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Senate Legal and Constitutional Affairs Committee

PO Box 6100

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AUSTRALIA

Dear Senators,

Thank you for the opportunity to make a submission to the Inquiry into the impact of changes to service delivery models on the administration and running of Government programs.

ABOUT LIBERTY VICTORIA

1. The Victorian Council for Civil Liberties Inc — Liberty Victoria (**LV**) — is an independent non-government organisation which traces its history back to the first civil liberties body established in Melbourne in 1936. Liberty is committed to the defence and extension of human rights and civil liberties. We seek to promote Australia's compliance with the rights and freedoms recognised by international law. Liberty has campaigned extensively in the past on issues concerning human rights and freedoms and government accountability.

SUMMARY OF SUBMISSIONS

2. Australia is a signatory to several international human rights instruments which individually and collectively provide for the right to social security. It is a right enjoyed by every citizen and ensures that no Australian should live in poverty. Having ratified these instruments, the Federal Government is obliged to give effect to them.
3. In recent years, the Federal Government has increasingly sought to introduce changes to legislation and policy seemingly aimed at dismantling Australia's social security system — and the safety net that it provides for all Australians — and demonising those who receive a payment. Some examples of these initiatives (a few of which were later abandoned) include:
 - a. imposing blanket income management programs (i.e. cashless debit cards) on people living in remote areas, which disproportionately affects First Nations people;
 - b. forcing single parents onto ParentsNext, which has had devastating consequences¹ and disproportionately affects single mothers and First Nations people;
 - c. persisting with the Work for the Dole and Community Development Program despite poor outcomes;
 - d. attempting to impose six-month waiting periods on people seeking an unemployment benefit;
 - e. requiring social security recipients to submit to drug testing to receive payments; and
 - f. refusing to increase the Newstart Allowance despite broad calls extending from business to community support sectors.
4. The introduction of so-called 'Robodebt' is another such policy change. LV believes that this policy has resulted in a further erosion of the right to social security in Australia and faith in the social security system.
5. By replacing a manual review process with an automated debt-recovery system, a significant accountability and transparency measure has been lost. Without some form of review taking place, there is uncertainty as to the reliability of robodebts. Even if one in five social security recipients provide clarifying information after receiving an initial letter resulting in 'no debt', this does not mean the debts raised in the other 80 per cent of cases are reliable. Indeed, a large portion of those cases end up with debts being reduced or waived following a challenge.
6. The reliability of the debts is further affected because the robodebt system imposes a reverse onus on the social security recipient to disprove the existence of a debt. This requires a person to be "both willing and able" to accurately verify their earnings, even many years into the past. There may be any number of legitimate reasons why social security recipients are either unwilling or unable to address an incorrectly issued debt notice. As a result of the Department no longer using its compulsory information gathering powers as a matter of course, an unknown number of social security recipients may simply 'give up and miss out'. Given the extraordinarily significant increase in debt letters being issued, vastly more people will fall into these categories.

¹ Luke Henriques-Gomes, 'Domestic violence victim forced on to ParentsNext welfare program in 'horrifying' case', *The Guardian* (online, 25 April 2019) <<https://www.theguardian.com/australia-news/2019/apr/25/domestic-violence-victim-forced-on-to-parentsnext-welfare-program-in-horrifying-case>>.

7. Compounding matters are the issues relating to service delivery. This will result in more people contacting Centrelink, which has a notorious shortage of specialised staff dedicated to dealing with these matters.
8. Underlying all of these issues is unclear legality of the robodebt scheme. It is unclear whether the law permits debts to be raised automatically following an undoubtedly flawed and inaccurate data-matching process. Even assuming that is so, there may not be a proper basis to raise a debt given the issues with 'averaging'. Further, there are concerns that the scheme does not adequately provide for procedural fairness.
9. The consequences of robodebt can be significant. These may include financial hardship due to a reduction of payments, debt recovery procedures being instituted, and general stress and anxiety. Anecdotal evidence suggests a significant increase in attempted and completed suicides as well as other deaths among people who have received robodebt letters.² LV feels strongly that the Robodebt system requires significant reform, if not complete removal, if Australia is to ensure that it is complying with its international human rights obligations – and that Australians are not unnecessarily and avoidably falling into poverty.

SUMMARY OF RECOMMENDATIONS

10. LV recommends the following:
 - a. The Department must ensure that its debt-raising processes are consistent with the right to social security as recognised under international human rights instruments.
 - b. The 'robodebt scheme' should be suspended.
 - c. The social security laws should be amended to introduce prohibitions against the use of solely automated processes which have legal or other significant effects for individuals (including specifically the raising of debts).
 - d. The Department should consider alternative means of identifying and recovering overpayments which do not place the burden of disproving a debt on the social security recipient.
 - e. Where data-matching technology identifies a discrepancy, the Department should determine for itself that the discrepancy is accurate, including by conducting a manual review and using its own information collection powers, before issuing a debt notice.
 - f. When communicating with a social security recipient about an overpayment, the Department should provide a proper, meaningful opportunity to the social security recipient to respond, and give them information about accessing reviews.
 - g. The Department should provide help to all social security recipients to obtain clarifying information. This should include using its coercive powers under social security laws and more readily offering means to provide information other than online options. A specialised service should be developed for social security recipients with special needs or who are vulnerable.

² Alex McKinnon, 'Robo-debt's potential toll', *The Saturday Paper* (2–8 March 2019) <<https://www.thesaturdaypaper.com.au/2019/03/02/robo-debts-potential-toll/15514452007563>>.

- h. The Department should seek to employ staff internally within Centrelink, rather than through private entities, to safeguard against the loss of corporate knowledge.
- i. The Department should ensure that Centrelink is properly resourced to improve its processes and ensure that staff are properly trained in dealing with complaints.
- j. The Department should improve the publication of its performance measure results so that they are more transparent (for example, by demonstrating how call wait times are actually measured).
- k. The Department should abolish any targets relating to finalisation of discrepancy reviews.

THE RIGHT TO SOCIAL SECURITY

11. As part of a society which values and promotes human dignity, equality and freedom, LV fundamentally believes that a properly functioning social security system — that is, a system which is available, adequate and accessible — is essential to ensure that all Australians have access to the basic necessities of life.
12. Accordingly, LV believes that it is incumbent on the government to ensure that the Australian social security system complies with the right to social security as it is articulated in international human rights instruments. These instruments include:
 - a. Article 9 of the *International Covenant on Economic, Social and Cultural Rights*;
 - b. Article 5(e)(iv) of the *Convention on the Elimination of All Forms of Racial Discrimination*;
 - c. Articles 11(1)(e) and 14(2)(c) of the *Convention on the Elimination of All Forms of Discrimination Against Women*;
 - d. Article 26 of the *Convention on the Rights of the Child*; and
 - e. Article 28 of the *Convention on the Rights of People with Disability*.
13. Australia has ratified all of these treaties and therefore is bound to implement them.
14. The United Nations Committee on Economic, Social and Cultural Rights (**UN Committee**) describes the right in the following terms:

The right to social security encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from: (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents.

Social security, through its redistributive character, plays an important role in poverty reduction and alleviation, preventing social exclusion and promoting social inclusion.³

15. The UN Committee has stated that the content of the right to social security includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage.⁴ The concepts of ‘arbitrariness’ and ‘unreasonableness’ are well understood to incorporate

³ Committee on Economic, Social and Cultural Rights, *General Comment No 19: the Right to Social Security (Article 9 of the International Covenant on Economic, Social and Cultural Rights)*, UN ESCOR, 39th sess, UN Doc E/C.12/GC/19 (11 August 2008), [2]-[3] (**UNESCO General Comment No 19**).

⁴ UNESCO General Comment No 19, [9].

notions that any restriction or limitation of a human right be proportional to a legitimate end sought and necessary in the circumstances of the case, consistent with the provisions, aims and objectives of the relevant human rights instruments.

16. Further, while recognising the realisation of the right to social security carries with it financial implications for States parties, the UN Committee has stated that:

the fundamental importance of social security for human dignity and the legal recognition of this right by States parties mean that the right should be given appropriate priority in law and policy. States parties should develop a national strategy for the full implementation of the right to social security, and should allocate adequate fiscal and other resources at the national level.⁵

17. In this sense, there is a “strong presumption” that retrogressive measures taken in relation to the right to social security are prohibited:

If any deliberately retrogressive measures are taken, *the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant*, in the context of the full use of the maximum available resources of the State party. The Committee will look carefully at whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures at the national level.⁶

Any retrogressive measures taken which are incompatible with these obligations will amount to a violation of the right to social security.⁷

18. Finally, the UN Committee stated that before a State party interferes with a person’s right to social security, the relevant authorities must ensure that the interference is “warranted by law”, is compatible with the right, and provides

(a) an opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies. Where such action is based on the ability of a person to contribute to a social security scheme, their capacity to pay must be taken into account.⁸

19. The purpose behind the changes to the way Centrelink provides health, social and welfare payments and services to the Australian community was identified by the federal Government in 2014. Then Treasurer Joe Hockey described the information and communication technology (ICT)

⁵ UNESCOR General Comment No 19, [41].

⁶ UNESCOR General Comment No 19, [42].

⁷ UNESCOR General Comment No 19, [64].

⁸ UNESCOR General Comment No 19, [78].

system as “extremely complex, inflexible, costly to maintain and difficult to ensure compliance” and announced that the Government had

no choice but to replace Centrelink’s information and communication technology (ICT) system arguing that problems with the system were affecting the quality of service to customers.⁹

20. The centrepiece to the Government’s transformation of the social security ICT system was the Welfare Payment Infrastructure Transformation (**WPIT**) Programme.¹⁰ The aims of the WPIT Programme can be summarised as follows:
 - a. to provide more efficient and effective automated digital services for customers,
 - b. to introduce a modern ICT platform for Centrelink staff, and
 - c. to strengthen the integrity of welfare payments by detecting fraud or non-compliance.¹¹
21. Two planks to the WPIT Programme was to establish the online compliance intervention (**OCI**) debt recovery system (commonly known as **robodebt**), and to encourage welfare recipients on to “digital channels and self-managed online services”.¹²
22. While there was some initial optimism amongst welfare rights advocates who envisaged the reforms “should reduce the administrative burden on recipients and result in reductions in overpayments and debt recovery”,¹³ little positive transformation appears to have taken place.
23. For the reasons more fully explained below, the robodebt scheme is arguably a ‘retrogressive measure’ in breach of Australia’s international human rights obligations as they pertain to the right to social security. The Government’s attempts to ‘modernise’ the delivery of social security to Australians, while seemingly legitimate on its face, have resulted in debts being raised which are not ‘duly justified’ (potentially not even at law) and have had significant consequences to many Australians — which in some cases have been grave. It is unclear whether the Government took the steps outlined by the UN Committee in introducing these measures. The way in which debts are raised also suggests that the Government has not properly taken steps and exercised the diligence it should before interfering with an individual’s rights.
24. Accordingly, LV believes that, unless and until the government addresses the issues with ‘robodebt scheme’ — both with the system itself and the way in which it is administered — the Australian Government will continue to violate the right to social security in breach of its international human rights obligations.

IMPACTS

25. The most obvious impact of robodebt is financial. It can entrench poverty in the most vulnerable members of the community.

⁹ Interview with Treasurer Joe Hockey, *3AW Mornings with Neil Mitchell* (transcript, 24 April 2014).

¹⁰ Other initiatives include the Cashless Debit Card and the myGov website: see Department of Human Services, *Annual Report 2016–17*, (Report, 2017), xi.

¹¹ Don Arthur, ‘Changes to welfare system compliance and ICT systems’ as contained in ‘Budget Review 2015–16’ (Research Paper, Parliamentary Library, Parliament of Australia, May 2015).

¹² Department of Human Services, *Technology Plan Strategy 2016–20* (Report, 2016), 5 (**DHS Technology Report 2016**).

¹³ National Welfare Rights Network, ‘Centrelink computer upgrade welcomed, but questions over fraud remain’ (Media Release, 13 May 2015).

26. When an alleged debt is raised, the Department is empowered to recover the overpayment. This can be done by reducing an individual's social security payment by up to 15 per cent and redirecting that portion back to Centrelink. In addition, the Department may add an interest charge to the debt, garnish an individual's tax return, recover the amount from other sources of income or assets, and prevent an individual from travelling overseas.
27. The most obvious impact that an alleged debt has on an individual is financial. For some, this impact is significant. This impact becomes plain when the dollars involved are considered, particularly in the context of the Newstart Allowance. It is widely considered to be inadequate, having not risen in real terms for approximately 25 years, and is the second-lowest unemployment payment in the OECD and lowest when rent assistance is included.¹⁴ A person entitled to the Newstart payment receives \$277.85 per week. Additional amounts are available through rent assistance (\$67.90 per week) and the energy supplement (\$4.41). Those with partial capacity to work may also receive \$3.10 per week as a pharmaceutical allowance. Research has shown that the 'budget standard' for a single unemployed person (the minimum needed to afford essentials like housing, food, electricity, healthcare and transport) — i.e. the poverty line — is \$433.68 per week.¹⁵ This means that people on the Newstart Allowance already fall well below the poverty line. Those receiving the Youth Allowance are in a similar position.
28. It is, therefore, unsurprising that many have reported feeling psychologically and emotionally distressed by reason of the financially precarious position they are left in after receiving a robodebt notice and the difficulties in trying to have the debt reviewed. Adding interest or taking an individual's tax return can also add to their financial problems. This kind of impact is documented in the experiences of those who gave evidence before the Senate Inquiry in 2017.¹⁶
29. Sadly, this trauma appears to have continued. There have even been reports of some welfare recipients who may have ended their own lives because of debts raised by Centrelink. This includes 22-year-old Jarred Madgwick who just hours after discovering Centrelink had raised a \$2,000 debt against him, took his own life.¹⁷ Other reports imply that some of the 2,030 people who died shortly after receiving a robodebt notice, nearly a third of whom were classified as "vulnerable" due to having complex needs like mental illness, drug use or experiencing domestic violence, may have also taken their own lives.
30. The indirect impact of robodebt is the impost placed on community support organisations. The corollary to welfare recipients 'giving up and missing out' includes increased financial hardship due to a reduction or suspension of payments, and general stress and anxiety. It also includes

¹⁴ Peter Whiteford, 'Is Newstart really the pacesetter Scott Morrison says it is?' *Inside Story* (10 July 2019) <https://insidestory.org.au/is-newstart-the-pace-setter-scott-morrison-says-it-is/?fbclid=IwAR0B2Z90JfQQ3gVKh1IsLxgGfqSbsV5uf3XwhgZ_5LqvOeEWgp1T7LE-szc>.

¹⁵ Peter Saunders and Megan Bedford, 'New Minimum Income for Healthy Living Budget Standards for Low-Paid and Unemployed Australians' (Research Paper, Social Policy Research Centre, Faculty of Arts and Social Sciences, University of New South Wales, August 2017), 91.

¹⁶ Senate Standing Committee for Community Affairs, Parliament of Australia, *Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative* (June 2017), 38–39 [2.111]–[2.112], 102 [5.60] (**Standing Committee Report 2017**).

¹⁷ Emily McPherson, 'Queensland man took his own life after learning of Centrelink debt, mum says', *Nine.com.au* (30 July 2019) <<https://www.9news.com.au/national/centrelink-robodebts-queensland-man-took-his-own-life-over-debt-mum-says-australia-news/e31e6f28-2e4b-4d3f-9095-d8f74e00cbc1>>.

increased pressure on already-stretched community support services.¹⁸ The way in which services provide help comes in a range of forms:

- a. supporting Centrelink customers deal with Centrelink, especially young people and people with disabilities;
 - b. providing support for stress and anxiety caused by dealings with Centrelink — a ‘significant increase’ according to staff members; and
 - c. stepping in to provide food assistance, cover rent arrears and other essential bills and pay transport and medication costs where a welfare recipient’s payments are reduced or suspended.
31. In terms of personnel, Anglicare estimates suggest that 13,041 hours per week of its social workers’ time is devoted solely to helping clients navigate the Centrelink system — equivalent of 343.2 full-time employees across Australia.¹⁹
32. LV believes that it is irresponsible to rely on robodebt to raise alleged debts in circumstances where the legality of the scheme is questionable, and the way in which debts are raised and pursued are deeply flawed, blunt and error-prone.

ISSUES WITH ‘ROBODEBT’ SYSTEM

33. LV is concerned that the current system has a greater risk of raising alleged debts which are not based on proper evidence and reasoning, and accordingly are erroneous. The fact that the OCI system has resulted in a significant increase in the number of debts being raised provides us with cause for concern.

Comparison between previous and current methods of raising debts

34. Before the ICT reforms came into effect, Centrelink used data-matching processes which compared Pay-As-You-Go data from the Australian Taxation office (ATO) with earning declarations made to Centrelink by the social security recipient.²⁰ Possible discrepancies identified by this data-matching process may have led to an ‘intervention’.
35. An intervention would involve Centrelink asking a welfare recipient to provide information. If this was not forthcoming, Centrelink could (and often would) request the welfare recipient’s employer to verify income that was earned between specific dates. After this manual process was complete, Centrelink would then decide if a debt should be issued.
36. Centrelink did not investigate all of the roughly 300,000 possible discrepancies raised per year due to resource and other practical constraints. Only seven per cent (approximately 20,000) of

¹⁸ Anglicare Australia et al, *Paying the Price of Welfare Reform: the Experiences of Anglicare staff and clients in interacting with Centrelink* (Full Report, May 2018) 6 (**Anglicare Report**).

¹⁹ Naaman Zhou, ‘Centrelink automation hurting Australia’s most vulnerable – Anglicare’, *The Guardian* (25 June 2018) <<https://www.theguardian.com/australia-news/2018/jun/25/centrelink-automation-hurting-australias-most-vulnerable-anglicare>>.

²⁰ From as early as 2004: Commonwealth Ombudsman, *Centrelink’s automated debt raising and recovery system: a Report about the Department of Human Services’ online compliance intervention system for debt raising and recovery* (Report, 2017) 5 (**Ombudsman Report 2017**); see also *Data-Matching Program (Assistance and Tax) Act 1990* (Cth).

all possible discrepancies — those classified as the ‘highest risk’ — resulted in a letter for clarifying information being issued.²¹

37. The OCI system digitised this debt-raising process. Fundamentally, the identification of a possible discrepancy no longer triggered a manual enquiry or a request for income data from a social security recipient’s employer. Rather, the OCI system results in a letter being issued in most cases, without meaningful human intervention or oversight.
38. This has led to a significant increase in the number of Centrelink interventions. In 2016-17, this resulted in approximately 783,000 interventions²² — an almost 40-fold increase. Put another way, the rate of initial letters being sent increased from 20,000 per year to 20,000 per week. Coinciding with this has been an increase in the number of debts raised.²³ While there has been a reduction in the number of debts reduced²⁴ or fully waived,²⁵ there has been a nearly three-fold increase in debts that were partially waived.²⁶ The cost-effectiveness of the scheme is also questionable with the Department spending at least \$400m to recover \$500m from social security recipients through the robodebt scheme.²⁷

High levels of ‘erroneous’²⁸ discrepancies, debts and pressures to raise debts

39. A high proportion of discrepancies identified by robodebt — approximately one in five — do not result on a debt being raised because a welfare recipient can provide clarifying information. In our view, this is an unsatisfactorily high number of cases where this is occurring. Of greater concern is the accuracy of the other 80 per cent of cases where there are real prospects of debts are being raised
40. According to the Department’s own data, in around 20 per cent of interventions, welfare recipients are able to provide information clarifying their income which results in no debt being owed. Some call these identified discrepancies are “errors”.²⁹ In a previous Senate Inquiry, the Department defended this, stating that:

²¹ In determining which discrepancies to investigate, the pool was subject to a risk matrix. Centrelink would investigate approximately 20,000 of the ‘highest risk’ discrepancies per year: Ombudsman Report 2017, [2.2].

²² Ombudsman Report 2017, [2.4].

²³ From 142,634 in July 2016–June 2017 to 193,936 in July 2018–March 2019: Department of Human Services, Senate Estimates (31 March 2019).

²⁴ From 39,420 in July 2016–June 2017 to 8,837 in July 2018–March 2019: Department of Human Services, Senate Estimates (31 March 2019).

²⁵ From 13,084 in July 2016–June 2017 to 8,710 in July 2018–March 2019: Department of Human Services, Senate Estimates (31 March 2019).

²⁶ From 3,187 in July 2016–June 2017 to 11,190 in July 2018–March 2019: Department of Human Services, Senate Estimates (31 March 2019).

²⁷ Luke Henriques-Gomes, ‘Robodebt scheme costs government almost as much as it recovers’, *The Guardian* (22 February 2019) <<https://www.theguardian.com/australia-news/2019/feb/22/robodebt-scheme-costs-government-almost-as-much-as-it-recovers>>.

²⁸ ‘Erroneous’ is used for ease of reference rather than as the best descriptor. LV recognises that in the 20 per cent of cases, no debt is owed and, accordingly, describing the discrepancy as an ‘error’ may not be entirely accurate. However, in LV’s view, this criticism emphasises form over substance. For reasons outlined, these discrepancies could have resulted in erroneous debts but for the intervention of the social security recipient. In other words, while the discrepancy may have been appropriately identified at first, it was later found to be incorrect. Moreover, a high number of debts are later when a social security recipient challenges the debt.

²⁹ Standing Committee Report 2017, 33 [2.89].

This is how the system is designed to work, in line with the legal requirements of welfare recipients to report all changes in circumstances and the department's obligation to protect government outlays.³⁰

41. The issue with this high number is not the fact that social security recipients are being notified about a discrepancy — this is entirely appropriate. The only reason 20 per cent of cases do not result in a debt being owed is because the welfare recipient provides Centrelink with information which shows there is no discrepancy. As such, the issue is that, even if information is available but not provided within time, a debt will automatically accrue. Where this does not occur, there may not be a proper basis for raising the debt. This would apply to the group of people who have reported their details correctly to both Centrelink and the ATO but are unable to produce the records to prove this.
42. This raises real questions about the accuracy of the remaining 80 per cent of cases where debts are ultimately raised.³¹ Unless challenged (which may result in a 'manual' review), it is difficult to discern what proportion of discrepancies:
 - a. are incorrect but where clarifying information has not been provided;
 - b. are higher (or lower) estimates of what is actually owed; or
 - c. are accurate.³²
43. As noted at paragraph [38] above, Departmental figures show that a large number of debts that are raised are reduced or either partially or fully waived. This figure equates to approximately 17 per cent of all debts raised, and only relates to debts which are challenged by social security recipients. When combined with the one in five interventions which result in no debt, it is clear that a substantial number of discrepancies identified by robodebt scheme lack a proper basis (either entirely or in part).
44. This potential unreliability was the subject of criticism from the Commonwealth Ombudsman. The Department acknowledged that modelling on how many debts were likely to be over-calculated as opposed to undercalculated had not taken place. The Ombudsman thus recommended:

The risk of over-recovering debts from social security recipients and the potential impact this may have on this relatively vulnerable group of people, warrants further consideration by DHS. We suggest DHS test a sizeable sample of debts raised by the OCI. The samples should include people who did not respond to the initial letter, as well as people who went online and people who contacted DHS via other channels. We also suggest DHS re-evaluate where

³⁰ Hank Jongen, General Manager, Department of Human Services, 'Misleading claims about online compliance system' (Media Release, 16 January 2017) <<http://mediahub.humanservices.gov.au/media/misleading-claims-online-compliance-system/>>.

³¹ Evidence to Senate Standing Committee on Community Affairs, Parliament of Australia, 11 April 2017, 51 (Emma King, Victorian Council of Social Services) (**VCOSS Senate Inquiry evidence**); Evidence to Senate Standing Committee on Community Affairs, Parliament of Australia, 8 March 2017, 1–2 (Cassandra Goldie, Australian Council of Social Services) (**ACOSS Senate Inquiry evidence**); Australian Council of Social Services, Submission 31 to Senate Standing Committee on Community Affairs, Parliament of Australia, *Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative* (21 March 2017) 6 (**ACOSS submissions**).

³² Ibid.

the risk for debts calculated on incomplete information should properly lie and investigate whether there are ways to mitigate this risk.³³

45. The Department has introduced measures to mitigate this risk. One measure has been to introduce better assessment tools, case selection technologies and online filter. The Department reports that these technologies have reduced the number of interventions being able to be resolved with no debt or low debt without needing to notify the social security recipient.³⁴ This appears to be encouraging progress to address the risk of over-recovery.
46. However, the establishment of a team of ‘compliance officers’ appears to have been less successful. This team of contractors hired by the Department attempts to contact welfare recipients to explain, check and review income reporting discrepancies. This is done by phone call and correspondence and gives welfare recipients an opportunity to provide clarifying information.³⁵
47. Recent revelations from whistleblowers have raised doubts as to the effectiveness and fairness of this process. It is reported that compliance officers are subject to targets on daily ‘finalisations’ — that is, how many debts were raised each day. While the Department stresses that not all finalised cases result in a debt being raised, one whistleblower is reported as having said:

The department is just a debt-raising machine, and that’s all they care about. They say that they care about the customer, but they don’t.
48. LV is concerned that imposing these targets has the potential to distract attention away from what should be the purpose of these reviews — to determine the accuracy of the identified discrepancy and provide individuals with information about their review rights — and encourages brief contacts or the avoidance of contact altogether.³⁶ This approach has a greater likelihood of producing erroneous debts.
49. Unfortunately, this culture may already be flourishing. Again, according to whistleblowers,³⁷ compliance officers are already engaged in troubling conduct including:
 - a. only allowing calls to ring once or twice before hanging up;
 - b. treating sent mail as if it had been received without checking whether the letter “had been signed for”;
 - c. not checking that an individual’s mail addresses was current (according to the Commonwealth Ombudsman, as many as 114,653 letters may have been sent to old mail and email addresses)³⁸;

³³ Ombudsman Report 2017, 42 [3.6].

³⁴ Ibid, 31–2 [2.81]–[2.82].

³⁵ Stephen Easton, ‘Centrelink returns fire after latest robodebt claims: ‘there is no questioning’ the algorithm’ *The Mandarin* (14 August 2019) <<https://www.themandarin.com.au/113811-centrelink-returns-fire-after-latest-robodebt-claims-there-is-no-questioning-the-algorithm/>>.

³⁶ Emily McPherson, ‘What happens inside Centrelink’s ‘toxic’ debt recovery offices’, *Nine.com.au* (9 August 2019) <<https://www.9news.com.au/national/robodebt-what-happens-inside-centrelink-offices-australia-news/d073fdfa-01a0-4d33-bcfe-a2df387417e9>>.

³⁷ Ibid.

³⁸ Commonwealth Ombudsman, *Centrelink’s automated debt raising and recovery system: A Report about the Department of Human Services’ online compliance intervention system for debt raising and recovery* (Implementation Report, 2019) 9 [2.17] (**Ombudsman Report 2019**).

- d. making calls on private numbers which were more likely to be unanswered; and
 - e. subjecting those with the lowest 'finalisations' to public shaming and humiliation with "whiteboards of shame".
50. Of particular concern is the assertion that, even where compliance officers may suspect that data-matching has produced inaccuracies, these discrepancies are not being questioned because it was "not within their remit to do so".³⁹ This suggests that, even if it may be apparent that the algorithm has identified a potentially inaccurate discrepancy, a debt is nevertheless raised. If this is the case, this would represent a dereliction of the Department's obligations to ensure that erroneous debts are not being issued to social security recipients.
51. The above suggests that, even with 'human involvement', the debt-raising system remains geared towards raising debts. Many welfare recipients are not likely to have been given a fair opportunity, if any, to provide clarifying information. As such, there is a real potential that erroneous debts are (still) being issued.

Averaging

52. LV also has concerns about 'averaging' as it has the real potential of raising debts which do not actually exist. At its core, whenever a welfare recipient does not provide earnings data to Centrelink, the OCI system automatically fills the gap with an *average* fortnightly income calculated using the ATO's annual income data. This assumes that earnings over a total period of employment are consistent, rather than applying the precise amounts against the fortnights in which the income was actually earned.
53. For example, if a person is studying and receiving a Centrelink payment for the first half of the financial year, and then commences work on \$60,000 per annum for the second half of the financial year, the automated system will average out the \$30,000 the person earned from January to June across the entirety of the financial year, attributing income that was not actually earned from July to December, and rendering the person ineligible for their benefit (or eligible for a lower rate of payment).
54. The obvious difficulty with averaging is that it does not account for the realities of many people's lives. For many people, averaging is an inappropriate way to determine their real income. Some common examples would include those who:
- a. work part time or casually;
 - b. work sporadic hours throughout the year due to study commitments or seasonality of some jobs;
 - c. struggle to find regular work, or might work multiple jobs;
 - d. have stopped working due to illness, family commitments or some other emergency.
55. There is evidence that a number of debts raised by Centrelink have been set aside by Administrative Appeals Tribunal and remitted to Centrelink to determine the debt correctly because of averaging. In those cases, Tribunal Members have commented that the robodebt

³⁹ Emily McPherson, 'What happens inside Centrelink's 'toxic' debt recovery offices', *Nine.com.au* (9 August 2019) <<https://www.9news.com.au/national/robodebt-what-happens-inside-centrelink-offices-australia-news/d073fdfa-01a0-4d33-bcfe-a2df387417e9>>.

algorithm did not accurately record what the actual overpayment was and, concerningly, Centrelink made no efforts to obtain actual wage records.⁴⁰

56. As the effect of raising a debt can result in, inter alia, reducing an individual's social security payment, doing so in circumstances where the basis for the overpayment is factually dubious would be unjustifiable and arbitrary, thus amounting to a violation of the right to social security. While averaging may suggest that an overpayment has occurred, it should not be used as a substitute for the Department properly investigating whether an overpayment has in fact occurred. Before raising any debt, it is incumbent on the Department to conduct proper checks, make efforts to contact the individual and others who may be able to provide clarifying information (for example, employers or financial institutions), and assist in the obtaining of that information as much as possible.

Double counting

57. 'Double counting' is a specific way erroneous debts may arise — and it is a problem which a manual review would detect and overcome with greater ease. Indeed, the reason provided by the Department in waiving the debt which was subject to challenge before the Federal Court was double counting.⁴¹
58. An example of double counting may occur where the name of an employer reported by an individual to Centrelink does not match the employer's name recorded with the ATO. While the employer is the same entity, the OCI will treat it as two different entities and record two streams of income. This results in income being counted twice. Therefore, even though a welfare recipient has earned an income within the permissible limits, a discrepancy may still be identified resulting in a debt letter being sent. By no fault of their own, the welfare recipient is then required to correct his mistake or risk having a debt raised against them.
59. This is another reason why Centrelink should check discrepancies itself before issuing debts. If the automated debt-raising system is to continue, as recommended by the Ombudsman, Centrelink should re-evaluate further where the risk for debts calculated on incomplete information should properly lie and investigate whether there are ways to mitigate this risk.

ISSUES WITH PROOF

'Reverse onus of proof'

60. The OCI system in effect creates a 'reverse onus of proof'. Social security recipients have 28 days to disprove the existence of the debt by providing clarifying information (for example, by producing copies of pay slips).⁴² Failure to provide information within the stipulated timeframe results in the data-matched income information forming the basis as to whether a debt is owed. As noted above, even if a compliance officer suspects there may be an error produced by the

⁴⁰ Victoria Legal Aid, Responses to Questions on Notice from the Senate Community on Community Affairs, Parliament of Australia, *Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative* (11 April 2017) 7 [35]–[39].

⁴¹ Cameron Houston and Chris Vedelago, 'Centrelink wipes 'robo-debt' at centre of test case', *The Sydney Morning Herald* (5 May 2019) <<https://www.smh.com.au/national/centrelink-wipes-robo-debt-at-centre-of-test-case-20190505-p51kac.html>>.

⁴² This was initially 21 days: Ombudsman Report 2017, 14 [3.26].

robodebt system, they do not question it thus, again, leaving it to the welfare recipient to correct the data.

61. For several reasons, it may be difficult — if not impossible — for welfare recipients to collect the necessary information to show that there has not been an overpayment. Some may feel so overwhelmed or lack the proficient to successfully navigate this process that they simply ‘give up and miss out’.⁴³ For many, this requirement may amount to discrimination for certain parts of our community. In addition, where information is simply unavailable, this still does not overcome the issue as to the legality of the debt.

Conflicting advice about record keeping

62. The advice given to social security recipients by the ATO and Centrelink about appropriate record keeping has not always been consistent and has conflicted in the past. Even though a welfare recipient may have relied on this advice in good faith, they may no longer be able to provide the necessary documents and face the prospect of an erroneous debt.
63. Before legislative changes were introduced removing limitation periods to recover debts,⁴⁴ Centrelink could only recover debts less than were six years old.⁴⁵ Despite this, the advice given by Centrelink or ATO about how long to retain documents was not consistent with this timeframe.
64. Until 2016, the Centrelink website and letters it issued stated that employment information was only required to be retained for 6 months.⁴⁶ Moreover, as of February 2017, the ATO suggested that individuals with simplified tax affairs retain tax records for only two years.⁴⁷
65. The issue with record-keeping advice remains problematic. Neither agency presently appears to recommend keeping relevant records permanently: the ATO suggests records be kept for 5 years;⁴⁸ the Centrelink website provides no timeframe.⁴⁹
66. If a social security recipient, relying on that advice, loses or destroys records thinking they are no longer needed, they may have great difficulty in providing information. Therefore, it is conceivable that a social security recipient may not be able to provide information because, relying on that advice, they no longer possess the relevant information to disprove the discrepancy. Given the reverse onus, it would be impossible to avoid a debt in these circumstances despite there being no proper basis to raise one.

⁴³ Anglicare Report, 9–11.

⁴⁴ See *Social Security Act 1991* (Cth), s1234B, as inserted by *Budget Savings (Omnibus) Act 2016* (Cth), item 36.

⁴⁵ *Social Security Act 1991* (Cth), ss 1231(2A)–(2E), 1232(2)(6), 1233(7A)–(7E), 1234(1B)(a)–(aa), as repealed by *Budget Savings (Omnibus) Act 2016* (Cth) items 31–35, 37.

⁴⁶ Terry Carney, ‘The New Digital Future for Welfare: Debts without Legal Proofs or Moral Authority?’ (2018) *University of New South Wales Law Journal Forum*, 4.

⁴⁷ Ombudsman Report 2017, 16 [3.24] citing Australian Taxation Office, SDR 2006/1, <https://www.ato.gov.au/individuals/income-and-deductions/in-detail/keeping-your-tax-records/> (accessed 6 February 2017).

⁴⁸ Department of Human Services, ‘Income reporting’ <<https://www.humanservices.gov.au/individuals/topics/income-reporting/30331>> (accessed 23 August 2019).

⁴⁹ Australia Taxation Office, ‘Keeping your tax records’ <<https://www.ato.gov.au/Individuals/Income-and-deductions/In-detail/Keeping-your-tax-records/>> (Accessed 23 August 2019).

Difficulties obtaining records

67. Where a social security recipient loses or destroys their own records, or never had the records to begin with, it may not be possible to obtain records by other means.⁵⁰ There are countless ways in which accessing required information may be problematic:
- a. an employer may have gone out of business;
 - b. an employer's records may themselves been lost or destroyed;
 - c. some employers may have poor record keeping practices, or no records at all (for example, if a person was paid cash in hand); and
 - d. some employers may not cooperate with requests for information (an issue which Centrelink does not encounter, given its powers to compel production of evidence).
68. Even if the information can be obtained, a timeframe of 28 days may simply be unrealistic or impractical to comply with for many people.
69. Due to issues with proof, exacerbated by Centrelink's refusal to investigate matters itself, there is a risk of over-recovering debts from welfare recipients, an already relatively vulnerable group of people already who may 'give up and miss out'. Many of the 80 per cent of cases (noted above at [39]) may simply be people who have not been able to overcome the reverse burden of proof. It is therefore unsurprising that the Commonwealth Ombudsman labelled this system "not reasonable or fair" in all cases and stated that the OCI system will "in practice ... place greater emphasis on the customer's responsibility to either accept the debt or provide further information."⁵¹ Associate Professor Terry Carney opines that more people will resort to the former option, and this is a cause for concern:
- It is of wider policy interest because, in practice, when confronted with suggestions of having an overpayment, often from up to seven years ago, the least literate, least powerful, and most vulnerable alleged debtors will simply throw up their hands, assume Centrelink knows that there really is a debt, and seek to pay it off as quickly as possible.⁵²
70. It is acknowledged that the Department has responded to the Ombudsman's recommendation by developing new internal guidelines for staff where social security recipients disclose difficulties in obtaining clarifying information. This includes suggesting information gathering powers under s 192 of the *Social Security Act 1991* (Cth) be used.⁵³
71. However, this is problematic for two reasons. Firstly, the Department appears to be using information gathering powers only sparingly. From April 2017 to December 2018, powers under s 192 were apparently used approximately 570 times.⁵⁴ This figure represents only a tiny fraction of the total number of discrepancies identified by OCI, suggesting the burden of providing information still rests disproportionately on social security recipients to an overwhelming extent.

⁵⁰ Ombudsman Report 2017, 12–13 [3.22]–[3.24].

⁵¹ Ombudsman Report 2017, 12 [3.22].

⁵² Terry Carney, 'The New Digital Future for Welfare: Debts without Legal Proofs or Moral Authority?' (2018) *University of New South Wales Law Journal Forum*, 3.

⁵³ Commonwealth Ombudsman Report 2019, 17 [2.56].

⁵⁴ Commonwealth Ombudsman Report 2019, 17 [2.58].

Secondly, while the visibility of this policy may be well-known internally, social security recipients may not know that Centrelink can help obtain information, including compulsorily.

Difficulties faced by vulnerable individuals

72. There may be a number of personal reasons why records may not be easily obtainable or have difficulty handing them over to Centrelink, such as:
 - a. some people facing acute problems such as mental health issues, relationship breakdown, homelessness and/or family violence may struggle to find the resources and emotional energy to collect the relevant information; and/or
 - b. those who are not technology proficient (especially older Australians) and lack literacy skills (such as recent migrants) may encounter barriers when navigating the computerised system.
73. To assist this particularly vulnerable group, the Department notes that they have met with welfare groups and other organisations, such as National Social Security Rights Network and ACOSS, to discuss how to help that cohort provide information.⁵⁵ It remains unclear what changes, if any, these meetings have actually had though.

UNCHALLENGED DEBTS — BARRIERS TO ACCESSING MERITS REVIEW

74. Related to the issue of proof is the concern that some will capitulate, choosing not to ‘fight’ a debt even where it has been raised wrongly.
75. The availability of a merits review mechanism is not in issue. Any debt raised by Centrelink is amenable to challenge. There are several stages to this process. The debt is firstly reconsidered internally by an authorised review officer. If the applicant is unhappy with the outcome of the ARO review, then the debt can be reviewed externally by the AAT.⁵⁶ As noted above, there is evidence that the AAT does remit to Centrelink overpayments produced by robodebt system where the debt is inaccurate. This suggests the merits review system is working.
76. Rather, the concern is whether welfare recipients will *access* that review system. ACOSS reported a number of reasons why “less assertive, confident, energetic or literate people” may be dissuaded from challenging a debt (see some examples below).
77. LV believes that it is entirely inadequate that supporting individuals in the community has shifted from the government to not-for-profit and other charitable organisations. That is not the hallmark of a properly functioning social security system. For this to occur, Australia is evidently failing in its international obligations.
78. In LV’s view, these failings demonstrate that the robodebt scheme has caused a loss of faith in the social security system. This seems plain if people are turning away from what should otherwise be a safety net.

Fear of repercussions if debt challenged

79. Firstly, some people were fearful to challenge an incorrect debt, claiming that the OCI system had created a “climate of fear”. Welfare recipients did not wish to “risk losing the financial safety net

⁵⁵ Ombudsman Report 2019, 19 [2.74].

⁵⁶ There are two tiers of review at the AAT. If the applicant is unhappy with the outcome of the first tier review (‘AAT1’), a further application for review can be made to the second tier (‘AAT2’).

which the Department provides” so chose not to challenge it.⁵⁷ In the words of one welfare recipient:

You feel powerless to challenge Centrelink, you just put your head down and go along with every time-wasting resume writing course they put you in, so that you can still have a roof over your head ... They have the power of destroying your life, actually and literally. Receiving an automated debt notice from Centrelink reinforces the punitive culture of the Department and shows their attitude that people who need income support are guilty until they prove their own innocence.⁵⁸

Challenging debts is time and resource intensive

80. Some people chose not to challenge debts because of the impost doing so would place on their lives in conjunction with other challenges such as unstable employment or a lack of time to consult the department. Some barriers in challenging a debt were revealed by a social security recipient’s submission to the previous Senate Inquiry:

I would estimate that I have spent probably 100 hours, if not more, gathering payslips from multiple employers; learning my rights about debt collectors, and what debt collectors can and cannot threaten; and learning my legal rights surrounding inaccurate welfare debts. I have spent hours on the phone to Centrelink, with many calls going unanswered and cut off midway. This process has resulted in emotional and physical stress, and increased sick leave from work.⁵⁹

The process of challenging debts is difficult to navigate

81. A third reason in its report is that some people simply do not possess the proficiency to navigate the system – especially a computerised one. As Anglicare suggests in its report, ‘:

The expectation that people experiencing acute problems like mental health issues, relationship breakdown, homelessness or domestic violence are able to find the resources and emotional energy to negotiate complex pathways to access or restore payments is unrealistic. A number of clients described how the experience of being forced to use a computer or phone — even when seeking out face-to-face interaction at a service centre — had meant they had just given up. This meant they missed out on essential financial support, potentially spiralling them further down the debt cycle, or not being able to provide essentials for their children and those they cared for.

SERVICE DELIVERY ISSUES ARISING FROM ROBODEBT

82. The second plank of the WPIT Programme was the shift to “digital channels and self-managed online services”.⁶⁰ The strategy has been to encourage social security recipients who receive an initial letter being urged to use its online self-service system as a first port of call.

⁵⁷ ACOSS Senate Inquiry evidence, 6.

⁵⁸ Christopher Knais, Welfare recipients say Centrelink robodebt system left them stressed and afraid, *The Guardian* (28 March 2017) <<https://www.theguardian.com/australia-news/2017/mar/28/welfare-recipients-say-centrelink-robot-debt-system-left-them-stressed-and-afraid>>.

⁵⁹ Standing Committee Report 2017, 38 [2.111].

⁶⁰ DHS Technology Report 2016, 5.

83. Many social security recipients are urged to use online platforms even though there may be no remedy available there. In its 2017-18 report, the Department acknowledges that:

At this time, not all transactions can be completed online, requiring some customers to be diverted back into staff-assisted channels. This makes it difficult for the department to re-engage customers digitally. The department continues to investigate making targeted improvements to its self service products.⁶¹

84. With the higher numbers of initial letters being issued, there has not been an increase in social security recipients contacting Centrelink. Despite efforts to encourage people onto online platforms, many people are still contacting Centrelink by phone or in person. This is due to the compounding effect of inter-related issues. Further, the quality of service has declined not just because of the increase in demand, but also because of the outsourcing of services.⁶²

Budget cuts and loss of corporate knowledge

85. Successive governments have cut Centrelink's budget overtime to save money. One such way to save money has been to outsource services to private call centres. While this may have resulted in monetary savings, it has come at the expense of experience. According to the CPSU, budget cuts have resulted in inexperienced people dealing with queries from welfare recipients.
86. Insufficient resources were diverted into training staff on how to use the online systems. Staff were therefore ill-equipped to "understand the customer experience of the OCI system" and provide assistance. Ironically, this resulted in more contacts with Centrelink rather than fewer which was the aim of the digital strategy.⁶³
87. The Commonwealth Ombudsman has reported that the Department has responded to its recommendations concerning communication between social security recipients and Centrelink. The Department is reports to have added resources and personnel, provided better training to staff who deal with social security recipients, and made information more visible.⁶⁴ However, of the new staff, most of them were hired through private companies.⁶⁵ This does not address the issue of the loss of corporate knowledge within Centrelink which is said to increase the pressure on the remaining staff.⁶⁶

Service delivery issues and impact on not-for-profit community support sector

88. Navigating Centrelink's customer interface system has been described as a "vortex of humiliating and frustrating bureaucratic procedures" which is plagued by problems.⁶⁷ Common problems reported by welfare recipients include:

⁶¹ DHS Annual Report 2017–18, 176.

⁶² Community and Public Sector Union, Submission 65 to Senate Standing Committee on Community Affairs, Parliament of Australia, *Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative* (March 2017) 2–3.

⁶³ Ombudsman Report 2017, 18 [3.35]–[3.37].

⁶⁴ Ombudsman Report 2019, 18 [2.63]–[2.67].

⁶⁵ Gareth Hutchens, 'Centrelink call centre staff boosted to cope with 1m calls a day', *The Guardian* (8 August 2018) <<https://www.theguardian.com/australia-news/2018/aug/08/centrelink-call-centre-staff-boosted-to-cope-with-1m-calls-a-day>>.

⁶⁶ Anglicare Report, 3.

⁶⁷ Andie Fox, 'As a struggling single mother, Centrelink terrorised me over ex-partner's debt', *The Sydney Morning Herald* (6 February 2017) <<https://www.smh.com.au/lifestyle/life-and-relationships/as-a-struggling-single-mother-centrelink->

- a. lack of clear information on who to contact for questions or a review;
 - b. long wait times while on-hold (see further discussion below);
 - c. taking time off work to visit Centrelink office in person;
 - d. being expected to use self service facilities which contained unclear explanations or limited options to resolve a particular dispute;
 - e. short timespans within which to speak to Centrelink staff;
 - f. awkwardness of forms; and
 - g. continuous harassing demands from debt collectors.
89. A study conducted by Anglicare concluded with similar results.⁶⁸ After surveying 218 staff members and conducting 18 client case studies, Anglicare reported on a typical client's journey interacting with Centrelink. The research revealed many of same complaints noted above including:
- a. long wait times, with many reporting wait-times of at least half an hour and up to two hours;
 - b. a lack of face-to-face interactions. Visiting Centrelink office often resulted in being directed and redirected to computers or phones. Online services in particular were not always appropriate, especially for those in crisis situation such as bereavement or unexpected job loss. Connecting them with social supports was simply not possible via self-help computer interfaces;
 - c. inconsistent information from online services and Centrelink staff; and
 - d. inability to understand complex needs and de-escalate challenging situations.
90. These issues present real barriers to social security recipients attempting to seek information about or challenge a robodebt. The inaccessibility to Centrelink has the real potential to result in people giving up, and a debt being raised. As these issues are well-known for some time now, LV believes that it is inexcusable that these barriers continue to exist and sufficient resources should be immediately invested overcome them.

Call wait times

91. LV wishes to address a particular issue — call wait times. In our view, the Department's claims that it has achieved its performance measures in relation to call wait times should be taken with a degree of scepticism.
92. The Department claims that it has been working on improving its capabilities to ease capacity and improve the technical functioning of its telephony platform.⁶⁹ In its 2017–18 Annual Report, the Department states that it achieved its targets concerning a timely response to incoming calls.

[terrorised-me-over-expartners-debt-20170206-gu61nu.htm](#)>. LV notes its concerns relating the breach of this author's personal details. This is an important issues which should also be looked at by this Committee.

⁶⁸ See Anglicare Report.

⁶⁹ Department of Human Services, *Corporate Plan 2017–18* (Report, 2018) 9.

Despite this, difficulties with phone services, including busy or engaged signals, call wait times, and call disconnections remains the third highest reason for a customer complaint.⁷⁰

93. A closer analysis of average-speed-to-answer data reveals that there are still many issues which trouble Centrelink's response to telephone calls.
94. *Firstly*, the average-speed-to-answer time only accounts for "handled" calls. An investigation⁷¹ analysing the 2015–16-year data found that calls which were 'blocked' (i.e. a call was received but the signal was engaged) or were abandoned were not counted. Removing these calls from the data pool significantly skews the results because 52.8 per cent of all attempted calls to Centrelink were either 'blocked' or abandoned. In actual terms, this equates to roughly 36 million phone calls.
95. *Secondly*, the 'average' wait time is also misleading. In 2015–16, the reported average wait time was 15 minutes and 9 seconds. This figure incorporates calls from all category types. When this figure is broken down by category, the average wait time for youth-related payments increases to 25 minutes and 35 seconds, and that for employment-related benefits increases to 25 minutes and 33 seconds. The Australian National Audit Office's report produced similar results when it examined wait time for the 2013–14 year. In the worst category – youth-related calls – 58 per cent of callers waited longer than 30 minutes on average to speak to Centrelink staff.⁷²
96. In addition, the average wait time appears to have increased since 2015-16, suggesting the strategies to reduce call wait times are not working. In 2016–17, the average wait time was 15 minutes and 44 seconds representing an increase of 35 seconds on average from the previous year.⁷³ In 2017–18, the average time was 15 minutes and 58 seconds⁷⁴ – only two seconds shy from the key performance indicator of 16 minutes.
97. *Thirdly*, the 'average' also does not distinguish between peak and off-peak times. During off-peak times, callers may not wait long (if at all) to speak to Centrelink staff. However, during peak months (July and December), the wait time would be longer. Pressure may be further exacerbated at certain times during the day as many may only be able to call during certain hours.⁷⁵
98. Testing conducted by *IsCentrelinkDown* suggests this may indeed be the case. The tests revealed that the rate of unanswered calls to the phone number found on the initial letter increased from the average of 27.44 per cent to about 50 per cent at 12:00 pm.⁷⁶
99. *Finally* — and perhaps the factor which singularly renders the results misleading — is that the 'average' does not account for double counting. Where a call is transferred to another line (for

⁷⁰ Department of Human Services, *Annual Report 2016–17*, (Report, 2017). This was behind dissatisfaction with a claim, application or assessment process, including waiting too long, needing to contact the department multiple times to progress the matter, and not being updated on progress and dissatisfaction with a decision, outcome or payment, including waiting too long, a cancellation or suspension, or a payment not being received.

⁷¹ Wes Mountain, 'Infographic: the Truth behind Centrelink's waiting times', *The Conversation* (21 March 2017) <<https://theconversation.com/infographic-the-truth-behind-centrelinks-waiting-times-74700>>.

⁷² Australian National Audit Office, *Management of Smart Centres' Centrelink Telephone Service* (Report 37, 2015) 41 (Table 2.3).

⁷³ Department of Human Services, *Annual Report 2017–18*, (Report, 2018) (**DHS Annual Report 2017–18**).

⁷⁴ DHS Annual Report 2017–18, 175.

Program 1.1 Services to the Community—Social Security and Welfare—Performance overview.

⁷⁵ The 1800 and 13 telephone numbers operate during business hours, and not on weekends.

⁷⁶ Standing Committee Report 2017, 68 [3.113].

example, from the general enquiries line to the complaints line) the clock restarts. This is because Centrelink considers the initial enquiry “resolved”.⁷⁷ Therefore, even if a person waits over one hour to speak to the correct Centrelink staff member having been on hold several times, so long as the duration of each time on hold does not exceed 15 minutes, Centrelink will consider the relevant KPI met.

ISSUES WITH LEGALITY OF ‘ROBODEBT’

100. To exercise public decision-making powers, there must be authority at law to do so. An issue that arises with the current robodebt scheme is whether the automated system is authorised at law to make the decision to raise a debt against a social security recipient. It is LV’s view that this authority is lacking. Moreover, even assuming the authority exists, Centrelink is arguably obliged to establish *for itself* that there is a difference between the amount paid and the amount to which a person is entitled.⁷⁸ This is especially so given the uncertainty about the reliability and accuracy of using an automated systems. LV believes that, only if an authorised Centrelink officer is satisfied that the entitlement was not been properly paid can a debt then be raised. In the absence of an express provision in the law which permits a debt to be created ‘automatically’, the default position — that is, no debt — should prevail.

Legality of automatically raised debts

101. Under s 1222A of the *Social Security Act 1991*, a debt can only be raised against a person who is paid a social security payment “if, and only if”:

(a) a provision of this Act, the [*Social Security Act 1947*], the *Social Security (Fares Allowance) Rules 1998* or the *Data-matching Program (Assistance and Tax) Act 1990* expressly provided that it was or expressly provides that it is, as the case may be; or

(b) the amount:

(i) should not have been paid; and

(ii) was paid before 1 January 1991; and

(iii) was not an amount to which subsection 245B(2) of the 1947 Act applied.

This requires establishes a clear responsibility on a decision-maker to be satisfied that the amount paid “should **not** have been paid” before a debt can be raised.

102. Automated decision-making under social security law is purportedly authorised by s 6A of the *Social Security (Administration) Act 1999* (Cth). This provision permits the Secretary to make arrangements for the use of computer programs for any purposes for which the Secretary may make decisions under the social security law. Decisions made by the operation of a computer program under such an arrangement is taken to be a decision of the Secretary.

103. While s 6A might justify the decision to send out a letter to a social security recipient, LV believes that this provision does not justify the legality of a robodebt. Section 6A of the *Social Security (Administration) Act 1991* is not listed under the *Social Security Act 1991*. More fundamentally, even if it were to apply, it lacks the *express* wording necessary to authorise such action. There are

⁷⁷ See Wes Mountain, ‘Infographic: the Truth behind Centrelink’s waiting times’, *The Conversation* (21 March 2017) <<https://theconversation.com/infographic-the-truth-behind-centrelinks-waiting-times-74700>>.

⁷⁸ *Social Security Act 1991* (Cth), s 1223.

clear legal consequences to an individual in raising a debt. In the absence of clear and unambiguous language, s 6A does not permit a debt to be raised automatically and without oversight by a human.

104. Further, there is no relevant provision in the other listed statutes listed under s 1222A(a) which *expressly provides* for the automatic creation of a debt after a data-matching process. Under s 10(1)(a)(iv) of the *Data-matching Program (Assistance and Tax) Act 1990*, Centrelink “may take action on the basis of information received by it under ... a data matching cycle to ... recover an overpayment of personal assistance.” At its highest, s 10(1)(a)(iv) appears to permit Centrelink to *use* the information derived from data-matching technology. In other words, it may trigger the process to raise a debt, but the information in and of itself does not authorise the raising of a debt. Accordingly, an authorised Centrelink officer is obliged to determine whether, taking into account the data-matched information, whether the individual should not have been paid.
105. The European Union’s General Data Protection Regulation provides a helpful contrast to the legal uncertainty in the Australian social security law around automated debt-raising. Article 22 provides that unless a specified exemption applies, the use of solely automated processing for decisions that produce legal or other significant effects for individuals is prohibited. Meaningful human involvement and oversight is required. In other words, human ‘rubber stamping’ will not suffice. As outlined above, the Australian context shows that debts can be raised in an automated way. As compliance orders do not consider reviewing identified discrepancies to be within their ‘remit’, there appears to be a complete lack of any meaningful human oversight. Adopting a similar approach to that in Europe would ensure not only that a debt is in fact owed but it would also improve confidence in the decision-making process more generally.

Lack of sufficient evidence to reach necessary state of satisfaction

106. Relying on ‘averaging’ to reach this state of satisfaction is questionable. Firstly, the legality of relying on an apportioned amount as a basis to raise a debt in all cases is unclear. For example, s 1073A of the *Social Security Act 1991* permits the apportioning of income from earnings but only in limited circumstances, namely that: the individual is receiving a pension; and only if the income was not paid in respect of a particular period of work. In the absence of similar provisions for all social security payment types (like the Newstart or Youth Allowance payments), averaging is arguably not an authorised method to determine earnings for individuals who are paid regularly and receive some other benefit.
107. Secondly, for the reasons outlined above, averaging has a real potential to raise an alarm about discrepancies which are uncertain or inaccurate. Given these deficiencies, it is arguable that a robodebt (without any meaningful human intervention) has a good chance of being based on no probative evidence or being unsupportable by probative evidence — and, therefore, being unlawful. Based on whistleblower reports that it is “not within the remit” of compliance officers to question them, LV has doubts that there is any meaningful human intervention reviewing the evidence said to justify those debts.
108. In reaching the necessary state of satisfaction, there is a practical onus placed on Centrelink to produce sufficient material to make out the decision to raise an overpayment.⁷⁹ Where there is uncertainty, the required state of satisfaction cannot be reached and the status quo should

⁷⁹ *McDonald v Director-General of Social Security* (1984) 1 FCR 354, 358.

remain unchanged. As raising a debt is a ‘grave allegation’, it attracts the *Briginshaw* principle. This means that a reasonable satisfaction should not be produced by ‘inexact proofs’.⁸⁰ It is unlikely that an ‘average’ fortnightly report will be sufficient to reach the requisite state of actual reasonable satisfaction to raise a debt.

Lack of procedural fairness

109. Finally, LV believes that the current system lacks procedural fairness. In exercising its public statutory power to raise a debt, the Department must provide social security recipients with “a real opportunity to place before the repository of the power [i.e. Centrelink] such information as is relevant”.⁸¹ As outlined above, there are real flaws in the systems which may inhibit an individual’s ability to provide the clarifying information necessary to avoid the raising of a debt. Some barriers are practical, others are personal.

110. LV believes that the Department should be more proactive in obtaining information. Where information from an individual is needed, it should adopt procedures and practices which provide practical assistance to them, in particular, those who are particularly vulnerable. Placing responsibility disproportionately on social security recipients is not only unfair; it has the real potential to undermine the effectiveness of the entire social security system. Literature both internationally and domestically has established that treating citizens without procedural justice and respect results in a decline in the rates of voluntary compliance with the regulatory system.⁸²

111. Any questions with regard to this submission can be directed to Liberty Victoria President Jessie Taylor, Liberty Victoria Policy Committee Member Greg Buchhorn, or the Liberty Victoria office on (03) 9670 6422 or info@libertyvictoria.org.au.

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⁸⁰ *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361–2.

⁸¹ *SZRMQ v Minister for Immigration and Border Protection* [2013] FCAFC 142, [9] (Allsop CJ).

⁸² Victoria Legal Aid, Submission 111 to Senate Standing Committee on Community Affairs, Parliament of Australia, *Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative* (11 April 2017) 8, citing TR Tyler, *Why People Obey the Law; Closing the gap between regulation and the community* (2006, Princeton University Press); Kristina Murphy, ‘Procedural justice and its role in promoting voluntary compliance’ in Peter Drahos (ed) *Regulatory Theory* (2017, ANU Press) 43; Kristina Murphy, ‘Procedural Justice and the Australian Taxation Office: A study of scheme investors’ Centre for Tax System Integrity Working Paper No 35 (October 2002); work by the Centre for Tax System Integrity <<http://www.ctsi.org.au/index.html>>.