

Inquiry into Centrelink Compliance Program

Submission to the Senate Community Affairs
Committee

9 October 2019

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to provide this submission to the Senate Community Affairs Committee inquiry into the Centrelink Compliance Program. The focus of this submission is Centrelink's Automated Debt Raising and Recovery System, and particularly, the use of averaging of ATO reported income over the period of time someone has received an income support payment, which is leading to incorrect calculations of alleged overpayments, and the reversal of the onus of proof onto the person affected, requiring them to prove their innocence on the basis of very limited information.

Centrelink's Automated Debt Raising and Recovery System

2. Centrelink's Employment Income Confirmation (EIC) system for raising and recovering debts, originally called the Online Compliance Intervention (OCI) system, was introduced in 2015-16. The EIC involves matching a customer's earnings data with historical Pay as You Go (PAYG) income data from the ATO. It automates some parts of the debt raising process previously done manually by the Department of Human Services (DHS). Where a discrepancy is detected, customers are asked to confirm/update their income using the EIC. Where a person does not provide all the fortnightly income information requested, the EIC uses averaged ATO data to fill in the gaps.
3. DHS has since developed an enhanced online system known as the Check and Update Past Information (CUPI), which was informed by input from stakeholders, user testing and complaints data. People who were sent initiation letters prior to October 2018 will continue to use the EIC online system, while people sent initiation letters on or after 1 October 2018 will use the CUPI online system. We understand from DHS that it is not feasible to transfer people initiated under the EIC system to CUPI due to technology and operational constraints.
4. There are two major flaws in the Government's robodebt scheme, which continue despite repeated calls for reform:
 - a. The use of averaging of ATO reported income over the period of time someone has received an income support payment, which is leading to incorrect calculations of alleged overpayments.

- b. The reversal of the onus of proof onto the person affected, requiring them to prove their innocence on the basis of very limited information.
5. These practices are at the heart of robodebt and the harm it continues to cause across our community. It appears that the reason that the Government has not addressed these two major flaws is because to do so would greatly increase the resources required to collect overpayments at the same scale.
6. This process seemingly goes against the Department's debt recovery guidelines that state that evidence is required to support the claim that a legally recoverable debt exists.
7. The ALA agrees with ACOSS that the Government has insufficient evidence to claim that overpayments exist from carrying out a crude data-matching process. The ALA submits that the Government is abusing its power by claiming that thousands of debts exist on this basis.
8. The Government knows that averaging will lead to inaccurate debt calculations. The Department's own debt recovery guidelines warn that averaging will result in mistakes because unless income earned was consistent each fortnight throughout the year, averaging will produce an incorrect assessment.
9. The ALA is aware that there is currently a case before the Federal Court initiated by Victoria Legal Aid regarding the lawfulness of the scheme. The ALA is also aware that it is likely a class action for unjust enrichment by the Commonwealth will be initiated on behalf of individuals who have had their legitimate Centrelink benefits reduced by the Federal Government through the robodebt scheme. It is not appropriate that the ALA provide an opinion as to the legal merits or otherwise of these matters.

The legislative framework for recovery of debts under the *Social Security Act 1991 (Cth)*

10. Under section 1222A(a) of the *Social Security Act 1991 (Cth)* ('the SSA'):

Debts due to the Commonwealth

If an amount has been paid by way of social security payment, or by way of fares allowance under the *Social Security (Fares Allowance) Rules 1998*, the amount is a debt due to the Commonwealth if, and only if:

(a) a provision of this Act, the 1947 Act, 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....

11. Section 1223(1) of the SSA states:

Debts arising from lack of qualification, overpayment etc.

(1) Subject to this section, if:

- a. social security payment is made; and
- b. a person who obtains the benefit of the payment was not entitled for any reason to obtain that benefit;

the amount of the payment is a debt due to the Commonwealth by the person and the debt is taken to arise when the person obtains the benefit of the payment.

12. Under s1223(1)b) the absence of an entitlement to obtain a social security benefit is a necessary precondition to a debt due to the Commonwealth being created. Under s1222A(a) a debt to the Commonwealth can only arise pursuant to an express provision of the SSA.² Accordingly, if the Commonwealth asserts the existence of the debt, then the onus is on the Commonwealth to establish the existence of the debt. There is no basis within the SSA for the position that a person who has received a social security payment is required to establish that there is no debt to the Commonwealth.

13. According to a 2017 report by the Commonwealth Ombudsman, under the OCI system introduced in 2015-16, the OCI matches the earnings recorded on a customer's Centrelink record with the historical employer-reported income data from the Australian Tax Office (ATO). Customers are asked to confirm or update their income using the online system. If the customer does not engage with DHS, either online or in person, or if there are gaps in the

² Hanks QC, Peter (2017), 'Administrative Law and Welfare Rights: A 40-year story from *Green v Daniels* to "Robot Debt Recovery"', *Australian Institute of Administrative Law Forum No. 89*, 2017, 7.

information provided by the customer, the system will fill the gaps with a fortnightly income figure derived from the ATO income data for the relevant employment period.³

14. The ALA agrees with Peter Hanks QC that underlying the OCI process is the premise that the onus is placed on the social security recipient to prove that Centrelink's assumption as to the recipient's income, based on the ATO income data, was not correct.⁴ As noted above, the effect of sections 1222(a) and 1223(1)b) of the SSA is that the existence of a debt is dependent on the Commonwealth establishing the receipt of amounts to which the recipient was not entitled. It would therefore appear that a debt which has been asserted by DHS based on the failure of a recipient to respond to an income figure formulated by reliance on ATO income data, has not been established in accordance with the SSA. The ALA submits that assertion of the existence of such a debt is not a lawful.
15. The 2017 Ombudsman report also noted that the OCI process relied on ATO income data, which is based on an assessment of annual income, and that this is different from the fortnightly income test. Therefore information based on ATO income data which is being relied upon by DHS in asserting the debt is not consistent with the social security test as required by the SSA. This was specifically noted by the Ombudsman:

Under the Social Security Act, a fortnightly income test is applied to determine a daily rate of payment, generally paid in fortnightly instalments. A person's entitlement in any given fortnight will therefore be assessed on the income they earned, derived or received that fortnight. This is different to the tax system (including family payments) which is concerned with assessing annual income. ATO data normally provides an aggregate annual employment income figure and does not provide the detail required to accurately assess fortnightly social security entitlements.⁵

16. Given the requirements of sections 1222A(a) and 1223(1) of the SSA, the ALA submits that there is a significant doubt as to whether the DHS has legal authority to assert a debt owed to the Commonwealth based on the OCI system.

³ Commonwealth Ombudsman, *Centrelink's Automated Debt Raising and Recovery System*, Report No. 02/2017 (2017), 1, <https://www.ombudsman.gov.au/data/assets/pdf_file/0022/43528/Report-Centrelinks-automated-debt-raising-and-recovery-system-April-2017.pdf>

⁴ Hanks QC, Peter n 2 above, 8-9.

⁵ Commonwealth Ombudsman, n 3 above, 42.

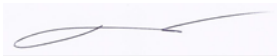
17. In summary, the basis for this position is:

- a. The effective reversal of onus for establishing the debt from the Department to the recipient to demonstrate that the purported debt does not exist;
- b. The reliance of income data from the ATO that is not consistent with the social security fortnightly income test.

Conclusion

18. The Australian Lawyers Alliance welcomes the opportunity to have input into the Community Affairs Committee inquiry into the inquiry into the Centrelink Compliance Program. We note that the ALA's representative Mr Greg Barns appeared before the Committee on Wednesday 9 October 2019 to further explain its views.

Andrew Christopoulos



President

Australian Lawyers Alliance