 months of the scheme show that the error rate was around 26%.[61] 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

[58] 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.
[59] 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.
[60] See, eg, Services Australia, Answer to Question on Notice 62 from Senate Community Affairs References Committee, *Centrelink's Compliance Program* (24 February 2020).
[61] ACT Council of Social Service Inc, 'Numbers confirm robo-debt is epic administration fail' (Media Release, ACT COSS, 8 April 2017)<https://www.actcoss.org.au/news-events/media-release/media-release-numbers-confirm-robo>.

auditing, including feedback from EJA's member organisations, would have identified this issue.

All ADM and AI systems must undergo testing and auditing at an appropriate scale to enable identification of system failures.

The Robodebt scheme resulted in significant harms and inaccuracies 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.

As discussed above, EJA strongly endorses the best practice guidelines issued by the Commonwealth Ombudsman in 2019.[62] 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. As evidence to the inquiry has made clear, government agencies and departments cannot be relied upon to always comply with best practice principles. It is clear that stronger oversight and enforcement mechanisms are required, in addition to best practice guidelines.

In consultation with EJA and other civil society organisations working with affected communities and individuals, EJA's recommendation is that legislation be enacted requiring external testing and audit of all automated systems in development for government / 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

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

would require a significant increase in funding in order to hire appropriately qualified staff.

d) Ongoing, to ensure that automated systems continue to work as intended and remain fit for purpose.

The testing of AI/ADM systems should also be conducted at an appropriate scale, in light of the nature and implications of the system, and should include thresholds to identify when a system has 'failed' the testing process.

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, rights 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 rate or benefit calculator, even if the human is ultimately responsible for making the decision, the calculator should be subject to rigorous testing and auditing.

Recommendation 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.**

ADM AND AI SYSTEMS MUST BE IMPLEMENTED WITH APPROPRIATE HUMAN OVERSIGHT AND ACCOMPANIED BY TRAINING FOR STAFF

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'.[63] The Ombudsman's best practice guidelines also emphasise the importance of human oversight.

[63] Australian Human Rights Commission, Submission to Senate Community Affairs Committee, Parliament of Australia, *Centrelink's compliance program* (19 September 2019) <https://humanrights.gov.au/our-work/legal/submission/centrelinks-compliance-program.

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. The EU General Data Protection Regulation prevents individuals, with some exceptions, from being subjected to a decision 'based *solely* on automated processing, including profiling' where that decision produces a legal or similarly significant effect.[64] To be considered 'solely automated there must be *no* human involvement in the decision-making process'.[65] EJA therefore considers that automated-decision making that affects a person's rights, interests, obligations or entitlements should have a 'human in the loop' to ensure accountability and oversight over decision-making.

However, including a 'human in the loop' is not, in itself, sufficient to protect people from harm. In the case of Robodebt, the Commonwealth Ombudsman found that:

- DHS did not adequately prepare its call centre and local service centre staff to respond to OCI enquiries;
- DHS did not devote sufficient resources to telephone services;
- DHS' communication and training strategy for staff was not adequate; and
- DHS staff were, in some cases, provided confusing and inconsistent information to customers, and/or lacked sufficient knowledge to fully advise customers.[66]

Justice Melissa Perry and others have also noted the 'human tendency to trust the reliability of computers'.[67] 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.[68] Over 700 sub-postmasters and post office staff were prosecuted, relying on an accounting system with known 'bugs, errors and defects'.[69] People lost their jobs, businesses, and in some cases their freedom.

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

[64] *General Data Protection Regulation* (European Union) art 22 (emphasis added).
[65] UK Information Commissioner's Office, *Guide to the General Data Protection Regulation (GDPR)* (January 2021) 154 (emphasis added).
[66] Commonwealth Ombudsman, *Centrelink's Automated Debt Raising and Recovery System* (Report, April 2017) 18-19.
[67] 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.
[68] See generally https://www.postofficehorizoninquiry.org.uk/
[69] *Bates v the Post Office Ltd (No 6: Horizon Issues)* [2019] EWHC 3408.

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. Staff would also have been able to better communicate with individuals and their legal and welfare advocates.

Digital literacy and over-reliance on computer systems by Centrelink

One of our member centres has provided an example of an instance where a computer illiterate client faced hardships due to the over-reliance on digital systems by Centrelink:

A First Nations mother was living in her car as she was without income for about two months. When she sought Fremantle Community Legal Centre's (FCLC) assistance, her advocate asked Centrelink to restore her payment. However, Centrelink replied that the client had cancelled her own payment and they could not restore her payment. The advocate talked to the client again and asked her if it was true that she cancelled her payment. The client said 'no way I cancelled my payment myself when I depend on this to live'.

The advocate approached Centrelink again to find out from technical support what happened to her payment and why it was cancelled, and to seek for the payment to be restored. The advocate communicated that the client was experiencing extreme hardship and homelessness. After a few days Centrelink replied that it was the client's fault as she cancelled her payment.

The client again insisted that she never has done this - she agreed to re-apply as she was desperately needing income support. Although the client is managing now it is still unclear what caused the cancellation. The client did indicate that she had difficulties with navigating the system and has problems with her mobile phone.

If DHS/SA staff had had the tools to identify and communicate concerns about systemic errors within their Department, this too would have improved the overall design of this decision-making system. Noting the failure of senior officials to take into account the concerns of Centrelink workers in the context of Robodebt, there should be processes developed to enable staff to raise and circulate concerns internally to departmental officials. Additionally, better whistle-blower protections may be necessary to prevent reprisals from making external representations about wrongdoing. In this regard EJA notes the recommendations for reforms in *Protecting Australia's Whistleblowers: The Federal Roadmap*, a report by Transparency

International Australia, the Human Rights Law Centre and Griffith University's Centre for Governance & Public Policy.[70]

Recommendation 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.**

Recommendation 10

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

Recommendation 11

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

AUTOMATED SYSTEMS MUST BE TRANSPARENT AND EXPLAINABLE

Both the Ombudsman's guidelines and AHRC, along with reports and guidelines from other internationally equivalent organisations,[71] emphasise the importance of transparency and accountability in government use of automated systems. This is necessary both for public trust, and to enable oversight mechanisms to work.[72] 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.

Transparency is a well-known and well-explored challenge of automated systems generally.[73] 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'.

[70]Transparency International Australia, the Human Rights Law Centre and Griffith University's Centre for Governance & Public Policy, *Protecting Australia's Whistleblowers: The Federal Roadmap* <https://www.hrlc.org.au/reports/protecting-aus-whistleblowers-federal-roadmap>.

[71] Eg OECD, *AI Principles*: https://oecd.ai/en/ai-principles.

[72] See Janina Boughey, 'The Culture of Justification in Administrative Law: Rationales and Consequences' (2021) 54(2) *University of British Columbia Law Review* 403.

[73] 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.

Even where systems are capable of providing transparent explanations, the form of that explanation may be different from the explanation demanded by public law.

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.[74] 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*.[75]

The use of contractors adds another layer to this transparency deficit.[76] As Boughey has explained, governments have refused to release information about the operation of automated systems under FOI laws, relying on commercial-in-confidence/trade secrets exemptions.[77] 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.

We recommend that all automated systems used by government in administering the law to determine individual legal interests, entitlements, benefits, obligations and rights 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.

Recommendation 12

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

[74] *Wingfoot Australia Partners v Kocak* (2013) 252 CLR 480, 498–501 [44]–[55].
[75] 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)
[76] 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.
[77] For a recent example see *O'Brien v Secretary, Department Communities and Justice* [2022] NSWCATAD 100.

THERE MUST BE EFFICIENT, FAIR, ACCESSIBLE AND INDEPENDENT PATHWAYS FOR REVIEW OF COMPLIANCE DECISIONS

Internal (ARO) and external (the AAT's successor) review mechanisms must be independent, accessible and efficient, to ensure the fairness of income compliance processes as a whole (see discussion above). We note that there have been serious concerns expressed about the accessibility and independence of the AAT[78] and that the Government recently announced that the AAT will be abolished and replaced with a new federal administrative review body.[79]

Any income compliance process must have appropriate, accessible and adequate oversight, including pathways 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, their advocate and the reviewer (the AAT).[80] Data must be presented in a way that is comprehensible to people without any specialist skills or expertise[81] (see comments above re FOI).

Independent oversight institutions, including the Ombudsman, Auditor-General and the AAT's successor, must be adequately resourced to perform their functions efficiently and effectively, including inquiring into the lawfulness of income compliance processes.[82] Commonwealth departments and agencies must take seriously 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 promptly.

Additionally, we note that first tier AAT review hearings in the Social Services and Child Support Division are not published, unlike decisions in the General Division (AAT2). As a result, AAT1 rulings overturning Centrelink reasoning are hidden from the public unless an appeal is taken to AAT2 and that appeal is then not settled by agreement.[83] Professor Terry Carney has observed that this rarely occurred with Robodebt cases, and that the 'lack of

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

[79] Mark Dreyfus MP, 'Albanese Government to Abolish Administrative Appeals Tribunal' (Media Release, 16 December 2022) <https://www.markdreyfus.com/media/media-releases/albanese-government-to-abolish-administrative-appeals-tribunal-mark-dreyfus-kc-mp/>.

[80] Australian Human Rights Commission (AHRC), *Human Rights and Technology* (Report, 2021) 65.

[81] 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.

[82] Terry Carney, 'Robo-debt illegality: The seven veils of failed guarantees of the rule of law?' *Alternative Law Journal* (2018) 44(1), 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* (online, 26 October 2020) <https://www.smh.com.au/politics/federal/audit-office-funding-slashed-renewing-calls-for-integrity-commission-20201026-p568q5.html>.

[83] Terry Carney, 'Robo-debt illegality: The seven veils of failed guarantees of the rule of law?' *Alternative Law Journal* (2018) 44(1).

attention to the normative (systemic preventive) role of the AAT in social security is highly regrettable'.[84] If some of these AAT1 decisions regarding Robodebt were a matter of public record, the legal arguments and conclusions being reached would have been publicised sooner, and may have led to reform at an earlier stage. For this reason we endorse Professor Carney's recommendation that select AAT1 (or equivalent) decisions should be published.

Recommendation 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 their decision-making.**

Recommendation 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.**

Recommendation 15

- **Publish select AAT1 (or equivalent) decisions.**

COMMUNITY LEGAL CENTRES MUST BE ADEQUATELY RESOURCED TO ADDRESS UNMET NEED

EJA members have provided us with many Robodebt case studies over the years which were included in EJA submissions and briefings. 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 CLC 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 AAT.

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,

[84] Terry Carney, 'Robo-debt illegality: The seven veils of failed guarantees of the rule of law?' *Alternative Law Journal* (2018) 44(1).

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.[85]

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 information, advice and advocacy on social security issues. The Northern Territory is the prime example: none of the non-profit legal services in the Northern Territory – neither Aboriginal Legal Services, CLCs nor the Legal Aid Commission receives specific funding to provide social security legal help.

The harms caused by the Robodebt scheme should never have occurred, and it is crucial that the lessons learned from multiple inquiries, and the Robodebt Royal Commission, 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, CLCs and legal aid must be appropriately resourced to support their clients to respond to challenges in a timely manner and achieve positive outcomes for our clients.

For these reasons, in its 2023-24 Pre-Budget submission, EJA requested funding of $3,630,000 to provide for one additional position to each of EJA's 21 legal centre members around Australia providing specialist social security legal assistance and programs, including to EJA as the peak organisation representing these services. This is an immediate interim measure that can be actioned while the community legal sector works with the Government on the co-design of a longer-term funding proposal.

Recommendation 16

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

MODEL LITIGANT PRINCIPLES MUST BE ABIDED

As discussed above, SA must be conscientious in meeting the Commonwealth'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

[85] Commonwealth of Australia and States and Territories, *National Legal Assistance Partnership* (Agreement, 1 July 2020) <https://www.ag.gov.au/legal-system/legal-assistance-services/national-legal-assistance-partnership-2020-25>.

problems being identified or addressed.[86] It may be necessary to strengthen independent oversight of Government adherence to the model litigant rules.

DEBT RECOVERY PRACTICES MUST BE REFORMED – TIME BAR, RECOVERY FEES AND DEBT COLLECTION AGENCIES

Time limit

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

Debt recovery fees

A recovery fee is imposed under s 1228B of the Social Security Act where the debt is wholly or partly a result of the person failing to provide information, or 'knowingly' or 'recklessly' providing false information. As outlined by Royal Commission witnesses, DHS erroneously imposed debt recovery fees on Robodebts in the absence of any evidence of the person having 'knowingly' or 'recklessly' incurred the debt. Through our members, we are also aware of issues with SA policies and procedures for establishing whether a person in fact failed to provide information. We note that in Victoria, additional charges for debt collection are prohibited.[87] This approach may be regarded as best practice.

Debt recovery fees are inappropriate in any scheme dealing with social security recipients, who are, by definition, on low incomes, and should be abolished, through the repeal of s 1228B of the Social Security Act.

Use of debt collection agencies

Governments contracts with private debt collectors and agencies to collect debts.[88] There is a lack of transparency regarding the practices of these debt collectors, including regarding the standards they are held to and if they are required to follow ethical guidelines. Some of these agencies are known to use aggressive tactics.

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[86] On Services Australia's failure to follow model litigant processes during Robodebt: see Terry Carney, 'Robo-debt illegality: The seven veils of failed guarantees of the rule of law' (2019) 44(1) *Alternative Law Journal*; 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.

[87] Consumer Affairs Victoria, 'Restrictions on debt collectors', *Consumer Affairs Victoria'* (Web Page, 5 October 2020)<https://www.consumer.vic.gov.au/licensing-and-registration/debt-collectors/restrictions>.

[88] 'If you don't take action to repay a Centrelink debt' *Services Australia* (Web Page) < https://www.servicesaustralia.gov.au/if-you-dont-take-action-to-repay-centrelink-debt?context=60271#interestcharges>.

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 rights,[89] 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 guidelines.[90]

Recommendation 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**.

Contact

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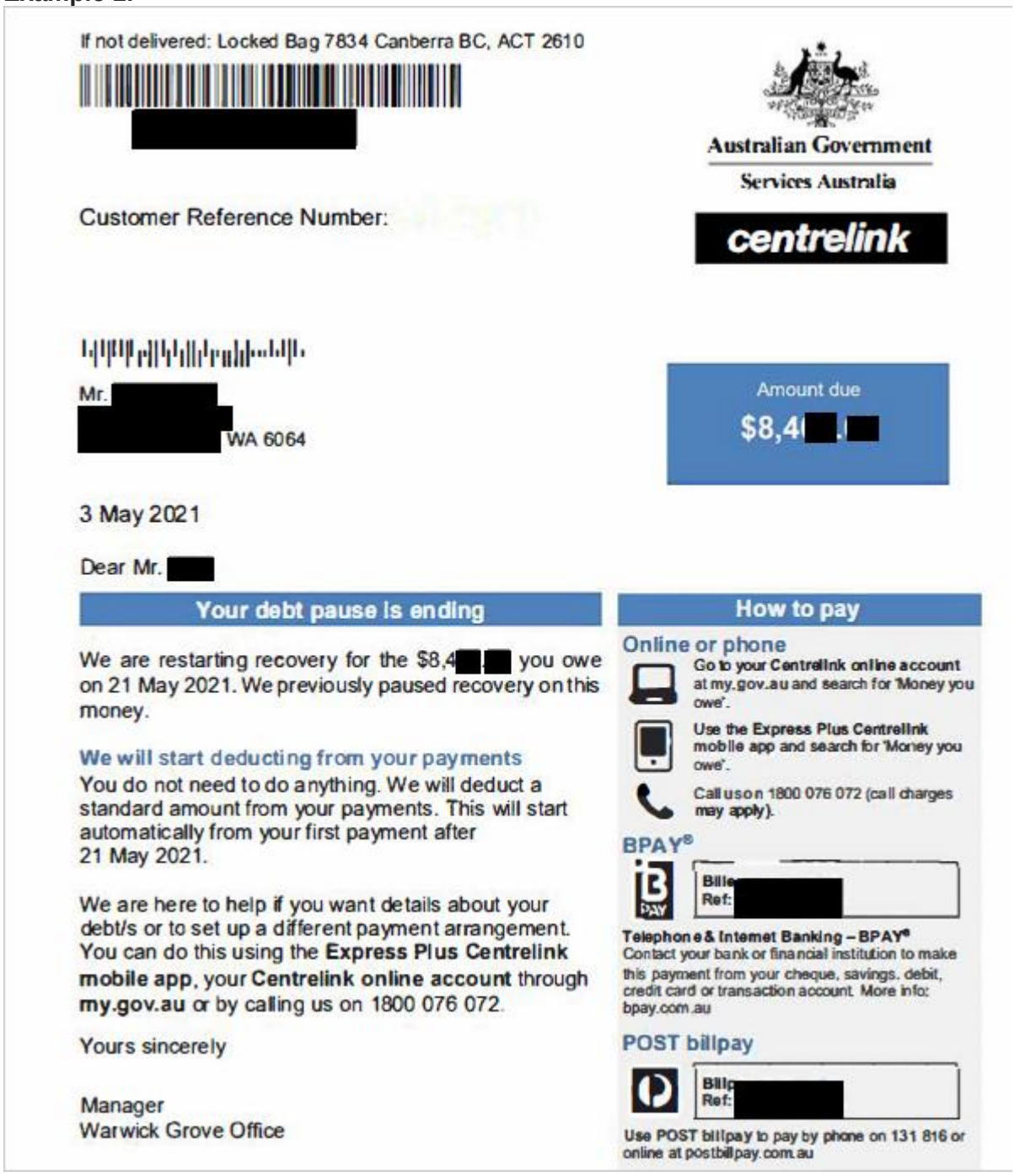
[89] Administrative Review Council, The Contracting Out of Government Services (Report 44, August 1998).
[90] See Australian Competition and Consumer Commission and Australian Securities and Investment Commission, *Debt collection guideline for collectors & creditors* (April 2021) https://www.accc.gov.au/publications/debt-collection-guideline-for-collectors-creditors.

APPENDIX: DEBT NOTICES

EJA's concerns regarding debt notices, are evidenced by the following de-identified examples. These examples contain inadequate information to enable the recipient to understand how the debt arose and how to challenge the decision. We note these examples were provided towards the end of 2021 and the template letters may have since been updated.

Example 1:



If not delivered: Locked Bag 7834 Canberra BC, ACT 2610

[redacted]

Australian Government
Services Australia

centrelink

Customer Reference Number:

Mr. [redacted]
[redacted] WA 6064

Amount due
$8,4[redacted]

3 May 2021

Dear Mr. [redacted]

Your debt pause is ending

We are restarting recovery for the $8,4[redacted] you owe on 21 May 2021. We previously paused recovery on this money.

We will start deducting from your payments

You do not need to do anything. We will deduct a standard amount from your payments. This will start automatically from your first payment after 21 May 2021.

We are here to help if you want details about your debt/s or to set up a different payment arrangement. You can do this using the **Express Plus Centrelink mobile app**, your **Centrelink online account** through **my.gov.au** or by calling us on 1800 076 072.

Yours sincerely

Manager
Warwick Grove Office

How to pay

Online or phone

Go to your Centrelink online account at my.gov.au and search for 'Money you owe'.

Use the Express Plus Centrelink mobile app and search for 'Money you owe'.

Call us on 1800 076 072 (call charges may apply).

BPAY®

Biller Ref: [redacted]

Telephone & Internet Banking – BPAY®
Contact your bank or financial institution to make this payment from your cheque, savings, debit, credit card or transaction account. More info: bpay.com.au

POST billpay

Biller Ref: [redacted]

Use POST billpay to pay by phone on 131 816 or online at postbillpay.com.au

Example 2

If not delivered: Locked Bag 7834 Canberra BC, ACT 2610

[redacted]

Australian Government
Services Australia

centrelink

Customer Reference Number: [redacted]

Mr. [redacted]
[redacted] WA 6064

Amount due
$5,2[redacted]
Pay or set up an arrangement now

12 May 2021

Dear Mr. [redacted]

We have balanced your Child Care Subsidy

We have received new information and have reviewed your Child Care Subsidy. This letter replaces any previous letters you have received about your payments.

We have confirmed your family income and circumstances for the 2018-2019 financial year.

Based on this information, we have paid too much Child Care Subsidy for you in the period of 2 July 2018 to 30 June 2019.

Details of your assessment

Due date (if you do not have a payment arrangement)	Due now
Money you owe	**$5,267.35**

We are here to help. For more information, please go to **servicesaustralia.gov.au/childcaresubsidy** or call us on 136 150.

Paying the amount you owe

There are many ways to pay this money back. It is okay if you cannot pay the full amount at once. Most people enter a payment arrangement and pay over time. Please read 'How to pay' on the right hand side of this letter.

If you do not take action

You may be charged interest daily if you do not repay the debt in full or keep to a payment arrangement. This means you may have to pay more money. We may also have to consider other ways to get the money back.

How to pay

Online or phone

Account number: [redacted]

Go to your **Centrelink online account** at **my.gov.au** and search for 'Money you owe'.

Use the **Express Plus Centrelink mobile app** and search for 'Money you owe'.

Call us on 1800 076 072 (call charges may apply).

BPAY®

Biller Code: 21915
Ref: [redacted]

Telephone & Internet Banking – BPAY®
Contact your bank or financial institution to make this payment from your cheque, savings, debit, credit card or transaction account. More info: bpay.com.au

POST billpay

Billpay Code: 0802
Ref: [redacted]

Use POST billpay to pay by phone on 131 816 or online at postbillpay.com.au

Pay in person at any Australia Post Office or postal outlet.

[redacted]

Manager
Warwick Grove Office

Income used to balance your Child Care Subsidy for 2018-2019

Dates	Income
02 July 2018 - 30 June 2019	$148[redacted].00

Important information

- A percentage of your Child Care Subsidy is withheld during the year. This helps reduce the likelihood of an overpayment that may cause you to owe us money at the end of the financial year.
- The amount and hours of Child Care Subsidy you get depends on your circumstances and includes the hours of activity you do. You need to tell us about any changes or we may overpay you.
- If the Australian Tax Office (ATO) amends your income, or if your circumstances change, we may need to review your entitlement to Child Care Subsidy.
- You need to tell us if your circumstances change within **14 days** of the change. You can do this by using your Centrelink online account. For a full list of changes that you need to tell us about, go to **servicesaustralia.gov.au/notifychanges**

If you do not understand or agree with a decision we have made

- You can contact us and we will explain the decision. We may be able to deal with your concerns without a review.
- You can ask for a review of the decision. We can change the decision if it is wrong. This review is free.

There is no time limit for a review of a decision about money you owe us. However, we may ask you to start making repayments while we review the decision.

Go to **servicesaustralia.gov.au/reviewsandappeals** for more information.

If you do not agree with the outcome of the review, you can apply to the Administrative Appeals Tribunal (AAT). The AAT is an independent body which can review a range of decisions made by Services Australia. The AAT can only review a decision that we have reviewed. For more information about applying to the AAT, please go to **aat.gov.au**

Other ways we can recover the money

We can recover the money you owe by:

- taking an amount from your fortnightly payments you get from us
- using your tax refund, Family Tax Benefit arrears, lump sum, top-up and supplement payments. This may occur even if you have an existing payment arrangement in place.
- sending your debt to an external collection agency
- asking your employer, bank or another organisation for information. We may ask them to help recover the money you owe.
- sending your case to our solicitors for legal action
- issuing a Departure Prohibition Order, which will stop you from travelling overseas.

If you would like to speak to us in your language

If you would like to speak to us in your language, please call **131 202**. You can also go to **servicesaustralia.gov.au/yourlanguage** where you can read, listen to or watch information in your language.

Online services

You can make a payment or view the amount you owe and your payment details online by:

- going to **my.gov.au** and signing in to access your Centrelink online account. Select 'Money you owe' from the menu. If you do not have a myGov account, you can create one and link it to your Centrelink online account.
- using the **Express Plus Centrelink mobile app** and selecting 'Money you owe' from the menu. You can download the free app to your mobile device. Make sure you have the latest version installed. For more information go to **servicesaustralia.gov.au/expressplus**

Let us know when things change

For a list of changes that you need to tell us about, please go to **servicesaustralia.gov.au/notifychanges**

Privacy and your personal information

The privacy and security of your personal information is important to us, and is protected by law. We need to collect this information so we can process and manage your applications and payments, and provide services to you. We only share your information with other parties where you have agreed, or where the law allows or requires it. For more information, go to **servicesaustralia.gov.au/privacy**

Data-matching

We data-match with the Australian Taxation Office to help recover debts. Our data-matching meets guidelines issued by the Office of the Australian Information Commissioner. For more information go to **servicesaustralia.gov.au/owingmoney**

To make a complaint or give us feedback

We aim to resolve your concerns as quickly as possible. If you want to make a complaint or give us feedback you can:

- call our feedback and complaints line on **1800 132 468**
- go to **servicesaustralia.gov.au/feedback** for other options.

If this does not resolve your concerns, you can make a complaint to the Commonwealth Ombudsman at **ombudsman.gov.au** using the online complaints form. If you are unable to complete the online form, you can call them on 1300 362 072.