Victoria Legal Aid submission to inquiry into Social Services Legislation Amendment (Welfare Reform) Bill 2017

August 2017

## About Victoria Legal Aid

Victoria Legal Aid (VLA) is a major provider of legal advocacy, advice and assistance to socially and economically disadvantaged Victorians. Our organisation works to improve access to justice and pursues innovative ways of provide assistance to reduce the prevalence of legal problems in the community. We assist people with their legal problems at courts, tribunals, prisons and psychiatric hospitals as well as in our 14 offices across Victoria. We also deliver early intervention programs, including community legal education, and assist more than 100,000 people each year through Legal Help, our free telephone advice service.

VLA is the leading provider of legal advice and advocacy to people seeking assistance with social security matters in Victoria. Our Commonwealth Entitlements program is one of the two largest advice and advocacy social security practices in Australia. In 2016/17 we provided legal advice on 2,297 social security matters and funded 69 grants of aid.

In 2017, we witnessed the fallout from the Department of Human Services’ (the Department) rollout of the Better Management of the Social Welfare System Initiative – or ‘robo-debt’. VLA continues to see clients affected by robo-debt through our Legal Help phone line services, Administrative Appeals Tribunal case work and in-house practice. In providing legal advice to clients affected by robo-debt, we have seen the human and financial cost or robo-debt, and continue to hold concerns about the Department’s efforts to shift the burden of responsibility from government to individuals.

## Summary of submission

While VLA has a number of concerns about the Social Services Legislation Amendment (Welfare Reform) Bill 2017 (the Bill), our submission focuses on those outlined in Schedule 17 of the Bill pertaining to information management. We understand that several other agencies, including the Australian Council of Social Service, have addressed other matters within the Bill and we share their reservations.

Given the implication of these proposed changes for robo-debt matters, we recommend that the amendments be rejected as they appear to be an attempt to broaden the Department’s power to gather information through coercive means and to use that information during investigations and criminal proceedings.

It is not clear from the Explanatory Memorandum what the rationale is for the proposed changes, nor the scope of those changes. However, on the face of it, it appears that these changes could extend the practice of shifting the burden of gathering information from the Department to the individual.

Consistent with our messaging on the robo-debt issue, our submission focuses on the human impact of these changes in the context of robo-debt and shifting the burden of responsibility from government to individuals. Our submission also articulates our concerns about the Department’s information gathering powers and providing information to prosecutors.

## Human impact of these changes in the context of ‘robo-debt’

Based on the experience of our clients who have been issued with robo-debt letters from Centrelink, there is a real possibility that the proposed amendments will have an adverse impact on individuals.

The provisions currently require information to be within a person’s custody or under the person’s control to compel the provision of that information to the Department. The amendments propose to omit this element and make it an offence if the person is not able to produce the document or records where the Secretary of the Department reasonably believes that the person will be able to provide that information.

While the Explanatory Memorandum minimises the impact of this change and considers the phrase ‘that is in the person’s custody or under the person’s control’ to be superfluous, the distinction highlights an issue faced by our clients. Many people who receive a robo-debt notice face the challenge of obtaining or retrieving information about employment earnings, that is no longer to hand or in their possession or control.

The penalty for failing to comply with these requirements can attract a term of imprisonment of up to 12 months (s.197, Social Security Act). The amendments are framed as a directive with no recourse for appeal or review of decisions by the Administrative Appeals Tribunal (AAT), leaving only judicial review as an option.

While this penalty does not apply if a person has a reasonable excuse, or only applies to the extent to which a person is capable of complying with the requirement, the Department has not exercised their powers with restraint to date nor has it demonstrated a level of reasonableness that the community expects.

As VLA has stated on previous occasions, we support efficiency and expediency as hallmarks of good government decision-making and administration. However, through our case work, we have witnessed the translation of a lack of responsible government action under robo-debt into real financial and personal harm for clients. This is especially the case for those who were already vulnerable and receiving a social security payment because of their vulnerabilities.

To illustrate this, we set out the case study below drawn from specific client stories recounted in legal advice sessions since robo-debt commenced.

**Case study 1: June’s story**

June is an Aboriginal woman living in regional Victoria. She has 5 children, including children at school. She is a single mother receiving the Single Parenting Payment. She has been diagnosed with Post-Traumatic Stress Disorder, anxiety and depression.

In early 2017, June received a letter from Centrelink alleging that data-matching had detected a discrepancy in her reporting while completing a traineeship over 5 years earlier. While undertaking the traineeship she made regular fortnightly reports of her variable income.

In response to the letter, June contacted the training organisation she had attended so that she could obtain payslips to support her earlier fortnightly reporting. However, because of the length of time which had passed since her attendance there, June was told that it no longer held her pay records.

June contacted Centrelink to try to explain her predicament. She was told by a Centrelink staff member that it was “up to her to correct the record”. But, without the payslips requested by Centrelink, she couldn’t.

June subsequently received a debt notice for over $2,000.

When June sought legal advice from a VLA duty lawyer, Centrelink had commenced deducting repayments from her Parenting Payment. At the same time, because of the alleged debt, June is also now ineligible for a Centrelink loan which she had hoped to rely on to make the large ‘start of year’ outlay for her children’s school uniforms and fees.

As she attempted to meet her basic financial commitments and the additional start up costs of the school year, June fell into serious financial hardship. June did not know how to make an application for an authorised review of her alleged debt and had not been provided with this information prior to receiving legal advice.

Further shifting the burden of responsibility from government to individuals

On the face of it, the changes increase the options available to Centrelink to place the burden on social security recipients to obtain and provide documents. There is the potential for these amendments to be used as a coercive tool to rectify errors that are occurring as a result of blunt and poorly targeted processing tools used in mass data-matching exercises by Centrelink.

These submissions focus only on the use of these coercive powers for current or previous recipients of social security payments.

Under the amendments the particular requirement that the document ‘be in the person’s custody or under the person’s control’ will be removed from s192 and be replaced by a requirement of a reasonable belief by the Secretary that the person will be able to produce the document.

Our consideration of the provisions is informed by principles recommended in the Administrative Review Council’s (ACR) 2008 report, The *Coercive Information-Gathering Powers of Government Agencies* (see [Attachment 1](#_Attachment_1_–)).

1. **The documents sought no longer need to be in a person’s custody or control**

The amendments are ambiguous about the scope of the power, yet those who fail to comply with it are at risk of imprisonment. The use of coercive powers should be limited to documents that a person has in their possession as such a request should be limited to circumstances where a person is capable of complying with it. A person should not be required to source information from third parties and incur the cost - financial, time and emotional – especially where they are not the author of those documents.

Until recently Centrelink’s practice was to seek these documents from the person who created or authored them – usually banks, or employers. In most instances these will be documents or records that a person is under no legal obligation to keep and it should not be expected that people will continue to hold onto these documents over many years. While Centrelink has the power to compel production from third parties, Centrelink recipients have limited if any powers to compel third parties to provide documents and information, cost aside.

Reference is made in the explanatory memoranda (at page 125) to the need for the provisions to be consistent with current Commonwealth policy as reflected in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*[[1]](#footnote-1). The relevant section of that guide refers to the need for the issuer to reasonably believe they are in the person’s custody or control.[[2]](#footnote-2) This important element does not explicitly appear in the provisions, and has been explicitly removed from social security law provisions.

1. **How to determine reasonable grounds for issuing the notice**

The amendments introduce a reasonable belief test as a minimum statutory trigger for the issuing of a notice. This is a welcome and appropriate amendment to ensure there is some consideration of the circumstances when the power will be used, however we have some significant concerns with it. These are amplified by the criminal liability that attaches to a failure to comply.

1. Regardless of whether the request is based on a reasonable belief, a person should still only be required to provide documents that are in their custody or control. The requirement to this effect in s192 should be preserved.
2. It is not clear how it will be that the Secretary assesses reasonableness. For example, will it be based on the particular circumstances of the notice recipient, the class of documents or the rationale for the request.
3. Once the assessment of reasonableness is made by the Secretary and the notice is issued a person has no choice but to comply or risk criminal liability.
4. It is not a reviewable decision in the same way as other social security decisions, and therefore seems entirely at the discretion of the person issuing the notice.
5. There is no requirement that records be kept of the basis for the decision as recommended in principle 3 of the ARC report.
6. The legislation does not properly identify who will be delegated the power to issue these notices on behalf of the Secretary and what level these decisions can be made. Principle 6 of the ARC report recommends that this be addressed in the legislation. Principle 7 of the ARC report refers to the importance of ensuing these powers are only delegated to suitably senior and experienced agency officers.
7. The Statement of Compatibility with Human Rights that accompanies the Explanatory Memorandum states that “this power cannot be delegated to a machine” (p181). We agree that it would be inappropriate for this to occur, however we were not able to identify the provision of the Act that prevents this from occurring.

## Recommendations

1. The requirement that the document ‘be in the person’s custody or under the person’s control’ in s192 be preserved.
2. Other amendments to the provisions should incorporate the principles in the ARC report.
3. The decision to issue a notice on the basis of a reasonable belief should be open to review under the usual administrative review procedures already available under the Act.

## Conclusion

Parliament should carefully consider the protections for those facing the coercive powers of government. Given the implication for robo-debt matters, these changes appear to be a means to gather information through coercive means and to use that information during investigations and criminal proceedings. We ask the Senate Committee to consider the human impact of these proposals, and recommend further consideration and clarification be sought.

## Attachment 1 – Administrative Review Council’s 2008 report, The Coercive Information-Gathering Powers of Government Agencies

### Setting the threshold and scope

**Principle 1**

The minimum statutory trigger for the use of agencies’ coercive information-gathering powers for monitoring should be that the powers can be used only to gather information for the purposes of the relevant legislation.

If a coercive information-gathering power is used in connection with a specific investigation, the minimum statutory trigger for using the power should be that the person exercising it has ‘reasonable grounds’ for the belief or suspicion that is required before the power can be exercised.

### Record keeping

**Principle 3**

When an agency uses its information-gathering powers for the purpose of a specific investigation it is good administrative practice for the agency officer concerned to prepare a written record describing the basis on which the threshold trigger for the use of the powers was deemed to have been met.

If the powers are used for monitoring or if an agency regularly issues large numbers of notices, a written record of the fact of the use of the powers is also desirable; it should name the officer who authorised the use of the powers.

**Principle 6**

Legislation should specify who may authorise the exercise of an agency’s coercive information-gathering powers.

If failure to comply with a notice would attract a criminal penalty, the legislation or administrative guidelines should specify the category of officer to whom the power to issue a notice can be delegated.

**Principle 7**

It is important that an agency has in operation procedures for ensuring that coercive information-gathering powers are delegated only to suitably senior and experienced agency officers.

The officers to whom the powers are delegated should be sufficiently senior and experienced to be able to deal effectively with questions associated with procedural fairness and privilege that can arise in the conduct of examinations and hearings.

**Principle 15**

Compliance would be further encouraged if terms such as ‘information in the possession of’, ‘in the custody of’ or ‘under the control of’ the notice recipient were defined. Pro forma notices can be useful if differences in expression occur in the legislation of a single agency.

1. Australian Government Attorney-General’s Office, September 2011 Edition [↑](#footnote-ref-1)
2. Ibid, page 90 at [9.1.1] [↑](#footnote-ref-2)