



Rethink Robo-debt

Building a fair and accurate system people can trust

Submission to the Senate Community Affairs References Committee Inquiry into Centrelink's Compliance Program

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Executive summary

I think our Government should treat people fairly. It should have transparent and honest processes. You should be able to talk to a person on the phone who can explain what's happened and tell you why you got this debt.

If you've made a mistake, then fair enough that you have to pay back money. But, with robo-debt, no one can explain whether you've made a mistake. No one tells you anything. They just say you've got a debt and you have to pay ... But now I know that the Government tries to make people pay debts that they don't understand and might not owe. It harasses and intimidates people. It's just so upsetting. (Janine)

National Legal Aid brings together the practice experience of the eight Australian state and territory legal aid commissions. In the 2017-18 financial year, legal aid commissions provided over 2.3 million legal services to people across the country.¹ Janine is one of many legal aid commission clients who have been adversely affected by the problems associated with the Centrelink Compliance Program, commonly known as 'robo-debt'.

Over half a million debts have been raised against Australians through robo-debt.² This system is causing severe hardship for people in circumstances of vulnerability, is causing people to repay money they do not owe, and is undermining trust in the social security system.

We share the stories of 11 people who were assisted by legal aid commissions with their robo-debts.³ These stories raise consistent themes and illustrate systemic flaws with the current program:

- The **stress and hardship that robo-debt can cause**, including undermining people's mental health.
- The **inaccuracy** of robo-debt, including the frequency with which debts decrease upon recalculation and the very real risk that people are paying money to Centrelink that they do not owe.
- The **unfairness** of robo-debt's 'reverse onus' where the responsibility lies with people to prove they do not owe the amounts claimed.
- The **lack of clear information** provided by Centrelink in correspondence about how the debt was calculated for people trying to understand and resolve their alleged overpayments.

¹ Sources: 2017-18 data National Legal Aid Statistics <https://nla.legalaid.nsw.gov.au/nlareports/> and National Partnership Agreement on Legal Assistance Services 2015-2020 2017-18 data.

² Department of Human Services, Senate Estimates, 2018-19 figures to 31 March 2019; Luke Henriques-Gomes, 'Centrelink still issuing incorrect robodebts to meet targets, staff claim', *The Guardian* (online, 29 May 2019) <<https://www.theguardian.com/australia-news/2019/may/29/centrelink-still-issuing-incorrect-robodebts-to-meet-targets-staff-claim>>

³ Unless otherwise indicated, names and minor (identifying) details have been changed to preserve confidentiality. All of the clients have consented to the sharing of their stories.

- The **challenges communicating with Centrelink**, with clients experiencing frustration and despair due to wait times, inadequate explanations of the basis for the alleged debt and pressure exerted on them to repay the alleged debt.
- The **pressure and intimidating contact from private debt collectors** contracted by Centrelink to enforce alleged debts, including during periods that clients are seeking review.
- The **damage to public trust and confidence** in the integrity of the social security system, as reported by many legal aid commission clients who fear being pursued for further debts in the future.

In addition to the systemic flaws, there are significant questions about the lawfulness of robo-debt. These considerations are currently before the Federal Court of Australia in the matters of *Madeleine Masterton v the Commonwealth* and *Deanna Amato v the Commonwealth* being run by Victoria Legal Aid.⁴

Informed by the legal aid commissions' direct work, and the experiences of clients, we call for a rethink of robo-debt to deliver a fair and accurate system that people can trust.

⁴ See Victoria Legal Aid, 'Centrelink waives another robo-debt as legal challenge continues' (6 September 2019) <https://www.legalaid.vic.gov.au/about-us/news/centrelink-waives-another-robo-debt-legal-challenge-continues>

Ten recommendations for a fair and accurate system people can trust

Centrelink provides a safety net for millions of Australians. Our social security system should provide people with the basics they need to live a healthy life and provide for their families. Any debt recovery system should fairly and accurately identify, investigate and resolve overpayments.

While government should embrace technology, robo-debt was a major system change, which was rolled out quickly. Despite the changes that have been made to the program since it began, flaws remain. A revised system is needed to rebuild public confidence in the Australian Government's capacity to administer a fair and accurate social security system that doesn't cause Australians to pay or challenge debts they don't owe.

Following are 10 changes which we advocate for to deliver a fair, accurate system that works both for government and the millions of people who receive social security during their lifetime.

- 1. Stop robo-debt and co-design a fairer system.** Robo-debt should be stopped and a new system designed to ensure accuracy and fairness.
- 2. End averaging.** The averaging process creates inaccurate debts. The use of Australian Taxation Office data to determine a notional fortnightly income assumes people work consistent hours. In reality, many people who receive social security are piecing together casual employment, caring for their families, are unwell, studying or taking on new jobs. Their income varies between fortnights. Averaging should be replaced with a better process for calculating and analysing potential overpayments that accounts for people's actual fortnightly earnings.
- 3. Centrelink must establish that the amount is correct before claiming a debt.** It is wrong for Centrelink to claim a debt without first being sure that the amount it is claiming is correct, and to place the burden of disproving the alleged debt on individuals. In the past Centrelink cross-checked its records and made inquiries of the person and past employers to confirm actual fortnightly earnings. Centrelink is the party with the powers and expertise to satisfy itself that the amounts it is claiming are correct, and it must do this before telling people they owe a debt.
- 4. Client focussed communication and service provision.** Centrelink has a unique role in the Australian community. By its nature, it deals with people who have a greater likelihood of experiencing poverty, disability, disadvantage and mental health issues. Its communication and engagement with people should reflect this. The following improvements should be made to the way Centrelink engages with people:
 - Centrelink should actively support people who are receiving social security to understand and comply with its processes and systems for income reporting.
 - Where Centrelink suspects possible overpayments, people should be approached respectfully using accessible communication. For example, correspondence from Centrelink should show how the amount has been calculated and how to access

further information. This supports people to identify any errors and easily understand what is being claimed.

- Centrelink should ensure that all people calling about robo-debts can easily resolve their dispute in a timely manner, with access to relevant and accurate information and the ability to review the decision at any stage.
- The Department of Human Services should be adequately resourced with skilled staff who have received training on working with customers who aren't comfortable with, or able to use, online processes.⁵

5. Embrace client-centred design and use of technology. The Department of Human Services should engage with service users and stakeholders, including community legal centres, community services, legal aid commissions and digital experts, to re-design and maintain a best-practice model for service delivery. This is an opportunity to design a system that works for users, to identify and address risks and to build trust in the system. The Department of Human Services should aim to develop a new system that uses technology integrated with data analysis methods that ensure accuracy. There must also be appropriate human oversight. User-testing and evaluating the impact of the system will be crucial components of designing and implementing the effective, evidence-informed solutions.

6. Accessible, transparent right of review. People should be able to access meaningful review. This process should be accessible and transparent:

- People seeking review should not be excluded or diverted from accessing the review to which they are legally entitled (regardless of whether they have provided new information in relation to the alleged debt).
- All debts should be put on hold pending the outcome of a review or reassessment process. Centrelink should not garnish a person's tax return or withhold their social security payments, and interest on alleged debts should not accrue, until any issues relating to the accuracy of the debt can be resolved.
- All communication and correspondence should clearly include information about having recovery paused while a review or reassessment takes place and about getting more time to obtain and submit information once a debt has been raised.

7. Access to advice and assistance. People need to be made aware of their rights when interacting with Centrelink. Legal and non-legal services, including financial counsellors, the network of community legal centres that specialise in social security law and legal aid commissions, must be adequately resourced to give people the information, advice and assistance required to understand and engage with the process. Centrelink should actively refer people to these services when they need assistance.

⁵ In this submission, we refer to the Department of Human Services, but note the May 2019 announcement that a new agency, Services Australia, will be established and will incorporate the Department of Human Services and the Digital Transformation Agency to 'drive greater efficiencies and integration of Government service delivery and mak[e] best use of technology and digital applications'. See Prime Minister of Australia, Media Release, 26 May 2019.

- 8. Stronger safeguards before seizing tax returns.** The tax garnishing process results in a person's tax return being seized by Centrelink. A person's tax return should not be taken in situations where a person's alleged debt is currently under review, where they are unaware they owe an alleged debt, or before they are notified of the outcome of a debt review. There should be appropriate human oversight of the tax return garnishing process to ensure lawfulness and fairness. This process should not take place unless Centrelink can establish that a person is aware of a debt.
- 9. Proper, limited use of penalty fees.** Centrelink regularly imposes penalty fees incorrectly where a person disputes an alleged debt, has not answered phone calls or received letters; circumstances which are inconsistent with the requirements in the *Social Security Act 1991* (Cth). A penalty fee should only be imposed where Centrelink can be satisfied a person knowingly provides false and misleading information. It must not be imposed in other situations, for example because of a perceived lack of engagement with Centrelink.
- 10. Fair, appropriate debt collection practices.** Many people would be surprised to learn that Centrelink outsources to private debt collectors. Legal aid commission clients report that these businesses call and send text messages multiple times a week pursuing unsubstantiated, potentially incorrect debts. Clients have shared the emotional and psychological consequences of receiving intimidating contact from debt collectors seeking to enforce debts that are often incorrect or under review or reassessment by Centrelink. The Department of Human Services should review its engagement of external debt collectors to pursue people for alleged overpayments to protect people from harassment and undue pressure.

This should be part of broader cultural change in how the Department of Human Services communicates with users to reflect that these interactions take place within the context of our social safety net. In practical terms, Centrelink should not outsource debt collection to agencies in circumstances where it has not successfully contacted the person or engaged in a payment arrangement negotiation. Key performance indicators and contracts should be revisited to ensure users are treated respectfully and communication is easy to understand, with alleged overpayments being referred back to Centrelink where questioned. If debt collectors are used, they should be paid a flat fee, similar to Australian Taxation Office practice.

National Legal Aid, legal aid commission clients and robo-debt

National Legal Aid represents the directors of the eight state and territory legal aid commissions. More information about National Legal Aid is in Annexure 1.

Legal aid commissions are independent, statutory bodies established under respective state or territory legislation. They are funded by state or territory and Commonwealth governments to provide legal assistance services to the public, with a particular focus on the needs of people who are economically and/or socially disadvantaged.

Legal aid commissions are the main providers of legal assistance services in Australia.⁶ In the 2017-18 financial year, legal aid commissions provided in excess of 2.3 million legal services to people across the country.

Legal aid commissions provide information, advice, and assistance in response to a broad range of legal problems. Working alongside our partners in the private profession, community legal centres, and Aboriginal legal services, we help people with legal problems such as, family separation, child protection, family violence, fines, social security, mental health, immigration, discrimination, guardianship and administration, tenancy, debt and criminal law matters.

Our clients experience social and economic disadvantage. For example, in 2018-19, legal aid commissions provided 154,281 more intensive legal assistance services to people with disability;⁷ 22,105 of these services were for people who identified as Aboriginal and Torres Strait Islander; 25,543 were for people who identified experiencing or being at risk of family violence; 14,302 were for people located in rural and regional areas; and 7,291 were for people of culturally and linguistically diverse backgrounds who required an interpreter.

Through the volume and diversity of our direct work, legal aid commissions see the impact of laws and policies on people and communities. Together with community services, financial counsellors and community legal centres, legal aid commissions have been go-to services for robo-debt issues since late 2016 and early 2017 when Centrelink commenced its Online Compliance Intervention.⁸ Legal aid commissions continue to receive enquiries from clients who are distressed to discover they have had robo-debts raised against them.

In 2018-19, Victoria Legal Aid provided more than 650 separate services in relation to robo-debt matters. As the Committee may also be aware, Victoria Legal Aid currently has two matters in the Federal Court of Australia challenging the lawfulness of robo-debt.⁹ In the

⁶ Productivity Commission 2014, *Access to Justice Arrangements: Volume 2*, Inquiry Report No 72, Canberra, 667.

⁷ We note that this will be an under-count because in accordance with the National Legal Assistance Data Standards Manual it is based on the person self-identifying disability status.

⁸ In this submission, we use 'robo-debt' to include the Online Compliance Intervention, which commenced in July 2016; the Employment Income Confirmation program; and the Check and Update Past Income program, which has been in place since October 2018.

⁹ Victoria Legal Aid, "It felt like guilty until proven innocent" - new test case against Centrelink's robo-debt system' (online, 12 June 2019) <http://www.legalaid.vic.gov.au/about-us/news/it-felt-like-guilty-until-proven-innocent-new-test-case-against-centrelinks-robo-debt-system>

same period, Legal Aid NSW provided 554 services in relation to social security debts, including robo-debts.

It is the work of the legal aid commissions across Australia that has informed the recommendations set out in this submission.

1. Hardship and distress for people and families

We know from what our clients tell us that suddenly being told they owe a significant debt, and having to spend large amounts of time and energy to disprove it, is causing hardship and distress. One of Victoria Legal Aid's clients said, 'I was an emotional and physical wreck ... I didn't want to get up and face the day'.

Janine explains what it was like to be pursued for a robo-debt, including the stress she experienced and the impact it has had on her trust in government and the social security system.

Janine: 'That letter was the start of a hellish process'

I'm 64 years old. My husband died of cancer seven years ago in 2012. We had to use all of our savings to survive during that time and pay medical bills. I was also nursing my elderly mother with dementia. It was a really challenging time.

I'd never been on Centrelink before all that happened, but then I needed some support to get by. I was still working a day or two a week casually as well. If I could get more work, I would take it, but it's difficult at my age to get people to give me more shifts.

This year, Centrelink sent me a letter saying I have a debt going all way the way back to 2014. That letter was the start of a hellish process. I don't trust the Government anymore. Especially for an older person who has never had a debt to the Government or anything like that, it's just shocking.

I think our Government should treat people fairly. It should have transparent and honest processes. You should be able to talk to a person on the phone who can explain what's happened and tell you why you got this debt.

If you've made a mistake, then fair enough that you have to pay back money. But, with robo-debt, no one can explain whether you've made a mistake. No one tells you anything. They just say you've got a debt and you have to pay.

One time, I held on the phone from 3pm until 5pm just to talk to someone. Then, at 5pm, the phone just disconnected and they said they were closing for the day and that I had to ring back the next day. It just feels awful to be treated like that.

It was only after I got help from Victoria Legal Aid that Centrelink actually got back to me. They did reduce the debt, but they still say I owe some money. I'm just paying it off now, because I'm scared of getting charged more fees.

You know, it's not the money, it's the principle. After a life of working and paying taxes, I didn't expect to be treated like this. I felt totally intimidated by the Government, instead of feeling like it's ok to get a little support at this time in my life.

It's so hard to talk about it to other people, because everyone assumes you have done something wrong and the Government wouldn't do this to people. I used to think that too.

But, now I know that the Government tries to make people pay debts that they don't understand and might not owe. It harasses and intimidates people. It's just so upsetting.

Clients of legal aid commissions have reported taking time off work to try to resolve their debt or because of the stress. Parents talk about not being able to afford uniforms for their children because their income has been reduced to pay an alleged debt.¹⁰

Our clients also report anxiety when receiving debt notices from Centrelink, and distress at recovery methods applied, including the use of private debt collectors and garnishing of tax returns. They report considerable frustration at the effort required to get an explanation of the basis of debts raised, and to resolve their disputes about these debts.

Melissa's story shows the pressure that the conduct of private debt collectors is putting people under. In Melissa's case, she contemplated suicide.

Melissa: Private debt collector's actions 'doing my head in and making me suicidal'

Melissa is a single woman in her early 60s, who has worked most of her life in marketing and communications. She received a \$15,000 debt out of the blue which she doesn't understand and that she hasn't received an explanation for.

When she first became aware of the alleged debt in January this year, she was 'disheartened, on the brink of tears and very emotional. There was no explanation given, how it was arrived at that I owed money.' She requested more information about it but has never received this. She did what she was told and tried to upload information from six temp agencies she had worked at, but the MyGov website would not allow the upload of Excel documents. She posted the documents to Canberra in February 2019 and waited for an outcome. She is still waiting.

The next contact she had was from a debt collection agency. The calls were incessant. She was getting phone calls all the time and three text messages a day. She was desperate to make it stop as it was 'doing my head in and making me suicidal'.

It was very difficult to get the debt collection activity to stop, despite the debt still being under consideration by Centrelink. She told the debt collection agency she was still providing information to Centrelink, but they told her that time had passed, and she needed to enter a repayment plan. When she spoke to Centrelink about getting the debt recalled from the debt collectors she was initially also told that it was 'too bad', she was too late, and she 'should have acted'. They said that until she provided new information the debt would be pursued.

It was not until she was on a call with a Centrelink officer where debt collectors disrupted

¹⁰ See e.g. Victoria Legal Aid, Submission to the Senate Community Affairs References Committee, *Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative* (6 April 2017); Victoria Legal Aid, Submission to the Productivity Commission's Inquiry into the Economic Impacts of Mental Ill-Health, *Intersections between mental health and the legal system and the impacts for people and communities* (April 2019) <<https://www.legalaid.vic.gov.au/about-us/news/reflecting-on-intersections-between-mental-health-and-legal-issues>>; Victoria Legal Aid, Submission to the Royal Commission into Victoria's Mental Health System, *Roads to Recovery: Building a Better System for People Experiencing Mental Health Issues in Victoria* (July 2019) <http://www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/access-to-justice-for-people-with-mental-illness-and-disability/roads-to-recovery-building-better-system-for-people-experiencing-mental-health-issues-in-victoria> These submissions identify that robo-debt actively undermines people's mental health.

the call twice that Centrelink finally agreed to put a hold on any recovery action for six months. Trying to understand what had happened to the information she had already provided, she was finally told there were gaps in the information, so no action had been taken to reassess the debt. Instead of telling her this earlier, Centrelink had just referred the debt to a debt collection agency.

Finally, equipped with this information, she is now getting the extra documents Centrelink say they need to determine the debt amount.

People who cannot provide the necessary paperwork, who find it too stressful to challenge the debt, or who simply obey Centrelink's direction, may give up and pay the amount claimed. Where people do not pay, money can be deducted from their already low social security payments or taken from their tax returns.

The robo-debt system and processes, including the conduct of private debt collectors, when combined with the inaccuracy and lack of transparency discussed below, is actively damaging people's mental health and wellbeing.

2. The inaccuracy of robo-debt: people are paying money they don't owe

Maureen: Paying a debt she may not owe, 'It was too difficult to deal with Centrelink'

I am 64 years old and I have a disability. Earlier this year, I got a letter from Centrelink saying I had to pay a debt of \$1,900 and that the debt was from all the way back in 2011. I did try to prove I didn't owe the money – I tried to get payslips from my old employer in 2011, but they said they didn't have any from that far back.

So, I rang up Centrelink and asked them to review the debt because I don't think I owe the money. But, I just didn't understand a word of what they said. I asked them to send me a letter to explain the debt, but they never did that.

In the end, I rang them back and said I'd just pay the debt and went on a payment plan. It was too difficult to deal with Centrelink and I didn't want to do it anymore.

I'm still paying the debt off. I think I'm about half way there.

This part sets out the aspects of the robo-debt system that contribute to people paying money to Centrelink that they don't owe:

- There has been a lack of transparent analysis of the extent of inaccuracy and over-calculations under robo-debt, despite clear indications of the inherent inaccuracy of the process and over 113,000 debts being changed or written off when challenged.¹¹
- Centrelink's correspondence continues to be unclear, and the timeframes stressful. Often people do not understand that they are being asked to repay an amount that could change significantly if they engage with Centrelink after an overpayment is alleged.
- Power imbalances and difficulty engaging with Centrelink mean people do not challenge, or do not persist in challenging, the amounts claimed.

All of this is in a context where the onus is reversed and it rests with the person to prove they do not owe the amount claimed, rather than Centrelink using its powers and expertise to establish that the amount it is claiming is correct.

This creates a very real risk that the robo-debt process leads not only to the raising of debts which are not properly owing, but to the payment of money to the Australian Government which is not owed to it. This is a consequence of the inherent inaccuracy of the methodology used, the prospect that some people will not question a compliance letter or a debt raised against them, and the difficulty many people have in identifying and exercising their legal rights.

¹¹ Department of Human Services, Senate Estimates, 2018-19 figures to 31 March 2019.

2.1 Robo-debt's inaccuracy and the lack of transparency

The robo-debt process involves matching a person's Centrelink income records with income records of the Australian Taxation Office. It uses an algorithm that 'averages' a person's income in an attempt to work out fortnightly income. If this notional income does not match reports made to Centrelink by the social security recipient, a 'compliance letter' is issued. If a person does not respond to a compliance letter, a debt is raised against them.

This method of averaging people's income to determine a notional fortnightly income assumes people work consistent hours. In reality, many people who receive social security are piecing together casual employment, caring for their families, are unwell, studying or taking on new jobs. Their income varies between fortnights. This means the calculation of alleged 'overpayments' is highly likely to result in inaccurate debts being raised.

In addition to 'averaging', robo-debt puts the burden on the person to correct any miscalculation. If a discrepancy shows up between what a person told Centrelink they earned and the notional fortnightly income calculated using Australian Taxation Office data, Centrelink then relies on the individual to prove they were not overpaid. People are left trying to track down bank statements or payslips from employers they have not worked for in years. Some employers have shut down, others may not be cooperative. For many people, even starting this process is overwhelming.

These flaws are highlighted by Salim's story.

Salim: 'it was a big mountain on my head'

In 2018, first I got a phone call saying that I owed \$13,000. I thought it was a scam. After that I got a letter through MyGov from Centrelink telling me I had to pay a huge amount of money, that I owed a debt of \$8600. It said that the debt went back more than five years. I couldn't believe it because it was from such a long time ago.

At that time I was working and getting \$15 per hour, I was reporting to Centrelink every fortnight and they worked out how much to pay me. After five years they tell me that they have paid me too much money, they used an annual calculation not fortnightly. I asked for an explanation and they sent me a spreadsheet that I didn't understand at all. It just looked like some code.

It was such a headache to get the documents together. I was really lucky, because I had actually kept payslips and documents in an old suitcase. I don't think most people would keep payslips from six or more years ago, so they would find it even more difficult than I did.

Then, even when I did get the old documents and sent them to Centrelink, they scanned them in incorrectly, so I had to try and upload them myself. The website is really difficult to use and it took me multiple goes. It was incredibly frustrating.

Throughout this process, I needed to call Centrelink so many times. I work long hours, from 6am until 2pm and then again from 4pm until 9:30pm. I am travelling between the jobs or I go home and take a shower between the jobs. Sometimes, I don't even have time to do that if I get stuck in traffic. Because I have so little time, it was so hard for me

to arrange calls with Centrelink to try and get this sorted out. There was no way to get through to them quickly, so I had to spend so much time waiting on the phone.

In the end, after I sent them all of the payslips, my debt was reduced by almost \$5,000! I was relieved but upset I had to go through the process. The whole thing was such a bad experience for me. I had a debt collector calling me. It took so much time and was very stressful. It was big mountain on my head and so it felt like that was gone once the debt was reduced.

There is limited publicly available data which identifies clearly the percentage of debts generated inaccurately, or any data about the number of debts wrongly paid by social security recipients who are subject to the robo-debt process. The data that the Department of Human Services has released regarding accuracy shows that 113,334 robo-debts have been changed or written off when people have challenged them.¹² What we do not know is how many people challenged their alleged overpayments or debts or what proportion are revised.

The lack of transparency of robo-debt in this regard is highly problematic.

In 2017, the Commonwealth Ombudsman asked the Department of Human Services ‘whether it had done modelling on how many debts were likely to be over-calculated as opposed to under-calculated’. None had been done, and the Ombudsman stated: ‘In our view the risk of over-recovering debts from social security recipients should be the subject of more thorough research and analysis.’¹³

While some refinement of the robo-debt process followed,¹⁴ there have been limited efforts to identify the risk of ‘over-recovered’ debts, or to modify robo-debt in light of this analysis. In early 2018, the Department of Human Services compared the ‘estimated debt amount produced by the assessment tool’ with ‘the actual outcome of the compliance intervention’.¹⁵ We note that this is very different to the actual amount the person was overpaid, taking into account their actual fortnightly income. The Department of Human Services’ analysis does not disclose or consider the levels of engagement from people who are sent a compliance letter.

It is essential that the Department of Human Services undertakes a straightforward analysis comparing the estimated debt amount produced by the initial calculation relying on averaged Australian Taxation Office data, and the correct amount of the debt owing to the Australian Government by the social security recipient (where needed, using information gathering powers to establish the actual income received). From our practice experience,

¹² Department of Human Services, Senate Estimates, 2018-19 figures to 31 March 2019.

¹³ Commonwealth Ombudsman, *Centrelink’s automated debt raising and recovery system* (Report No. 2, April 2017), 42 (*Commonwealth Ombudsman Report 2017*).

¹⁴ Commonwealth Ombudsman, *Centrelink’s automated debt raising and recovery system: Implementation Report* (Report No. 1, April 2019) 19-21 (*Commonwealth Ombudsman Report 2019*).

¹⁵ *Ibid* 20.

the client stories set out in this submission and the information in part 2.3 below, it is clear that many robo-debts go uncorrected or unchallenged where people do not respond effectively to compliance letters. It is not appropriate or acceptable to assume or imply that these debts were accurate.

Robo-debt recipients' lack of engagement with the robo-debt process, and lack of publicly available data and analysis, must not be mistaken for robo-debt's accuracy and integrity.

2.2 Confusing, unclear correspondence and time pressure

The Commonwealth Ombudsman made several recommendations in the 2017 report. One of the key recommendations was in respect of the letters sent by Centrelink notifying customers about possible income discrepancies, which were identified as being unclear and deficient in many respects.¹⁶

In the report of April 2019, the Ombudsman reviewed the progress of implementation of reforms to robo-debt recommended in the report of April 2017. Amongst the measures instituted by the Department of Human Services were changes to 'initiation letters' notifying social security recipients of possible debts,¹⁷ and clarification of online messaging in relation to the use of averaging.¹⁸

The Ombudsman found that the recommendation that initial contact letters clearly explain the concept of averaging, and how Centrelink will rely on Australian Taxation Office data if the person does not make contact or provide further evidence about actual income, had not yet been met.¹⁹ The report noted that the purpose of this recommendation was to 'ensure people receive sufficient information about why it may be in their best interests to provide income related information rather than relying on the Australian Tax Office information for the calculation of any debt.'²⁰

The Ombudsman explained why clarity in correspondence is so important:

*Good public administration requires a transparent and open decision-making process that clearly sets out the issues the person needs to address to challenge a decision and the findings of fact on which the decision is based. This principle continues to apply when decision making is automated.*²¹

As the below example of redacted Centrelink correspondence shows, the changes to communication introduced by Centrelink are insufficient.

¹⁶ Commonwealth Ombudsman Report 2017 (n 13) 9 [3.15].

¹⁷ Commonwealth Ombudsman Report 2019 (n 14) 10.

¹⁸ Ibid 14.

¹⁹ Ibid 10 [2.24].

²⁰ Ibid.

²¹ Commonwealth Ombudsman Report 2017 (n 13) 9 [3.14].

We have finished checking your past income

We recently asked you to check and update your past income information.

Our records show you did not check and update your information, or ask for more time by the due date. We have used the information we had from the Australian Taxation Office (ATO) to assess the amount of payments you received from us in the past.

What this means for you

The amount of employment income you reported to us:	██████████
The amount of employment income reported to us should have been:	██████████
The amount you received from us:	██████████
The amount you should have received from us:	██████████
This means you owe us:	██████████

This is a notice of decision made under social security law.

If you want to discuss or you do not agree with the decision, you can call us on **1800 061 838** and ask us to have the decision explained or reviewed.

The correspondence from Centrelink does not make it clear to people that averaging is the basis of the calculation of their debt and that this may mean they pay back more than they in fact owe.²² Further, the phrase '[t]he amount of employment income reported to us should have been' (see above), creates the impression that this amount is correctly calculated, when in fact it is an estimate produced through a methodology that is known to be flawed.

The confusion and distress people experience as a result of Centrelink's correspondence and engagement is highlighted by Rachel and Jane's stories.

Rachel: Grieving mother in a remote Aboriginal community confused by Centrelink correspondence

Rachel's son, a young man, passed away in 2018 in traumatic circumstances. In mid 2019, Rachel received a letter from Centrelink addressed to her son's estate. The letter demanded payment of a debt totalling \$3300. In the same week, Rachel received a letter from Centrelink addressed to her late son, asking him to verify his employment records from 2013–2015.

Rachel lives in a remote Aboriginal community and has limited access to services. When NT Legal Aid visited Rachel's community as part of its routine outreach work, Rachel approached lawyers, visibly distressed, saying 'I don't know why Centrelink want to take

²² Commonwealth Ombudsman Report 2019 (n 14) 3.

money from son'. NT Legal Aid are assisting Rachel to challenge the debt.

Jane: Robo-debt correspondence exacerbates mental health issues for family violence victim survivor

In June 2018 Jane was asked by Centrelink to clarify her earnings from 2013–2014. As she was no longer working for the same employer, Jane provided Centrelink with copies of her bank statements.

Almost a year later, in April 2019, Centrelink contacted Jane by phone and told her that she owed \$1600. Jane then received a letter from Centrelink saying that she owed \$940. On the recommendation of her GP, Jane saw a NT Legal Aid lawyer attending her Aboriginal health service legal clinic, run by NT Legal Aid as part of a Health Justice Partnership with the Aboriginal Health Service. The GP indicated that Jane had experienced mental health issues for many years and in recent months experienced a severe exacerbation of her depression.

When Jane saw the NT Legal Aid lawyer she was confused and anxious. Jane showed her lawyer the robo-debt notice and said, 'I don't know what this is – how much I really owe, or whether I owe anything at all. They are saying I owe money from 2013–2014; I was going through DV [domestic violence] at that time, my memory of that whole period is foggy'.

In addition to the unclear nature of the correspondence and communication, as Helena's story shows, the time periods imposed on people present an overwhelming burden, which can deter people from engaging with Centrelink.

Helena: 'They've taken years but they want us to sort it out in weeks'

In December 2016 I got a letter from Centrelink telling me that I owed a debt of around \$6000. At the time I had been working a number of different casual jobs to make ends meet. My main job was as a TAFE teacher and I relied on Newstart Allowance payments during holiday periods when there was no work.

Centrelink asked me to provide more information about my earnings dating back to 2013. I gave them whatever I could, but it was difficult having to chase down paperwork from 4 separate employers. Centrelink re-calculated the debt based on the paperwork I gave them and the debt went down to \$2700.

I appealed the debt to a Centrelink Authorised Review Officer who re-calculated it again and it went down even further to \$2200. I appealed again to the Tribunal. The Tribunal Member who looked at my case said that they couldn't figure out whether or not I owed the debt based on the information they had on the file. They asked Centrelink to get some missing payslips from one of my employers and re-calculate the debt again. This time the debt went back up to \$4200.

The debt has changed so many times that I have decided to appeal again to the next level of the Tribunal. Part of my frustration with the whole thing is that I don't understand the

documents or how the calculations work. Although you [Legal Aid] tried to show me how the debt was calculated, I still don't feel comfortable that I owe the debt.

During my appeal I spoke with the lawyer from Centrelink who told me that I now owed more debts for later years. I contacted Centrelink about those debts and asked for some time to get my payslips. When I called I felt like Centrelink was talking to me as if I was guilty. The first person I spoke to wasn't helpful at all. Their attitude seemed to be that I owed the money and should just deal with it. It was almost like speaking with thugs on the other end of the phone. I felt like I was being treated with utter contempt. Eventually I was able to speak with someone else who did agree to give me a two week extension.

They've taken years but they want us to sort it out in weeks. That's utterly not fair.

The whole situation has made me very stressed out and is not doing anything good for my health. I already have PTSD and this is exacerbating it. It's been really hard for me to find anybody to talk to; I haven't been able to talk to my friends because I feel a level of shame about what has happened. The only person I've been able to speak to is my trauma therapist. I am not happy I am in this situation. I would like to find a clear, real way out of it.

2.3 Power imbalances and challenges dealing with Centrelink

While much of the work of legal aid commissions is assisting people who have identified that they have a robo-debt and have proactively approached Legal Aid, we also see the barriers people face to seeking and obtaining assistance to understand and challenge the robo-debt process.

By way of example, Northern Territory Legal Aid Commission highlighted that people on Centrelink benefits in the Northern Territory are likely to be some of the people most vulnerable to the robo-debt system, given that many have:

- Low levels of English;
- A lack of familiarity with bureaucratic processes;
- A lack of regular access to in-person legal advice (particularly people living in remote Aboriginal communities), making it difficult to obtain timely advice on robo-debt notices when they are received; and
- A lack of access to news and other information about the problems associated with the robo-debt system.

NT Legal Aid further explains:

These factors mean that people in the Northern Territory who receive robo-debt notices are particularly likely to either ignore the notice, or accept it without question.

In our experience, Aboriginal people in remote communities are especially vulnerable, as the significant power imbalance between government service providers and these individuals creates a tendency to accept Government information at face value and not question whether a decision can be appealed.

At a policy level, therefore, the 'guilty until proven innocent' design of the robo-debt system is highly problematic.

This is consistent with social science research which shows that people 'have a tendency towards inertia (to accept the environment in which they are as a fixed given), and show a status quo bias in making decisions'.²³ It is this tendency which makes 'default rules' a powerful influence on people. In circumstances where they receive a letter from Centrelink describing an apparent discrepancy in reporting, many social security recipients will not question the calculation made. In the context of a program which uses averaging in a blunt way, likely to result in substantial miscalculations in many cases, this is particularly unfair.

This problem is compounded by the lack of access to legal or advocacy services, both because of limited availability of these services and because of people's lack of awareness that they may benefit from legal help or that there may be options other than payment in full. As identified in legal needs research, the most disadvantaged members of our community are least likely to identify that there might be a problem with a debt raised against them, and to seek appropriate assistance.²⁴

In addition to the factors that might prevent people from questioning or challenging the debt in the first place, even where people do initially seek to question the debt, as Maureen's story above shows, the challenges of dealing with Centrelink can make people give up and pay the debt.

As a result of the 2017 Ombudsman report, Centrelink staff are now required to attempt to contact a person to provide them the opportunity to prove they do not owe a debt by providing payslips or bank statements.²⁵ In our experience, many of our clients do not receive these calls, particularly where Centrelink has out of date contact details because the person has not been a Centrelink recipient for many years.

We understand that these phone calls have been outsourced to private companies. Our clients report receiving confusing, inconsistent information from staff. There have also been a number of media reports regarding how calls are managed, staff having limited

²³ See references gathered in: Colin R. Kuehnhanss, 'The challenges of behavioural insights for effective policy design' (2019) 38(1) *Policy and Society* 14, 17.

²⁴ See, in this regard, the body of research in relation to the correlation between a low level of 'legal capability' and various forms of social disadvantage: Hugh M. McDonald and Zhigang Wei, 'How people solve legal problems: level of disadvantage and legal capability' (2015) (23) *Justice Issues - Law and Justice Foundation of New South Wales*.

²⁵ Commonwealth Ombudsman Report 2019 (n 14) 9 [2.12].

information available to provide to callers, and practices by some staff that include cutting corners or hanging up after two rings to meet targets.²⁶

Victoria Legal Aid recently consulted with a small sample of people it has assisted with robo-debts. Of the 28 people:

- 82% say they have had difficulty engaging with Centrelink;
- 97% have asked for Centrelink to reassess, recalculate or review the debt/s and of those:
 - 63% say they have had difficulty in getting Centrelink to do so;
 - 67% say they had difficulty obtaining the documents requested by Centrelink; and
 - 47% say their debt was reduced, 33% are still awaiting an outcome and the remaining 20% are either unsure of the outcome or received no change to their debt; and
- 32% have had their tax return taken and, of those, 60% said it put them in financial hardship.²⁷

The combination of an extremely inaccurate methodology for calculation, placing the burden on the person to prove they do not owe a debt (i.e. reversing the onus), and communicating and engaging in difficult, inaccessible ways is contributing to people paying money they don't owe to the Australian Government. This is not a situation that should be tolerated by the Committee, the broader community or government.

²⁶ Emily McPherson, 'Exclusive: What happens inside Centrelink's "toxic" debt recovery offices', *9 News* (online, 9 August 2019) <https://www.9news.com.au/national/robodebt-what-happens-inside-centrelink-offices-australia-news/d073fdfa-01a0-4d33-bcfe-a2df387417e9>; Ben Smee, 'Blind Centrelink officer says he was shamed and sacked for slow work', *The Guardian* (online, 19 August 2019) <https://www.theguardian.com/australia-news/2019/aug/19/blind-centrelink-officer-says-he-was-shamed-and-sacked-for-slow-work>

²⁷ We also note that this is a sample of people who took steps to seek legal assistance with their matters and only 11% were still receiving Centrelink. I.e. this sample is not reflective of the experience of people experiencing the most significant disadvantage who are less likely to seek legal assistance.

3. Robo-debt's systemic impact

In addition to the hardship caused for individuals and their families, robo-debt has multiple flow-on impacts for services and the system, including:

- Community services, financial counsellors, community legal centres, Aboriginal legal services, and legal aid commissions continue to respond to requests for advice and assistance from people affected by robo-debt and its consequences.
- Although rationalised on the basis of its cost savings and recovery, robo-debt continues to be a costly system for government and to place a strain on Centrelink.
- At a macro level, these impacts compound one another, diminishing public confidence in the social security system and the integrity and functionality of the system as a whole.

3.1 Impact on community services and the legal assistance sector

Since the introduction of robo-debt in 2016, community services, community legal centres and legal aid commissions have experienced an increase in requests for assistance from those affected by robo-debt and its consequences. Some consumers are seeking advice and assistance to challenge a debt raised. Others are confused and unsure what robo-debt correspondence from Centrelink means. Many have attempted to obtain clarification from Centrelink but had difficulty speaking to a staff member, or even when they do, have not had the debt explained to them in a way that they understand. The burden of explaining the robo-debt system is pushed onto community services, legal centres and legal aid commissions.

In its March 2018 report on the impact of robo-debt, 'Paying the Price of Welfare Reform: The Experiences of Anglicare staff and clients in interacting with Centrelink', Anglicare found that:

- 66% of Anglicare workers found that robo-debt increased the amount of support clients needed because they were stressed and anxious about Centrelink.²⁸
- 45% of workers reported that robo-debt challenged their knowledge about Centrelink and how it works.²⁹
- Over half of workers (56%) reported that robo-debt had increased their workload and reduced their time to provide support to other clients (30%).³⁰

Anglicare further reported that where robo-debt led to a decrease in income, it impacted on the ability of their support workers to effectively support their clients. Without income, workers could not assist clients to lodge housing applications; and where income had been

²⁸ Teresa Hinton, *Paying the Price of Welfare Reform: The experiences of Anglicare staff and clients in interacting with Centrelink* (May 2018), 86. See also: Naaman Zhou, 'Centrelink automation hurting Australia's most vulnerable – Anglicare', *The Guardian* (online, 25 June 2018) <https://www.theguardian.com/australia-news/2018/jun/25/centrelink-automation-hurting-australias-most-vulnerable-anglicare>

²⁹ Hinton (n 28) 87.

³⁰ *Ibid* 88-9.

reduced because of the debt, it put clients at risk of eviction because of falling behind in rent. It also led to some clients taking out pay-day loans to make ends meet at exorbitant rates of interest. These compounded challenges placed an extra burden on Anglicare staff, and made it more difficult to intervene in cycles of debt or assist clients to maintain stable housing.³¹

Since its introduction in 2016, legal aid commissions have assisted people who have been affected by robo-debt who are confused and distressed. In 2018–19, Victoria Legal Aid provided more than 650 separate services in relation to robo-debt matters. In the same period, Legal Aid NSW provided 554 services in relation to social security debts, including robo-debts.

In 2017, Social Security Rights Victoria reported a 68% increase in demand for services since robo-debt was implemented,³² and the Law Society of South Australia reported a three-fold increase in people requesting assistance of community legal centres.³³

In its 2017 report, the Committee expressed concern at the level of demand faced by the community legal sector. It further expressed a view that ‘legal assistance should not be required to navigate Australia’s social security system, but [the Committee] recognises that it is currently necessary for many people’.³⁴

The increased demand for legal assistance and community support reflects the confusion and lack of clarity of the robo-debt system. It is a system that has caused confusion and hardship for individuals, which has had a flow-on effect for community services, financial counsellors, community legal centres, Aboriginal legal services, and legal aid commissions. These are services that are already under pressure and not well-resourced to respond to additional demand.

3.2 The cost of robo-debt and the strain on Centrelink

The Australian Government initially introduced robo-debt for the purpose of delivering financial savings. During Senate Estimates, the Department of Human Services confirmed that the costs incurred to administer the robo-debt program have increased each financial year to approximately \$400 million in total between the 2015-16 and 2018-19 financial years. Approximately \$500 million in debts were recovered, leaving a total of \$100 million saved on a ‘cash basis’.³⁵

³¹ Ibid 90-2.

³² 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* (21 June 2017) 85.

³³ Ibid 84.

³⁴ Ibid 86.

³⁵ Commonwealth of Australia, Senate Community Affairs Legislation Committee, *Estimates* (21 February 2019) https://www.aph.gov.au/Parliamentary_Business/Senate_estimates/ca/2018-19_Additional_estimates 119-123; Luke Henriques-Gomes, ‘Robodebt scheme costs government almost as much as it recovers’, *The Guardian* (online, 22 February 2019) <https://www.theguardian.com/australia-news/2019/feb/22/robodebt-scheme-costs-government-almost-as-much-as-it-recovers>

The \$1.5 billion which the Department of Human Services says robo-debt has recovered refers to the amount of *debts raised*, not the amount which has been repaid in real terms.³⁶

Based on these figures, robo-debt has generated \$100 million for the Australian Government. While this is not an insignificant amount, it is important that this is weighed against the personal, financial and systemic costs of the current program.

The current robo-debt process places a strain on the Centrelink system requiring additional staff and resources to address the structural problems with how the robo-debt program has been designed.

The costs of the program have increased since it was first introduced in 2016 over which period the program has required redesign and more staff involvement,³⁷ such as: implementing the recommendations made by the Ombudsman;³⁸ addressing complaints redirected from the Ombudsman to Centrelink; and responding to enquiries by people confused by Centrelink correspondence and debt letters.

The purported amounts recovered also do not take account of the impact on individuals, the associated costs for service providers supporting people with robo-debts and the long-term costs of a loss of trust in the integrity of our social security system.

3.3 Undermining public confidence in the social security system

As the client stories throughout this submission show, the implications of robo-debt for public confidence and trust in the social security system are significant.

From a system perspective, this has implications for people's engagement with Centrelink and, potentially, for voluntary compliance with Centrelink's requirements. Rather than acting as a deterrent or a reminder for people that they must report correctly, robo-debt is convincing people that the system lacks integrity and cannot be trusted.

Research conducted by Professor Valerie Braithwaite in respect of voluntary compliance with tax obligations highlights the costly implications of a breakdown of public confidence in a public good – such as the tax system, or Centrelink – that in part derives its workability and financial viability from voluntary compliance. She writes:

For a democracy to survive, government needs citizen cooperation, certainly against the backdrop of legitimate coercive powers, but with full public confidence that such coercive powers are only used when more democratically acceptable means of achieving cooperation fail ... Use of power requires public transparency and accountability around

³⁶ Ibid.

³⁷ Doug Dingwall, 'Centrelink Spending more on 'robo-debt', nearly one million letters sent', *The Sydney Morning Herald* (online, 7 February 2019) <https://www.smh.com.au/politics/federal/centrelink-spending-more-on-robo-debt-nearly-one-million-letters-sent-20190206-p50w1k.html>

³⁸ Commonwealth Ombudsman Report 2019 (n 14) 20.

*the measures taken by the revenue authority to resolve the dispute and the reasons why coercive measures like a garnishee order were used.*³⁹

She further writes:

*Digitisation cannot replace conversations that help us understand what is expected of us, and give us opportunity to explain why we can't or won't do what government wants. Conversation is at the heart of responsive regulation: **Regulation that is respectful of people and communities and their needs because there has been a concerted effort to listen and take account of those needs.** When government agencies say in response to the busy-ness of their working day "we have no time for conversations", publics move in the direction of saying "we have no time for moral obligation to obey government".*⁴⁰

Perceptions and experiences of unfairness through the robo-debt process, or excessive use of power such as the use of tax garnishee powers, undermine the public perception of the role of Centrelink. These widespread perceptions of unfairness of Centrelink's processes become entrenched and this presents a risk that compliance with Centrelink obligations will be reduced.

Importantly, the inaccuracy of robo-debt plays a key role in undermining public confidence. For those who have accessed social security it is not simply a matter of keeping their income information up to date. People can accurately report their incomes but still have a 'discrepancy' between their reporting and the Australian Taxation Office data that triggers the robo-debt process and the requirement to prove there was no under-reporting.

Legal aid commission lawyers have observed that the process is so blunt that it is not possible for recipients of Centrelink to prevent the robo-debt process happening to them in the future through compliance with their reporting obligations.⁴¹ As the system stands, the only thing people can do is keep their payslips indefinitely, and be ready to disprove an inaccurate allegation of an overpayment at some unknown point in future, possibly after Centrelink has already taken their tax return.

Victoria Legal Aid's client Deanna Amato is an example of this. As recently reported, in relation to her case in the Federal Court of Australia, Centrelink originally claimed that Deanna owed over \$2700, and garnished her \$1700 tax return. After she commenced

³⁹ Valerie Braithwaite, Submission No 9 to House of Representatives Standing Committee on Tax and Revenue, *Inquiry into the 2017 Annual Report of the Australian Taxation Office* (29 June 2018) 4-5.

⁴⁰ Ibid 7 (emphasis added and citations omitted, including J Braithwaite, 'The Essence of Responsive Regulation' (2011) 44(3) *UBC Law Review* 475-520). See also: V Braithwaite and M Wenzel 'Integrating explanations of tax evasion and avoidance' in A Lewis (ed) *Cambridge Handbook of Psychology and Economic Behaviour* (2008, Cambridge University Press) 304-331.

⁴¹ We note the relevance of Single Touch Payroll, which is proposed to be rolled out in 2020 so that most employers will undertake real-time reporting to the Australian Tax Office, which will be provided to the Department of Human Services, meaning social security recipients are no longer required to calculate and report their income based on the gross income they have earned each fortnight. See National Social Security Rights Network, 'Budget 2019: Changing the Social Security Income Assessment Model' (29 April 2019).

litigation, Centrelink recalculated her overpayments and identified that in fact she owed \$1.48. In relation to this, Deanna said:

I'm happy that I don't have a big debt looming over me anymore, but on the other hand, I'm stunned that it was recalculated so easily after I took legal action ... Centrelink will make you jump through hoops to prove your innocence, but it turns out they were capable of finding out if my reporting was correct and that I didn't owe them anything like what the robo-debt claimed I owed. It makes me question the system even more.⁴²

It is not an anomaly that a person in Deanna's circumstances was caught up in the robo-debt system despite her accurate reporting. There is nothing that a person in that position could have done or could do to prevent the robo-debt process detecting a so-called 'discrepancy'.

In addition to people who *have* accurately reported, there are people who had every intention of complying with their obligations but were overwhelmed by the complexity of the process and made mistakes. As Chris's story shows, even for people carefully reporting their income, the system makes it easy for mistakes to be made.

Chris: Every effort made to report income correctly in a complex and confusing system

Chris was a university student who worked as a delivery driver for a pizza shop. He also undertook some casual work for university student services and his income fluctuated. Centrelink raised a youth allowance debt of \$1079 for the period July 2011 to April 2012 after a data check with the Australian Taxation Office.

Chris's pay periods did not correspond to the reporting dates specified by the Department of Human Services and he was required to translate his earnings to accommodate Centrelink's requirements. He always did this very carefully.

Centrelink found that he earned \$1481 in consecutive fortnights at the university and that he had been overpaid Youth Allowance. Chris disputed Centrelink's interpretation of his earnings.

When Chris received the letters, he went into the Centrelink office and waited a long time to speak to someone who could assist him to resolve the debt. After waiting, he was told that the Centrelink staff member who could resolve the matter wasn't available and he should call the phone line. Chris tried to call Centrelink numerous times to resolve the issue himself, but faced difficulties both getting through and speaking with Centrelink staff to get clear answers. It was only because Chris was unable to resolve the issue directly that he contacted Legal Aid Western Australia for assistance.

Chris was very upset at Centrelink's decision and the AAT's affirmation of the decision. He was very frustrated that he painstakingly reported his income but was still having to pay

⁴² Victoria Legal Aid, 'Centrelink waives another robo-debt as legal challenge continues' (online, 6 September 2019) <https://www.legalaid.vic.gov.au/about-us/news/centrelink-waives-another-robo-debt-legal-challenge-continues>

back a debt.

Centrelink eventually wrote off the debt on the condition that Chris sign a document admitting to the debt. Chris said: 'The whole process was a frustrating waste of time and energy'.

In our experience, clients are becoming wary of Centrelink as a result of robo-debt. Some call legal aid commissions or other community organisations because of their distrust of the information provided by Centrelink in order to clarify or confirm their rights. Other clients who have been subject to robo-debt have now sought to challenge past Centrelink decisions because the lack of transparency and sense of unfairness experienced in respect of the robo-debt decision made them suspicious about past Centrelink decisions. As discussed above, while there are still a significant number of people who are accepting Centrelink's debt calculations and paying without challenge, direct experience of robo-debt or exposure through the media has made customers more wary and untrusting of Centrelink's decisions.

Rather than catching people who are deliberately non-compliant and setting up a system that encourages compliance through respect and appropriate enforcement, robo-debt is casting a wide net that catches people who (a) made every attempt to accurately report their income; or (b) did accurately report their income. Through operating in this way, Centrelink is undermining trust and confidence in its system and its integrity. It is important that the Committee considers the long-term consequences of this for Centrelink and its operation.

4. Lack of transparency in reviews and appeals

In relation to the review process for debts, National Legal Aid's three key concerns are set out below.

- **Failure to put or keep debts on hold pending review/reassessment.** There is inconsistency in practices regarding whether and how debt recovery is put 'on hold' while a review of the debt takes place. From clients' experiences and Victoria Legal Aid's review of Centrelink documents, it is apparent that not all debts are put on hold pending review even when it is requested. In addition, when a 'hold' is put in place, it is for a limited period and is automatically lifted at the end of that period, regardless of whether a review has taken place. When a hold is lifted recovery action resumes and interest accrues.

When a hold is lifted, people may start receiving automated letters advising them of the outstanding debt amount and a requirement to pay. These letters do not advise that the hold has been lifted and people often assume that the debt will remain on hold pending the outcome of a review/reassessment. For example, one client requested a review and her debt was put on hold for three months. After the three months Centrelink started sending recovery letters to the client again. Another three months later the client had still not received a review and had to again contact Centrelink to confirm that the debt remained on hold.

- **Exclusion from review.** Clients have instructed legal aid commissions that they have been told by Centrelink or its agents that they may not seek an internal review of a debt raised under robo-debt in the absence of providing new information in relation to the alleged debt. Victoria Legal Aid's review of Centrelink documents confirms that such representations are made. This seems to be a breach of the obligation to undertake a review requested in accordance with s 129 of the *Social Security (Administration) Act 1999* (Cth). We have also observed that although clients may not be refused a review/reassessment, in practice their debt is not reassessed until they provide documents.
- **'Reassessment' instead of review.** Legal aid commissions have observed that our clients who have requested a review under s 129 of the *Social Security (Administration) Act 1999* (Cth) have instead been diverted into a less formal 'reassessment' process. Unlike the statutory internal review process, this informal process often does not provide the recipient with a decision letter that provides any explanation of the 'reassessment' or any changes to the debt amount or period. Some clients do not receive any correspondence notifying them that a reassessment has been undertaken. Rather, they receive a letter notifying them of their current outstanding debt amount. Following 'reassessment' clients have also been advised they must have their debt considered by a 'subject matter expert' (a more senior Centrelink employee) before they can request internal review of the decision by an Authorised Review Officer. These additional steps seem to be a breach of the requirement for the Secretary or an Authorised Review Officer to undertake a review requested under s 129 of the *Social Security (Administration) Act 1999* (Cth). They result in a client having to undergo three

processes rather than one before they are advised they can apply to Administrative Appeals Tribunal for review.

In addition, for the reasons we have set out above, even if review processes are available, they are less likely to be effectively taken up by people experiencing the most significant disadvantage. Furthermore, it appears to National Legal Aid that these processes have operated to shield the lawfulness and fairness of robo-debt from scrutiny. It is not clear whether the diversion to less formal processes has the effect of reducing the number of debts calculated pursuant to robo-debt being identified and reported as being amended in decisions of Authorised Review Officers or at the Administrative Appeals Tribunal.

These flaws are highlighted by Peta's story.

Peta: Barriers to accessing the review process 'the whole thing feels like a bullying system'

My experience with Centrelink has been confusing and unfair. To this day, I don't have any understanding of the process. What I do know, is that from the start, they were wrong – I didn't owe the debt that they said I owed. I've lost a lot of trust.

Centrelink first sent me a letter in 2018 asking me to provide information about my income. It related to what they said was a debt of more than \$2300 from 2011. At that time, my mental health wasn't great and that affected my ability to respond. I did contact my old employer to try and get payslips, and then left it when they didn't send anything.

In February 2019, Centrelink contacted me and asked me to accept the debt. I felt like I didn't have any other option but to accept the debt. I didn't fully understand what the debt was based on and I didn't know my rights.

I was lucky that my old employer was still trading and eventually provided me with payslips from almost eight years ago, so I could send them to Centrelink. I also asked for an Authorised Review Officer to look at my case. That is supposed to be a proper review process.

In April this year, Centrelink just sent me a letter saying I had a debt of \$400 instead of \$2300. They didn't explain how they reached that number. I didn't know how they had recalculated it or whether I could trust the new amount. It was daunting to think I would need to do even more work to clarify the amount, especially because my mental health wasn't the best.

In July, I contacted Centrelink to get an update on my request for an Authorised Review Officer review. I was told that there was no review pending. I knew this was wrong, because I made a freedom of information request for all of my documents from Centrelink. The documents showed that Centrelink knew about my request for the review. Then Centrelink said I needed to get over another hurdle of going through a "subject matter expert" before could I ask for a review by an Authorised Review Officer.

I don't understand how Centrelink can refuse to undertake an Authorised Review Officer review when they know I have requested one. I feel lucky and grateful in understanding more of my rights and what I can ask for from the legal advice I have received. I wouldn't have known this before I got legal advice.

I am in disbelief and it is disheartening that this is going on for a lot of people and they might not even be aware that they don't owe the debt.

The whole thing feels like a bullying system that affects people who are vulnerable the worst and then adds more stress as the due date approaches and they add interest.

5. The question of lawfulness

In addition, to its inaccuracy, unfairness, imposition of hardship, and systemic burden, there are significant questions about the lawfulness of robo-debt.

These considerations are currently before the Federal Court of Australia in the matters of *Madeleine Masterton v the Commonwealth* and *Deanna Amato v the Commonwealth*.

At a high level, the concerns regarding lawfulness that the Committee should be aware of are set out below.

- The high degree of estimation behind a robo-debt, combined with the obligation on Centrelink recipients to correct any inaccuracy, arguably do not comply with the requirements of the *Social Security Act 1991* (Cth), including:
 - **Averaging.** A debt cannot be validly calculated by using an aggregate employment income figure derived from the Australian Tax Office for tax purposes that covers a period longer than a fortnight, and assuming that that the income was spread evenly across each fortnightly period relevant to the person's entitlement to social security.
 - **Reverse onus.** A debt cannot be validly raised, where the basis for the debt is an assumption that the debt exists coupled with a failure by the social security recipient to disprove the assumption.⁴³
- **Penalty fee.** Centrelink currently imposes penalty fees for robo-debts where a person disputes an alleged debt, or has not answered phone calls or received letters. This is arguably inconsistent with the *Social Security Act 1991* (Cth), which requires that a penalty is added to a debt due to the Commonwealth only if Centrelink is satisfied the person:
 - refused or failed to provide information in relation to the person's income from personal exertion; or
 - knowingly or recklessly provided false or misleading information in relation to the person's income from person exertion.⁴⁴
- **Tax garnishing.** A garnishee notice is one of the methods available to the Commonwealth to recover a debt due to it under the *Social Security Act 1991* (Cth) and

⁴³ For more detailed explanation of potential bases for unlawfulness see e.g.: Terry Carney, 'The New Digital Future for Welfare: Debts without legal proofs or moral authority?' (2018) 1 *UNSW Law Journal Forum* 1, 6; Peter Hanks 'Administrative Law and Welfare Rights: A 40-Year story from *Green v Daniels* to "Robo debt Recovery"' (2017) 89 *AIAL Forum* 7. In summary, a debt to the Commonwealth can only arise pursuant to an express provision of the *Social Security Act 1991* (Cth) (s 1222A(a)); and an amount paid by way of social security payment is a debt due to the Commonwealth if, and only if, a person who obtains the benefit of the payment was not entitled to that benefit (s 1223(1)). The robo-debt process does not involve any determination, or any permissible determination, of whether a person was not entitled to the benefit of the payment.

⁴⁴ *Social Security Act 1991* (Cth) s 1228B(1)(c). In addition, there is the argument that there is no valid debt, so nothing to attach the penalty fee to.

requires the Australian Tax Office to intercept tax refunds and pay them directly to Centrelink. The power to issue a garnishee notice is limited to situations where the Commonwealth:

- has first sought to recover the debt by either deductions from a social security payment or repayment by instalments under a repayment agreement; *and*
- can establish that the person has failed to enter into a reasonable repayment arrangement; or, if such an arrangement is in place, has failed to make a payment in accordance with that arrangement.⁴⁵

Firstly, we reiterate our concerns outlined above as to the lawfulness of debts raised under the robo-debt program; if a debt is not lawfully raised, a garnishee notice cannot be lawfully issued in respect of it.

We have further concerns that the requirements of the *Social Security Act 1991* (Cth) are not being met prior to garnishee notices being issued. The legal requirements describe a power to be exercised after proper exploration of reasonable alternatives. Instead, the tax return garnishing process appears to be highly automated,⁴⁶ and does not require a decision-maker to reach a state of satisfaction of the two pre-conditions set out above. We have seen tax returns taken:

- Where a person has not received any correspondence regarding the debt or is not aware that they owe a debt;
- Where a person's debt is currently under review; and
- Within days of a debt review being completed but before a person is notified of the outcome.

In our view, this demonstrates the absence of systems in place to ensure that decisions to issue garnishee notices are made in accordance with the requirements of the *Social Security Act 1991* (Cth).

David's story highlights the risk that people are having their tax taken for incorrect debts in a way that is clearly unfair and arguably inconsistent with the law.

David: Tax incorrectly garnished

David is in his late 40s and has worked on and off in manufacturing jobs most of his life. He didn't even know that Centrelink said he owed them money. The first he heard about it was when his tax return was taken to repay the alleged debt.

In July 2019, he filed his tax return, expecting a significant return. When the tax return came, he found out that Centrelink had taken most of the amount he was expecting to get.

David had to go through a complicated process of dealing with Centrelink to try and have

⁴⁵ *Social Security Act 1991* (Cth) s 1230C(2) and 1233.

⁴⁶ See Department of Human Services Operational Blueprint 107-05050040.

the debt reviewed. He received mixed information and had to talk to multiple people. Eventually, Centrelink told David that the debt was wrong and that they would repay him some of the money that they took from his tax return. Centrelink has repaid half of the money it took from his return.

David says:

... It's a nightmare and I'm struggling to see how it is legal. You just don't go and garnish people's tax return ... It's like someone stealing from you and then you have to prove that you don't owe them anything.

The process is a merry-go-round and you get different information. I feel like I've made 50 phone calls.

Annexure 1: About National Legal Aid and Australia's legal aid commissions

National Legal Aid (NLA) represents the directors of the eight state and territory legal aid commissions (LACs) in Australia.

LACs are independent, statutory bodies established under respective state or territory legislation. They are funded by state or territory and Commonwealth governments to provide legal assistance services to the public, with a particular focus on the needs of people who are economically and/or socially disadvantaged.

NLA's purpose is:

- To lead and encourage a national system of legal aid which allows people experiencing disadvantage to obtain access to justice; and
- To provide a forum for engagement at a national level with governments, stakeholders, and the community, and for the individual LACs to engage with each other about best practice of delivering legal aid.

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- Obtain access to independent legal advice;
- Afford the appropriate cost of legal representation;
- Obtain access to the federal and state and territory legal systems; or
- Obtain adequate information about access to the law and the legal system.⁴⁷

⁴⁷ See National Legal Aid <http://www.nationallegalaid.org/>