



Law Council
OF AUSTRALIA

Centrelink's Compliance Program

Senate Standing Committee on Community Affairs

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2019 Executive as at 16 September 2019 are:

- Mr Arthur Moses SC, President
- Ms Pauline Wright, President-elect
- Dr Jacoba Brasch QC, Treasurer
- Mr Tass Liveris, Executive Member
- Mr Ross Drinnan, Executive Member
- Executive Member, Vacant

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful to the Law Institute of Victoria, the Law Society of New South Wales, the Law Society of South Australia and the Queensland Law Society, as well as the Administrative Law Committee and AAT Liaison Committee of the Law Council's Federal Litigation and Dispute Resolution Section and the National Human Rights Committee for their assistance with the preparation of this submission.

Executive Summary

1. The Law Council welcomes the opportunity to provide this submission to the Senate Standing Committee on Community Affairs (**the Committee**) in respect of its inquiry into Centrelink's compliance program (**the Inquiry**).
2. In July 2016, the Department of Human Services (**the Department**) made a significant change to the way its agency Centrelink operates. It launched what was described by the Office of the Commonwealth Ombudsman (**the Ombudsman**) as an 'online compliance intervention (**OCI**) system for raising and recovering debts' (emphasis added).¹ Centrelink's compliance processes have, since 2016, used various iterative online systems, including Employment Income Confirmation from February 2017 to August 2018 and Check and Update Past Income from August 2018 to the present.² For the purpose of this submission, the term '**Online Compliance System**' is used to refer cumulatively to the system introduced in 2016 and all subsequent iterations.
3. The Law Council has previously expressed significant concerns regarding the Online Compliance System. During its evolution to date, a number of elements of the Online Compliance System have been refined and improved, including in response to recommendations made by the Ombudsman and others. The Law Council welcomes those improvements.
4. Certain features of the system, including some which are central to its architecture, have, however, remained largely constant and must be addressed.
5. One such feature is the use of data-matching processes to compare averaged income data received from the Australian Tax Office (**ATO**) with the earnings reported to Centrelink by the social security recipient (**the Beneficiary**) as a basis for the calculation of debts. The use of averaged data by the Online Compliance System risks failing to meet specific requirements of the *Social Security Act 1991* (Cth) (**the Act**), which calculates social security entitlements on a fortnightly basis, creates debts in the exact amount of a payment or overpayment to which a Beneficiary was not entitled, and expressly limits debts to those created by the Act itself. The use of averaged data in this context as a basis for claiming a debt arguably fails to meet each of these requirements.
6. A second such feature is the placing of an effective onus on the Beneficiary to disprove a claimed debt calculated in this way. While the Beneficiary is obliged to provide information to the Department, that obligation is separate from the question of where an onus to demonstrate (or disprove) a debt should properly lie. The terms of the Act, supported by certain principles of the common law, strongly suggest that the requirement to demonstrate a debt should remain with the Department as the party asserting the debt.
7. Associated with the above features, a continuing high error rate, disproportionate impact on already vulnerable people within the community, and lack of clear information to Beneficiaries about the calculation of debts, implications of the processes used, and available tiers of review contributes to an ongoing lack of procedural fairness. The apparent unwillingness of the Commonwealth to

¹ Commonwealth Ombudsman, *Centrelink's automated debt raising and recovery system*, Report No 2 (2017), 1, http://www.ombudsman.gov.au/_data/assets/pdf_file/0022/43528/Report-Centrelinks-automated-debt-raising-and-recovery-system-April-2017.pdf.

² Services Australia, *Income Compliance Programme: Submission to the Senate Community Affairs References Committee* (Submission No. 20, September 2019), 12, Table 6.

systematically modify the Online Compliance System in light of adverse tribunal or court findings is also of concern.

8. Each of the above issues is considered in further detail below and the Law Council makes the following recommendations:
- (a) the operation of the Online Compliance System should be reviewed as a matter of urgency to ensure that all purported debts raised comply with the full requirements of the Act, including, in particular, sections 1222A and 1223;
 - (b) any past or present purported debts which cannot be shown by the Department to be raised in compliance with the full requirements of the Act, including the above provisions, should be reassessed and any defects rectified before further processing is undertaken;
 - (c) the Online Compliance System should be amended as necessary to ensure the compliance of future processes with the full requirements of the Act, including the above provisions, and to rectify any deficient processes used in relation to purported debts previously raised;
 - (d) the above-mentioned review of the operation of the Online Compliance System should address the legality of placing an effective onus on the recipient of social security payments to disprove a purported debt and
 - (e) any past or present instances in which an onus was placed on the recipient to disprove a purported debt and in which the Department cannot show the legality of that onus should be reassessed and any defects rectified before further processing is undertaken;
 - (f) the above-mentioned review of the operation of the Online Compliance System should address whether the principle in *Briginshaw v Briginshaw*³ (***Briginshaw***) is respected in practice, including in respect of future processes and regarding purported debts previously raised;
 - (g) the Department should review and ensure its engagement in all legal proceedings regarding the Online Compliance System conforms with its obligations under the model litigant protocol;
 - (h) the AAT is encouraged to consider selective publication of relevant AAT1 decisions, facilitated by the provision by Government of resources necessary for that purpose;
 - (i) additional funding should be provided to legal assistance service providers, including through increased allocation of legal aid funding to civil matters, community legal centre and Aboriginal and Torres Strait Islander-specific legal services funding;
 - (j) additional resources should be allocated to the AAT and affected courts to meet demands arising in this area; and
 - (k) The implications for the demands upon justice and legal assistance services of any future amendments to Centrelink's compliance program, including the Online Compliance System, should be assessed in advance through a Justice

³ (1938) 60 CLR 336.

Impact Test, conducted by Government in close engagement with key justice sector representatives.

Introduction

9. The Commonwealth Government foreshadowed the Online Compliance System in 2015, saying that it would:

achieve savings of \$1.7 billion over five years by enhancing the Department of Human Services (DHS) fraud prevention and debt recovery capability, and improving assessment processes.

From 1 July 2015 DHS will implement an integrated package of compliance and process improvement initiatives including improved automation and targeted strategies for fraud prevention in areas of high risk.

The savings from this measure will be redirected by the Government to repair the Budget and fund policy priorities.⁴

10. Accordingly, the Online Compliance System was introduced as part of measures to contribute to 'ensuring the integrity of the welfare system'.⁵ It was also a necessary component of fiscal measures to produce a budget surplus.
11. The Online Compliance System has been described as being a means by which Centrelink could automate and build capacity in its pre-existing compliance processes.⁶ In its September 2019 submission to the Committee, the Department reiterated that the 'Fundamental elements of [its] approach to administering income compliance reviews have not changed',⁷ including with regard to data-matching against external sources and obligations upon the Beneficiary to provide information.
12. Notwithstanding the above, there are strong indications that the Online Compliance System has in fact resulted in at least two important departures from Centrelink's prior processes. As summarised by Peter Hanks QC, the operation of the Online Compliance System 'involves assuming that data from the Australian Tax Office (ATO) on 'customers'' taxable income is a reliable gauge for the income test under the *Social Security Act 1991* (Cth) and requiring that 'customers' prove that the assumed hypothetical debt (based on the ATO data) is incorrect'.⁸ The Law Council considers that it has not been demonstrated whether the Online Compliance System data-matching processes comply fully with the requirements of the Act and related legislation, or whether it is legally correct to place an effective onus on the Beneficiary to disprove an alleged debt.
13. The Law Council has previously expressed significant concerns regarding the Online Compliance System. These concerns were set out in detail in the Law Council's submission to the Committee's 2017 inquiry into the *Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better*

⁴ Commonwealth of Australia, *Budget Measures: Budget Paper No. 2* (12 May 2015), 116.

⁵ 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* (Coalition Senators' Dissenting Report, 21 June 2017), [1.2].

⁶ See, for example: Department of Human Services, *Design, Scope, Cost-benefit Analysis, Contracts Awarded and Implementation Associated with the Better Management of the Social Welfare System Initiative: Submission to the Senate Community Affairs References Committee* (Submission No. 66, March 2017), 1-2.

⁷ Services Australia, *Income Compliance Programme: Submission to the Senate Community Affairs References Committee* (Submission No. 20, September 2019), 14.

⁸ Peter Hanks, 'Administrative Law and Welfare Rights: A 40-year Story from *Green v Daniels* to 'Robot Debt Recovery' *AIAL Forum* (Issue 89, October 2017), 1.

Management of the Social Welfare System initiative,⁹ and also raised within the broader context of access to justice in Australia by the *Justice Project* report (**Justice Project**).¹⁰ This submission reflects and expands upon the Law Council's previous statements.

14. In its submission, the Law Council does not address all of the terms included in the Inquiry's terms of reference, but focuses in particular on issues arising under terms a. (ongoing impact) and j. (use and legality) of the terms of reference.

Background

Previous Centrelink debt collection practices

15. Prior to the commencement of the Online Compliance System, a manual process was used by Centrelink to investigate, raise and recover debts associated with social security payments. This process is summarised by the Ombudsman in its 2017 report.¹¹
16. This earlier process involved the identification of potential debts and their allocation to compliance officers of the Department for investigation. At first instance, the officer would contact the Beneficiary seeking further information as required, and asking that payslips or other supporting documentation be provided.¹²
17. If the information was not provided or was insufficient, the officer would next use the Department's information gathering powers to obtain payroll and other records directly from the Beneficiary's current and/or former employer(s). This data would in most instances allow the officer to ascertain actual earnings and thereby calculate whether an overpayment had been made.
18. If the necessary data could not be obtained to allow the calculation of actual earnings, the officer could, as a last resort, obtain annual earnings data from the ATA and average it over the period under investigation. This method was only permitted under the Department's guidelines, however, 'if every possible means of obtaining the actual income information has been attempted'.¹³

⁹ Law Council of Australia, *Senate inquiry into the design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative submission*, 24 April 2017, <https://www.lawcouncil.asn.au/resources/submissions/senate-committee-centrelink-inquiry>.

¹⁰ Law Council of Australia, *The Justice Project*, final report published August 2018, <https://www.lawcouncil.asn.au/justice-project/final-report>. See, in particular, 'Social Security Laws', 54-57 of the chapter on 'Governments and Policymakers' (<http://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Governments%20and%20Policymakers%20%28Part%20%29.pdf>), and 'Centrelink online debt compliance system', 42-44 of the chapter on 'People Experiencing Economic Disadvantage' (<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/People%20Experiencing%20Economic%20Disadvantage%20%28Part%20%29.pdf>).

¹¹ Commonwealth Ombudsman, *Centrelink's automated debt raising and recovery system*, Report No 2 (2017), Appendix A, [1.8-1.11].

¹² A general power to require the provision of information is provided by the *Social Security (Administration) Act 1999* (Cth) (**the Administration Act**), Part 1 of Division 5. A specific power to require contact, attendance or the provision of information by current social security recipients is provided by s 63 of the Administration Act.

¹³ Commonwealth Ombudsman, *Centrelink's automated debt raising and recovery system*, Report No 2 (2017), Appendix A [1.10], citing Department of Human Services, 'Acceptable Documents for Verifying Income when Investigating Debts' (Operational Blueprint 107-02040020). Note that later versions of this document have revised wording.

19. Regarding the requirement to prove or disprove a claimed debt, Emeritus Professor Terry Carney of the University of Sydney states that, prior to the implementation of the Online Compliance System, the Department accepted that it was itself required to prove a claimed debt. Carney notes that this was also codified in the Department's guidelines at the time:

*The raising and recovery of debts must satisfy legislative requirements. Evidence is required to support the claim that a legally recoverable debt exists.*¹⁴

20. If an overpayment could be shown to have occurred, the officer 'would raise a debt and could apply a ten per cent recovery fee if they were satisfied the [Beneficiary] had refused or failed to provide the information about their income or had recklessly or knowingly failed to declare their income without excuse'.¹⁵ The Beneficiary was then sent notice of the debt and recovery processes would commence.

Function of the Online Compliance System

21. In its 2017 report, the Ombudsman stated that:

*The OCI matches the earnings recorded on a customer's Centrelink record with historical employer-reported income data from the [ATO]. Parts of the debt raising process previously done manually by compliance officers within DHS are now done using this automated process. 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 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 ('averaged' data).*¹⁶

22. Process flows made available by the Department in the context of its 2019 submission to the Inquiry¹⁷ confirm that the Online Compliance System continues to rely heavily on automated systems. The Online Compliance System obtains ATO income records and checks them against the fortnightly income declarations made by social security recipients. It then uses the ATO data to calculate estimates of income during each fortnight for which social security payments have been made.
23. Where discrepancies are identified which indicate a potential debt, and where the Beneficiary concerned has not been classified by Centrelink as a vulnerable person, the case enters the review stream. The Online Compliance System generates and sends communications to the Beneficiary using the MyGov online portal or registered mail.
24. If no response is received by Centrelink from the Beneficiary, the first point of contact by a compliance officer follows. The compliance officer oversees 'due date processing'¹⁸ and, subsequently, checks the outcome of the Online Compliance System assessment process. The Law Council notes that 'checking of the outcome', apparently does not, however, require the compliance officer to

¹⁴ Terry Carney, 'The New Digital Future for Welfare: Debts Without Legal Proofs or Moral Authority?' (2018) *New South Wales Law Journal Forum*, 3, citing DHS, 'Acceptable Documents for Verifying Income when Investigating Debts' (Operational Blueprint 107-02040020).

¹⁵ Commonwealth Ombudsman, *Centrelink's automated debt raising and recovery system*, Report No 2 (2017), Appendix A [1.9].

¹⁶ *Ibid* 1.

¹⁷ Services Australia, *Income Compliance Programme: Submission to the Senate Community Affairs References Committee* (Submission No. 20, September 2019), 24, Appendix B.

¹⁸ *Ibid*.

independently verify or obtain further information in support of the Online Compliance System assessment but, rather, serves to check that the Online Compliance System has, on its face, raised a debt based on the data-matching undertaken. The Online Compliance System is then cleared to send notifications to the Beneficiary, advising them of the assessment outcome and their rights to reassessment and review.¹⁹

25. Processes for debt recovery may then be initiated, potentially including a garnishee of wages, reduction or suspension of welfare payments, or referral to a third-party debt collection agency.
26. In some cases, as discussed below, an additional penalty in the amount of ten per cent of the identified overpayment is added by the Online Compliance System to the debt claimed from the individual.
27. Several options for reassessment and review of Online Compliance System assessments are available. These are discussed in more detail below, but include:
 - (a) avenues for informal and formal review conducted internally by the Department;
 - (b) external review by the Social Services and Child Support Division of the Administrative Appeals Tribunal at first instance (**AAT1**) and further merits review by the General Division of the AAT (**AAT2**) if required;
 - (c) judicial review by the Federal Court or Federal Circuit Court of Australia; and
 - (d) review of specific decisions or the administration of the Online Compliance System by the Ombudsman.

Application in practice

28. The implementation of the Online Compliance System has been the subject of considerable public and media discourse, with many articles reflecting points of concern, or tracking progress made by the Department in refinement of the system. While the Law Council understands that significant progress has been made in a number of areas since the initiation of the Online Compliance System, it appears that some important points of concern persist. Broad reported themes, aside from those regarding the legality of the system itself, have included:
 - (a) a lack of clarity in communication,²⁰ particularly early in the implementation of Online Compliance System,²¹ and significant difficulties on the part of

¹⁹ A further, detailed description of the function of the Online Compliance System is provided by Senate Standing Committee on Community Affairs, *Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative* report, June 2017, 'What is the OCI?', [1.6]-[1.15].

²⁰ Letecia Luty and Ken O'Shea, "The system is truly Orwellian": our horrifying experiences with robodebt', *The Guardian* (online), 10 October 2019, <https://www.theguardian.com/commentisfree/2019/oct/10/the-system-is-truly-orwellian-our-horrifying-experience-with-robodebt>.

²¹ Gareth Hutchens, 'Centrelink robo-debt correspondence 'incomprehensible', Senate inquiry told', *The Guardian* (online), 16 May 2017 <https://www.theguardian.com/australia-news/2017/may/16/centrelink-robo-debt-correspondence-incomprehensible-senate-inquiry-told>.

individuals in accessing information regarding the calculation of asserted debts;^{22 23}

- (b) an undue impact on the more vulnerable people within the community—including persons with disability²⁴ and their families²⁵—many of whom rely on social security programs,²⁶ as well as indications of possible links to self-harm or suicidal ideation;^{27 28}
- (c) observations of significant error rates, including double counting of income,²⁹ and corrections being made subsequent to the assertion of a debt;³⁰ and
- (d) questions around the economic effectiveness of the Online Compliance System in recovering projected levels of debt relative to the cost of its implementation.^{31 32}

Previous inquiries and advocacy

- 29. Since its commencement, the architecture, implementation and effect of the Online Compliance System has been reviewed in detail in several different contexts.

Commonwealth Ombudsman

- 30. Following receipt of a number of complaints, the Ombudsman undertook an investigation of the system during the first quarter of 2017 and released its report in April of that year (**the 2017 Report**).³³ The 2017 Report did not consider the policy

²² Emily Jane Smith, 'This woman has \$27,000 in government debt and she doesn't know why', *SBS* (online), 6 February 2019 https://www.sbs.com.au/news/the-feed/this-woman-has-27-000-in-government-debt-and-she-doesn-t-know-why_1.

²³ Robert Skinner, 'How I fought off a robodebt', *The Monthly* (online), August 2019,

<https://www.themonthly.com.au/issue/2019/august/1564581600/robert-skinner/how-i-fought-robodebt>.

²⁴ Paul Farrell, 'Centrelink accused of 'disability bullying' after man with intellectual disability receives \$15,000 robodebt', *ABC News* (online), 8 October 2019, [https://www.abc.net.au/news/2019-10-07/centrelink-accused-of-disability-bullying-over-\\$15,000-robodebt/11570920](https://www.abc.net.au/news/2019-10-07/centrelink-accused-of-disability-bullying-over-$15,000-robodebt/11570920).

²⁵ Paul Farrell and Alex McDonald, 'Centrelink robodebt raised against dead disability pensioner', *ABC News* (online), 29 July 2019, <https://www.abc.net.au/news/2019-07-29/centrelink-robodebt-raised-against-dead-disability-pensioner/11342994>.

²⁶ 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>.

²⁷ Shalailah Medhora, 'Over 2000 people died after receiving Centrelink robo-debt notice, figures reveal', *ABC* (online), 18 February 2019 <https://www.abc.net.au/triplej/programs/hack/2030-people-have-died-after-receiving-centrelink-robodebt-notice/10821272>.

²⁸ Fergus Hunter, 'Flawed Centrelink debt recovery system 'bringing some to the brink of suicide': Andrew Wilkie', *Brisbane Times* (online), 4 January 2017 <https://www.brisbanetimes.com.au/politics/federal/flawed-centrelink-debt-recovery-system-bringing-some-to-the-brink-of-suicide-andrew-wilkie-20170104-gtlog9.html>.

²⁹ Matthew Butt, 'Administrative law and Centrelink's 'robodebt' system', *AUSPUBLAW* (8 March 2017), <https://auspublaw.org/2017/03/centrelinks-robodebt-system/>.

³⁰ Luke Henriques-Gomes, 'Centrelink cancels 40,000 robodebts, new figures reveal', *The Guardian* (online), 6 February 2019 <https://www.theguardian.com/australia-news/2019/feb/06/robodebt-faces-landmark-legal-challenge-over-crude-income-calculations>.

³¹ 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>.

³² Katie Burgess, 'Robodebt Centrelink compliance program cost \$600m to recoup \$785m so far', *The Canberra Times* (online), 27 September 2019, <https://www.canberratimes.com.au/story/6407984/four-of-five-robodebt-reviews-hit-with-a-debt-as-cost-revealed/>.

³³ Commonwealth Ombudsman, *Centrelink's automated debt raising and recovery system*, Report No 1 (2019).

rationale or legal foundation³⁴ of the Online Compliance System in detail, but closely examined its functionality. The Ombudsman made eight recommendations, including: that the automatic imposition of a debt recovery fee be reassessed;³⁵ that communications and information sharing between Centrelink and members of the public be improved;³⁶ that practical difficulties faced by individuals in obtaining evidence of their employment history be given greater weight;³⁷ that assistance to vulnerable people be strengthened;³⁸ and that an evaluation be completed before further expansion of the Online Compliance System.³⁹

31. In April 2019, the Ombudsman released an implementation report (**the 2019 Report**) documenting the progress made by the Australian Government against these recommendations.⁴⁰ The 2019 Report records strong progress, with all except recommendation two (review of information letters) considered met. It finds that both numbers of debts reduced or cancelled and numbers of complaints had reduced substantially from levels at the start of 2017.⁴¹
32. It is noteworthy that the Ombudsman does not, either in the 2017 Report or the 2019 Report, recommend against the use of averaged data *per se* or engage with the questions around its legality. Similarly, neither report challenges the onus effectively placed by the Online Compliance System on individuals to disprove an asserted debt. Hanks concludes that the 2017 'report's failure to identify the legislative foundation (or to consider whether that foundation was absent) remains a serious weakness'.⁴²
33. Regarding the use of averaged data, the 2017 Report finds that:

*the business rules in the OCI that support the debt calculation are comprehensive and accurately capture the legislative and policy requirements. ...However, the calculation relies on the customer accurately entering the various types of income into the OCI.*⁴³
34. The 2017 Report finds that the use of averaged data is not new but should be called upon as a last resort only, and where actual periods worked are known.⁴⁴ In other words, the Ombudsman finds that averaging should only be used in situations where a particular period of work at a certain payment rate is known by Centrelink, such that an exact, rather than estimated, result will be produced. This differs from the way in which averaged data continues to be used by the Online Compliance System, which uses income data matching as the standardised basis of its case selection for review.⁴⁵ In fact, its data averaging process is expressly used to

³⁴ Peter Hanks, 'Administrative Law and Welfare Rights: A 40-year Story from *Green v Daniels* to 'Robot Debt Recovery' *AIAL Forum* (Issue 89, October 2017), 12.

³⁵ Commonwealth Ombudsman, *Centrelink's automated debt raising and recovery system*, Report No 2 (2017), [4.5], Recommendation 1.

³⁶ *Ibid* [4.7], [4.8] and [4.10], Recommendations 2, 3 and 5.

³⁷ *Ibid* [4.9], Recommendation 4.

³⁸ *Ibid* [4.11], Recommendations 6 and 7.

³⁹ *Ibid* [4.12], Recommendation 8.

⁴⁰ Commonwealth Ombudsman, *Centrelink's automated debt raising and recovery system*, Report No 1 (2019).

⁴¹ *Ibid* 23 figure 4, and 24 figure 5.

⁴² Peter Hanks, 'Administrative Law and Welfare Rights: A 40-year Story from *Green v Daniels* to 'Robot Debt Recovery' *AIAL Forum* (Issue 89, October 2017), 12.

⁴³ Commonwealth Ombudsman, *Centrelink's automated debt raising and recovery system*, Report No 2 (2017), [2.28]-[2.29].

⁴⁴ *Ibid* [2.32].

⁴⁵ Services Australia, *Income Compliance Programme: Submission to the Senate Community Affairs References Committee* (Submission No. 20, September 2019), 24, Appendix B.

address situations where the exact periods of work and/or amounts of payment are not known. As the Department states in an informational video:

The ATO told us how much your employer paid you for the whole financial year. This amount may be different to what you told us. For example, you may not have been getting payment from us for the whole year. So, for the time you weren't on payment, you didn't need to tell us about the money you earned. If this the case, you'll need to tell us how much you were paid and when. If you don't tell us, we'll use income information from the ATO and average it over the period that you worked – which could result in a debt (emphasis added).⁴⁶

35. Regarding the placing of an onus on the individual to respond to an alleged payment discrepancy, the 2017 Report finds it to be 'reasonable and appropriate' to require an individual to provide data.⁴⁷ While legislation clearly provides for the Department to call upon a Beneficiary to provide information,⁴⁸ the Law Council considers that those provisions may not necessarily extend to placing the Beneficiary under an onus to disprove a claimed debt. Indeed, it appears arguable that common law also prevents such an interpretation.
36. These issues are considered further below.

Senate Standing Committee on Community Affairs

37. In February 2017, the Online Compliance System and related matters were referred by the Senate to the Committee, which received 156 submissions and conducted nine public hearings. The Committee tabled its report in June 2017, which was accompanied by a dissenting report by Coalition Senators.⁴⁹
38. The majority report, which was highly critical of the Online Compliance System, observed that a 'lack of procedural fairness is evident at every stage of the OCI program',⁵⁰ arising from a range of issues at the stages of design, testing, implementation and review.⁵¹ These issues are discussed further below.
39. The Committee made 21 recommendations, starting with the recommendation that the system be placed on hold 'until all procedural fairness flaws are addressed'.⁵² The Committee expressly recommended that all debts determined through the use of averaged data be recalculated 'using accurate income data sourced from

⁴⁶ Department of Human Services, 'Check and update your past income' (online video), <https://www.humanservices.gov.au/individuals/topics/check-and-update-past-income/45976>.

⁴⁷ Commonwealth Ombudsman, *Centrelink's automated debt raising and recovery system*, Report No 2 (2017), [3.4].

⁴⁸ As noted above, a general power to require the provision of information is provided by the *Social Security (Administration) Act 1999* (Cth), Part 1 of Division 5; and a specific power to require contact, attendance or the provision of information by current social security recipients is provided by s 63 of the that Act.

⁴⁹ Senate Standing Committee on Community Affairs, *Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative*, June 2017.

⁵⁰ *Ibid* [6.2].

⁵¹ The Committee's grounds for this conclusion are summarised at [6.2] and include (inter alia): inadequate consultation and testing to inform the design of the system; sending letters to unconfirmed addresses and taking a lack of response as a failure to engage; calculating debts on the basis of averaged income data in the knowledge that the claimed debts may be inaccurate; providing insufficient information or explanation to Beneficiaries to enable them to challenge a debt; and seeking to recover debts dating back beyond the period of time for which the Beneficiary is required to retain their records.

⁵² Senate Standing Committee on Community Affairs, *Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative*, June 2017, [6.9], Recommendation 1.

employers',⁵³ and that 'the department resume full responsibility for calculating verifiable debts (including manual checking)'.⁵⁴

40. A Government Response was tabled in September 2017,⁵⁵ endorsing the analysis of the Ombudsman's report and noting progress toward implementation of that set of recommendations. The Government Response found 'no evidence to support the [Committee] recommendation to put on hold the online system'⁵⁶ and did not substantially respond to the balance of the Standing Committee majority recommendations.
41. The submissions made to the Standing Committee include analyses provided by a number of different organisations, including the Law Council.⁵⁷ In its submission, the Law Council expressed concern about a reversal of the onus of proof, inaccuracy in the calculation of debt notices, limited complaint and review processes, significant impacts on the legal assistance sector, and release by the Department of personal information.

The soundness of the legal basis for the Online Compliance System and legal implications relating to its implementation

Creation of a debt

42. Section 1222A of the Act states:

If an amount has been paid by way of social security payment ... the amount is a debt due to the Commonwealth if, and only if:

(a) a provision of this Act ... expressly provides that it is (emphasis added).

43. Subsection 1223 (1) of the Act states:

(1) Subject to this section, if:

(a) 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.

44. The question of what constitutes a lack of entitlement to a payment is addressed by subsection 1223 (1AB) of the Act, which (non-exhaustively) includes situations

⁵³ Ibid [6.11], Recommendation 3.

⁵⁴ Ibid [6.16], Recommendation 6.

⁵⁵ Australian Government, *Australian Government response to the Community Affairs Reference Committee Report: Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative*, September 2017.

⁵⁶ Ibid 8.

⁵⁷ Law Council of Australia, *Senate inquiry into the design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative submission*, 24 April 2017, <https://www.lawcouncil.asn.au/resources/submissions/senate-committee-centrelink-inquiry>.

where a Beneficiary was not qualified to receive the payment, it was not payable, or it was paid as a result of a false statement or a misrepresentation.⁵⁸

45. Accordingly, a debt to the Commonwealth in the case of incorrect social security payments (including overpayments) only exists at law where it falls within the scope expressly stated by the Act.⁵⁹ In circumstances where a Beneficiary has received a payment without entitlement, the debt created by the Act is in the specific amount of the payment to which the person was not entitled.
46. Since, as Hanks states, the ‘absence of an entitlement to obtain the benefit of a payment is a precondition to a debt being created’,⁶⁰ Centrelink must therefore ascertain the exact benefit to which the individual was entitled, against which the accuracy of the payment actually made may then be measured. A system, such as the Online Compliance System, which is not in all circumstances able to do so, may not meet legislative requirements; particularly if relied upon in isolation, without independent verification or the assumption of responsibility by Centrelink for determining the debt.
47. The Act recognises that Beneficiaries may experience income fluctuations and, therefore, stipulates that the social security payments and allowances administered by the Department must be assessed fortnightly.
48. Section 556 states that ‘the rate of a person’s Youth Allowance is to be worked out in accordance with the Youth Allowance Rate Calculator in section 1067G’. Section 643 states that ‘A person’s Newstart Allowance rate must be worked out using Benefit Rate Calculator B at the end of section 1068.’ The Youth Allowance Rate Calculator⁶¹ and Benefit Rate Calculator B⁶² both require that the daily rates of their respective allowances must be calculated on the basis of fortnightly data.
49. As has been set out above, the Online Compliance System uses income information from the ATO and averages it over the relevant period,⁶³ where details of exactly what income was earned when are not known to it.⁶⁴ Commonwealth law has permitted data matching to be undertaken between government agencies since 1990⁶⁵ and that power was subsequently linked to the Act in order to make debts identified through data matching recoverable.⁶⁶ Nevertheless, the calculation which results in the context of the Online Compliance System is by nature an estimation, assuming that the Beneficiary has earned a consistent income over the relevant period, despite many social security recipients (including those on Newstart and

⁵⁸ Respectively, *Social Security Act 1991* (Cth) paras 1223(1AB)(b), (c), and (d).

⁵⁹ Note that subsection 1222A (a) includes, in addition to the Act, three other instruments: the *Social Security Act 1947* (Cth), the *Social Security (Fares Allowance) Rules 1998* (Cth), and the *Data-matching Program (Assistance and Tax) Act 1990* (Cth), however these are not relevant for the purpose of this submission.

⁶⁰ Peter Hanks, ‘Administrative Law and Welfare Rights: A 40-year Story from *Green v Daniels* to ‘Robot Debt Recovery’ *AIAL Forum* (Issue 89, October 2017), 7.

⁶¹ *Social Security Act 1991* (Cth) s 1067G.

⁶² *Ibid* s 1068.

⁶³ The use of averaging is permitted by legislation in limited circumstances, including with respect to individuals receiving the age pension to the extent that given income was not paid in respect of a particular period of work. Those circumstances, however, are not relevant for the purpose of this submission. See: Matthew Butt, ‘Administrative law and Centrelink’s ‘robodebt’ system’, *AUSPUBLAW* (8 March 2017), <https://auspublaw.org/2017/03/centrelinks-robodebt-system/>.

⁶⁴ Commonwealth Ombudsman, *Centrelink’s automated debt raising and recovery system* (Report No 2 of 2017, April 2017), 1.

⁶⁵ *Data-Matching Program (Assistance and Tax) Act 1990* (Cth), s 6.

⁶⁶ *Social Security Act 1991* (Cth) s 1224C. See further discussion in Peter Sutherland, ‘Social Security Overpayments and Debt Recovery: Key Developments’, *AIAL Forum AIAL Forum* (Issue 89, October 2017), 78-79.

Youth Allowance) typically being employed on a casual basis or working multiple jobs.

50. The only apparent exception to the above concern would arise in circumstances where the Beneficiary did in fact work consistent hours and was paid a consistent income across the entirety of the income period recorded by the ATO, meaning that the average fortnightly income is the same as the actual fortnightly income.
51. For this reason, the Law Council is concerned that the Online Compliance System, to the extent that it relies on averaged or estimated income data, may not in all instances ascertain the exact benefit to which the Beneficiary is entitled. Accordingly, it may, therefore, fail to satisfy the requirements of sections 1222A and 1223 of the Act for the creation of a debt in law. The Law Council notes in this context Carney's conclusion that the Online Compliance System in effect substitutes the 'legally required precise and variable specific fortnightly amounts' for an average which may not correctly apply the law.⁶⁷
52. Further, according to Matthew Butt of the National Social Security Rights Network and the University of New South Wales:

*The potential errors caused by averaging are a known risk recognised by Centrelink's own guidelines. ...[T]he errors produced by the system can be seen as the inevitable price of the policy objective of automation. The system is, as the Human Services Minister has said, working as intended.*⁶⁸

53. This challenge remains recognised but unaddressed by the Department, which (as of October 2019) states on its *Compliance Program* information page:

*The hours you worked or the amount you earned may have changed from payday to payday. If this is the case, you should give us more details. You need to tell us the exact amounts you earned... Using the ATO information works best when you work the same hours and earn the same amount each payday.*⁶⁹

54. The Law Council questions the appropriateness of the use of data averaging on the grounds discussed above, and also its ongoing necessity in view of the July 2019 implementation by the ATO of Single Touch Payroll system, which requires the 'real-time reporting' of 'employee salary or wages and ordinary time earnings and superannuation contributions'.⁷⁰

Recommendations:

- **The operation of the Online Compliance System should be reviewed as a matter of urgency to ensure that all purported debts raised comply with the full requirements of the Act, including, in particular, sections 1222A and 1223.**
- **Any past or present purported debts which cannot be shown by the Department to be raised in compliance with the full requirements of the**

⁶⁷ Terry Carney, 'Social Security and Robo-Debt', *Austaxpolicy* (Tax and Transfer Policy Institute, ANU, 5 June 2018), <https://www.austaxpolicy.com/social-security-robot-debt/>.

⁶⁸ Matthew Butt, 'Administrative law and Centrelink's 'robodebt' system', *AUSPUBLAW* (8 March 2017), <https://auspublaw.org/2017/03/centrelinks-robodebt-system/>.

⁶⁹ DHS, *Compliance Program*, <https://www.humanservices.gov.au/individuals/subjects/compliance-program>.

⁷⁰ Explanatory Memorandum, Treasury Laws Amendment (2018 Measures No. 4) Bill 2018, [3.7].

Act, including the above provisions, should be reassessed and any defects rectified before further processing is undertaken.

- **The Online Compliance System should be amended as necessary to ensure the compliance of future processes with the full requirements of the Act, including the above provisions, and to rectify any deficient processes used in relation to purported debts previously raised.**

Requirement to prove or disprove a debt

Statutory considerations

55. As discussed above, debts arise by—and only by—the operation of the Act: if a benefit payment has been made and the recipient was not entitled to it, then the amount of the payment is a debt to the Commonwealth from the time the recipient received it.⁷¹ The Act, however, does not expressly address the question of whether an onus rests on either party to prove or disprove a claimed debt.
56. Although this is a question which may be resolved finally by the courts, the Law Council notes that there are strong arguments in favour of a reading of the Act which places the requirement to prove a claimed debt with the Department. Indeed, Hanks states a view that:

...the existence of a debt to the Commonwealth is something to be established by the Commonwealth as the entity which asserts the existence of the debt: the Social Security Act cannot be read as requiring that the person who has received a social security payment establish that there is no debt – indeed, s 1222A(a) and s 1223 (1) deny any such possibility.⁷²

Common law considerations

57. Common law principles also require consideration in this context.
58. The Full Federal Court decision in *McDonald v Director-General of Social Security*⁷³ (**McDonald**) related to an appeal from the AAT and affirmed a decision by the forerunner agency to Centrelink to cancel the applicant's invalid pension. The case addressed questions including whether an onus of proof existed and, if so, whether it fell upon the applicant to establish her entitlement to a pension, or on the respondent to establish the grounds on which its decision to cancel the pension had been made. Woodward J stated that there 'can be no evidential onus of proof ... unless the relevant legislation provides for it'.⁷⁴ His Honour went on to consider a situation in which the decision-making authority is unable to decide a question of fact on the balance of probabilities. In such a situation, an analysis should be made of the exact proposition being tested (for instance, in the context of *McDonald*, it had to be determined if the relevant question was whether a pension should be cancelled, or whether it should have been granted in the first place). Where the relevant proposition has been identified and the decision-maker had been unable to

⁷¹ See section 1223(1) of the Act.

⁷² Peter Hanks, 'Administrative Law and Welfare Rights: A 40-year Story from *Green v Daniels* to 'Robot Debt Recovery' *AIAL Forum* (Issue 89, October 2017), 7.

⁷³ (1984) 1 FCR 354.

⁷⁴ *McDonald v Director-General of Social Security* (1984) 1 FCR 354, 358.

'achieve the statutory requirement of reaching a state of mind' that the proposition is made out, it would not be upheld.⁷⁵

59. Considering this, Carney contends that there will often be 'a 'practical onus' to be distilled from the particular features of the legislation'.⁷⁶ While cautioning about reducing complex passages to simple propositions, he concludes that:

*unless a decision-maker is satisfied about the pertinent facts or criteria, then the status quo prevails. Or, to put it another way, if a decision-maker is unable to be satisfied about key matters, then a 'default' outcome may result.*⁷⁷

60. *McDonald*, therefore, indicates that the relevant authority (for this purpose Centrelink) will need to ascertain whether it is the existence or non-existence of a given circumstance which is at issue (for this purpose the existence of a debt).⁷⁸ Where there is insufficient evidence (of the claimed debt) for the authority to determine the matter, the default outcome may be expected to result and, in that case, the debt will not be shown to exist.

Position of the Department

61. Prior to the implementation of the Online Compliance System, the Department appeared to accept that it was itself required to prove a claimed debt. Carney observes that this was stated by Centrelink in its guidance to decision-makers at the time:

*The raising and recovery of debts must satisfy legislative requirements. Evidence is required to support the claim that a legally recoverable debt exists.*⁷⁹

62. Centrelink's previous standard processes also reflected that position. In investigating potential overpayments, it previously used its own resources, including statutory powers to obtain employment and payment records from employers, to check and confirm the data provided to it by social security recipients.⁸⁰

63. The Ombudsman, in its 2017 Report, observed that those previous processes changed upon the implementation of the Online Compliance System. It stated that one of the 'main efficiencies' resulting from the Online Compliance System would be achieved by means of the Department:

*no longer using its information gathering powers to request information directly from third parties, such as employers. Under the OCI, it is now the customer's responsibility to provide this information.*⁸¹

⁷⁵ Ibid.

⁷⁶ Terry Carney, 'The New Digital Future for Welfare: Debts Without Legal Proofs or Moral Authority?' (2018) *New South Wales Law Journal Forum*, 5.

⁷⁷ Ibid 6.

⁷⁸ Ibid 369 per Woodward J.

⁷⁹ Terry Carney, 'The New Digital Future for Welfare: Debts Without Legal Proofs or Moral Authority?' (2018) *New South Wales Law Journal Forum*, 3, citing DHS, 'Acceptable Documents for Verifying Income when Investigating Debts' (Operational Blueprint 107-02040020).

⁸⁰ Commonwealth Ombudsman, *Centrelink's automated debt raising and recovery system*, Report No 2 (2017), Appendix A, [1.9].

⁸¹ Commonwealth Ombudsman, *Centrelink's automated debt raising and recovery system*, Report No 2 (2017), Appendix A, [1.8-1.11].

64. While the rationale for the change in Departmental process appears clear, there is scarce indication publicly available that the change was informed by thorough consideration of its legal underpinnings.
65. The Ombudsman, in its 2017 Report, stated that:
- it is entirely reasonable and appropriate for DHS to ask customers to explain discrepancies following its data matching activities as a means of safeguarding welfare payment integrity.*⁸²
66. That observation appears to relate to practical considerations, rather than addressing in any detail the question of whether a legal responsibility exists to discharge an onus of proof.
67. Similarly, the Department, in its submission to the Inquiry, maintains that the fundamental elements of its approach have not changed.⁸³ It goes on to state:
- In line with Section 66A of the Social Security (Administration) Act 1999, the responsibility to explain any differences between the income identified from data matching and the information held by the Department is, and has always been, an obligation on the customer in the first instance. This has not changed.*⁸⁴
68. With respect, the Law Council considers that the above statements are insufficient to address the issue. It is not in dispute that the Beneficiary is under an obligation to provide information to Centrelink in accordance with the terms of the Administration Act. That obligation should not, however, be conflated with the requirement to prove or disprove the existence of a claimed debt.
69. The Law Council considers that a significant change has in fact been made in this respect by the implementation of the Online Compliance System, which effectively reverses the previous process. The Online Compliance System functions to assert a debt and calls upon the Beneficiary to disprove that assertion.
70. This issue could readily be clarified if the onus of proof were expressly to be placed by the Act on the Department. Inclusion of such a provision would not preclude the Department seeking information and an explanation from a Beneficiary in the event of a discrepancy between the information reported to Centrelink and that provided by the ATO. It would also accord with procedural fairness principles.
71. The Law Council recommends that the Committee review carefully whether that process is correct at law. This recommendation accords with the position taken by the Committee in its 2017 majority report, which concluded that:
- it is a basic legal principle that in order to claim a debt, a debt must be proven to be owed. The onus of proving a debt must remain with the department. This would include verifying income data in order to calculate a debt.*⁸⁵

⁸² Commonwealth Ombudsman, *Centrelink's automated debt raising and recovery system* (Report No 2 of 2017, April 2017), [3.4].

⁸³ Services Australia, *Income Compliance Programme: Submission to the Senate Community Affairs References Committee* (Submission No. 20, September 2019), 14.

⁸⁴ *Ibid* 15.

⁸⁵ Senate Community Affairs References Committee, Parliament of Australia, *Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative* (Report, June 2017), [6.13].

Recommendations:

- **The above-mentioned review of the operation of the Online Compliance System should address the legality of placing an effective onus on the recipient of social security payments to disprove a purported debt.**
- **Any past or present instances in which an onus was placed on the recipient to disprove a purported debt and in which the Department cannot show the legality of that onus should be reassessed and any defects rectified before further processing is undertaken.**

Standard of evidence

72. In addition to consideration of the onus of proof, a further question relating to the standard of evidence required to establish a proposition is raised by the High Court decision of *Briginshaw*.⁸⁶ This case is authority for the principle that the ‘standard of persuasion’ necessary for a tribunal in civil matters to achieve reasonable satisfaction should reflect the seriousness or gravity of the consequences which would follow from a particular finding.⁸⁷ As noted above, Centrelink guidance previously stated that ‘evidence is required to support the claim that a legally recoverable debt exists’.⁸⁸
73. The Law Council considers that the operation of the Online Compliance System should be amended to ensure that the onus of proving a debt remains with the Department, and that the standard of evidence applied is sufficient to satisfy the principle in *Briginshaw*.

Recommendations:

- **The above-mentioned review of the operation of the Online Compliance System should address whether the principle in *Briginshaw* is respected in practice, including in respect of future processes and regarding purported debts previously raised.**

⁸⁶ *Briginshaw v Briginshaw* (1938) 60 CLR 336.

⁸⁷ *Ibid.* Dixon J states at 362: *No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.*

⁸⁸ Terry Carney, ‘The New Digital Future for Welfare: Debts Without Legal Proofs or Moral Authority?’ (2018) *New South Wales Law Journal Forum*, 3, citing DHS, ‘Acceptable Documents for Verifying Income when Investigating Debts’ (Operational Blueprint 107-02040020).

Addition of a penalty

74. Section 1228B of the Act provides for ‘an amount equal to ten per cent of so much of the debt as arose because the person refused or failed to provide the [required] information or provided false or misleading information’ to be added as part of the debt. This can occur in circumstances where the debt was incurred wholly or in part because of the person’s actions in failing to provide information or knowingly/recklessly providing false information.⁸⁹
75. The operation of the provision, however, is subject to the existence of a debt within the terms of the Act, as considered above. Accordingly, the Law Council considers the application of a penalty under this provision is inappropriate where such debts may be incorrectly calculated and therefore not substantiated in law.
76. As stated by the National Social Security Rights Network in its 2017 supplementary submission to the Committee:
- ...insufficient information is obtained through the OCI process to determine whether to apply the recovery fee fairly and reasonably, [therefore] it should only be applied if there is a manual process involving a DHS officer to support the determination.*⁹⁰
77. The Law Council welcomes positive changes made by the Department since that time, including steps to discontinue the automatic application of the penalty.⁹¹
78. The Law Council also welcomes amendments to communications used by the Department flagging the penalty, avenues for review and the ability to provide information about a reasonable excuse to a compliance officer.⁹² The Law Council supports the recommendation made by the Commonwealth Ombudsman that, for debts raised prior to 27 May 2017, additional correspondence should be sent detailing why the penalty was applied and providing an option to advise of personal circumstances that may affect the likelihood of a successful review.⁹³

Human rights implications

79. The Law Council believes that new and evolving technologies—including artificial intelligence, machine learning and other forms of automated decision-making—offer important benefits in many areas of application. The potential impacts of such systems may not initially be understood clearly, however, and their rapid development may outpace the legal and regulatory frameworks necessary to guide and govern them. For these reasons, the Law Council has called for the development and implementation of such systems to be:

⁸⁹ Section 1228B(1)(c) of the Act.

⁹⁰ National Social Security Rights Network, *NSSRN supplementary submission to the inquiry into the Better Management of the Social Welfare System initiative* (Supplementary submission, 5 May 2017), 3, <http://www.nssrn.org.au/wp/wp-content/uploads/2017/05/NSSRN-supplementary-submission-Better-Management-of-the-Social-Welfare-System-Initiative-inquiry-FINAL.pdf>.

⁹¹ As documented by the Commonwealth Ombudsman, ‘DHS will now only apply a recovery fee if the person does not go online, telephone the department, or respond to the department’s calls, as no evidence of any reasonable excuse has been provided’; Commonwealth Ombudsman, *Centrelink’s Automated Debt Raising and Recovery System* (Report No 1 of 2019, April 2019), [2.13].

⁹² Commonwealth Ombudsman, *Centrelink’s Automated Debt Raising and Recovery System* (Report No 1 of 2019, April 2019), [2.2].

⁹³ *Ibid* [4.8] (Further Recommendation 1 (Recovery Fees)).

*...rights-based and strongly grounded in overarching principles, including those drawn from international human rights law, and subject to principles of the rule of law and procedural fairness;*⁹⁴

80. With specific regard to the Online Compliance System, the Law Council notes that the raising of debts under that system—to the extent of any inconsistency with the provisions of the Act—may have implications for Australia’s compliance with its international law obligations. Article 9 of the *International Covenant on Economic, Social and Cultural Rights*⁹⁵ (ICESCR) provides that:

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

81. This right has been considered by the Committee on Economic Social and Cultural Rights, which stated in its General Comment No. 19 that a ‘failure to enforce relevant laws or put into effect policies designed to implement the right to social security’ may constitute a violation of article 9 of the ICESCR.⁹⁶

Procedural fairness

82. Cumulatively, issues including those discussed above have been considered to constitute a pervasive lack of procedural fairness in the Online Compliance System.
83. Responding to the earlier iterations of the system, the Committee majority in 2017 found, as referenced above, that a lack of procedural fairness was evident throughout. The Committee stated that this was evident (inter alia) in inadequate consultation and testing to inform the design of the system, sending letters to unconfirmed addresses and taking a lack of response as a failure to engage, calculating debts on the basis of averaged income data in the knowledge that the claimed debts may be inaccurate, providing insufficient information or explanation to Beneficiaries to enable them to challenge a debt, and seeking to recover debts dating back beyond the period of time for which the Beneficiary is required to retain their records.⁹⁷
84. As at the time of this submission, the Law Council notes that some improvements have been made. However, it remains concerned that several aspects of the Online Compliance System in its current form still fall short of procedural fairness standards.
85. The Ombudsman’s 2019 Report indicates that the Department is yet to finalise implementation of its 2017 recommendation to explain clearly the concept of averaging, the circumstances in which it may be used and its potential implications for the Beneficiary.⁹⁸ In particular, the Ombudsman notes that Communications by

⁹⁴ Law Council of Australia, *Artificial Intelligence: Australia’s Ethics Framework* (Submission to the Department of Industry, Innovation and Science, 28 June 2019), [3(b)], <https://www.lawcouncil.asn.au/docs/b3ebc52d-afa6-e911-93fe-005056be13b5/3639%20-%20AI%20ethics.pdf>.

⁹⁵ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, UNTS 993 3 (entered into force 3 January 1976).

⁹⁶ Committee on Economic, Social and Cultural Rights, *General Comment No 19: the right to social security* (art. 9), 39th sess, UN Doc E/C.12/GC/19 (4 February 2008), [65].

⁹⁷ Senate Standing Committee on Community Affairs, *Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative*, June 2017, [6.2].

⁹⁸ Commonwealth Ombudsman, *Centrelink’s automated debt raising and recovery system*, Report No 1 (2019), [4.9]-[4.10], referring to Commonwealth Ombudsman, *Centrelink’s automated debt raising and recovery system*, Report No 2 (2017), [4.7], Recommendation 2 (c).

Centrelink do not yet 'adequately explain the consequence of not contacting Centrelink and choosing to rely on averaged ATO information'.⁹⁹ The Law Council considers this information should be provided in plain language and in a range of accessible and culturally appropriate formats. The availability of interpretation services should also be clearly communicated in all documentation provided by Centrelink to Beneficiaries.

86. In respect to Beneficiaries who have already been issued with debt notices but may be unaware of the averaging process used by the Online Compliance System, the Law Council supports Further Recommendation 4 of the Ombudsman's 2019 Report¹⁰⁰ that the Department should, in any debt recovery notices, provide Beneficiaries with information about potential issues arising from the use of ATO information, and options available to the Beneficiary for review. This should remain an ongoing requirement. Similarly, where Beneficiaries are subject to a ten per cent recovery fee, any debt recovery correspondence should provide information in plain language about why the fee was applied and the relevant options for review.
87. The Law Council considers that as a general rule, the Department should ensure that Beneficiaries are fully informed, in plain language and in an accessible and culturally appropriate format, as to the calculation of any claimed debt, including the implications of the use of ATO data in the calculation of debts, the grounds for application of a recovery fee, and the relevant options for review.
88. Matters of procedural fairness are of particular concern in the context of automated compliance systems where there is a power imbalance between the decision makers and the Beneficiaries, who may already be in positions of significant economic and/or social disadvantage. In this regard, the Law Council notes the submission of the Australian Human Rights Commission (**AHRC**) to the Inquiry, which observes that:
- ...automated decision-making systems that do not include provision for rigorous human oversight of the decision-making process, and the decisions actually being made, are more prone to error. In particular, such systems are more likely to make arbitrary decisions...*¹⁰¹
89. The Law Council notes that the AHRC will conduct a further public consultation into automated decision-making systems and human rights, to be completed in 2020.¹⁰² It encourages careful consideration of any recommendations which result from that review, which are likely to be highly relevant to the Department's activities.

⁹⁹ Ibid [4.10].

¹⁰⁰ Ibid [4.12], Further Recommendation 4 (Additional messaging).

¹⁰¹ Australian Human Rights Commission, *Centrelink's compliance program: AHRC submission to the Senate Community Affairs References Committee* (Submission 4, 19 September 2019).

¹⁰² Ibid 8.

The availability and effectiveness of review and redress in response to contested actions of the Online Compliance System

Tiers of review

90. Centrelink encourages Beneficiaries who do not understand or agree with its decisions, including in regard to debt, to contact it informally and seek an explanation of the rationale for the decision, and to allow an initial check for mistakes to be conducted.¹⁰³ A second, formal tier of internal review is available and undertaken by an independent Authorised Review Officer.
91. Following the exhaustion of review options within the Department, applications may be made for merits review at the AAT1 level, through the AAT's Social Services and Child Support Division. A further merits review at the AAT2 level may be sought through the General Division of the AAT. The Law Council notes that there is no time limit imposed and benefit recipients may seek reassessment at any time by contacting the Department.¹⁰⁴
92. In accordance with section 5 of the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* (**the ADJR Act**), decisions taken by Centrelink including by means of the Online Compliance System may be subject to review by the Federal Court or the Federal Circuit Court of Australia. Section 6 of the ADJR Act may permit judicial review of the conduct of processes associated with Centrelink decision-making. There is also constitutional judicial review in the High Court¹⁰⁵ and under the Federal Court's original jurisdiction.¹⁰⁶
93. A high proportion of error rates continue to be documented regarding decisions of the Online Compliance System. Figures reported during Senate Estimates hearings in October 2019 indicated that, from the commencement of the Online Compliance System, 234,097 debts were subsequently reduced (65,813) or either waived or permanently set aside (168,284).¹⁰⁷ Earlier figures, dating from February 2019, indicated amendment or cancellation of approximately seventeen per cent of debts raised.¹⁰⁸
94. As of May 2019, figures released to Senate Estimates indicated that this proportion had increased to twenty per cent, with '57,386 debts reduced, 24,788 waived in part and 31,160 fully waived' from a total of 500,281 debts raised through to March 2019.¹⁰⁹

¹⁰³ See Department of Human Services, *Reviews and appeals of a Centrelink decision* (online information page), <https://www.humanservices.gov.au/individuals/enablers/reviews-and-appeals-centrelink-decision/34671>.

¹⁰⁴ Commonwealth Ombudsman, *Centrelink's Automated Debt Raising and Recovery System* (Report No 1 of 2019, April 2019), [2.8].

¹⁰⁵ Under sections 75(v) and 75(iii) of the Constitution.

¹⁰⁶ *Judiciary Act 1903(Cth)*, s 39B.

¹⁰⁷ Quoted prior to the finalisation of Hansard transcripts of Senate Estimate hearings on 24 October 2019 by the Australian Labor Party, 'Robodebt Has Been Wrong 234,097 times and It Will Chase You Even After You're Dead' (Media Release, 25 October 2019).

¹⁰⁸ Luke Henriques-Gomes, 'Centrelink cancels 40,000 robodebts, new figures reveal', *The Guardian* (Online), 6 February 2019.

¹⁰⁹ Terry Carney, 'Bringing robo-debts before the law: why it's time to right a legal wrong', *LSJ Online* (1 August 2019), 72, quoting figures provided to Senate Estimates by the Department of Human Services and

95. This has led to significant demand for legal advice and assistance, and numerous applications for review by the AAT have been considered at the AAT1 level. Although many of these debts were overturned, Carney observes that the Department has neither lodged any challenge at the AAT2 level, nor introduced any systemic changes to address the invalidation of its reasoning at the AAT1 level.¹¹⁰ Additionally, AAT1 decisions are not, in this area, made public, meaning that it is difficult for Beneficiaries to access and consider the reasoning of the Tribunal in the context of their own situations.¹¹¹
96. Two cases have also been commenced in the Federal Court of Australia challenging the legal foundation of the Online Compliance System.¹¹² In both cases, however, the originally claimed debt has subsequently been reassessed and either cleared or reduced to a nominal sum.¹¹³ It remains to be seen whether these cases will permit review by the court of the legality of the Online Compliance System process in circumstances where the specific debt calculation in each case is no longer in question.
97. The Law Council is aware that a class action is under preparation,¹¹⁴ which may permit the Federal Court to examine the entirety of the Online Compliance System and associated processes at a systemic level in light of possible liability in tort or unjust enrichment. In the interim, however, the Department's response to past and current cases before the AAT and Federal Court has prompted questions about its observance of model litigant protocols.

Model litigant protocols

98. It is well established that the Commonwealth has a duty to act as a 'model litigant' in any claim or litigation brought by or against itself or one of its agencies.¹¹⁵ The Department and Centrelink are therefore required to act in good faith, with fairness and honesty in the context of any such claim.
99. Carney raises concerns that the Department has arguably contravened model litigant protocols. He states:

...many robo-debts were overturned by the [AAT1]. But these decisions (and hearings) remain private at that level. Centrelink did not once challenge the invalidation reasoning by appealing to the [AAT2], where the ruling would have become public. Nor did it desist from raising debts on the basis of the invalidated

reported by Luke Hermes-Gomes, 'Centrelink still issuing incorrect robodebts to meet targets, staff claim', *The Guardian* (online) 29 May 2019.

¹¹⁰ Ibid 73.

¹¹¹ Ibid.

¹¹² *Masterton v Secretary, Department of Human Services of the Commonwealth*, VID73/2019; and *Amato v the Commonwealth*, VID611/2019.

¹¹³ Luke Henriques-Gomes, 'Centrelink drops woman's robodebt in second case set to challenge legality of scheme' *The Guardian* (6 September 2019), <https://www.theguardian.com/australia-news/2019/sep/06/centrelink-wipes-robodebt-in-second-case-set-to-challenge-legality-of-scheme>.

¹¹⁴ Gordon Legal, 'Gordon Legal to Fight Illegal Robodebt Clawback' (Press release, 17 September 2019), <https://gordonlegal.com.au/news/gordon-legal-to-fight-illegal-robodebt-clawback/>.

¹¹⁵ A useful summary of the origin and content of the 'model litigant rules' is provided by the Rule of Law Institute of Australia in its factsheet *The Model Litigant Rules: Key Facts and Issues*, September 2013, accessed at: <https://www.ruleoflaw.org.au/wp-content/uploads/2013/09/Rule-of-Law-Institute-Model-Litigant-Rules-Facts-and-Issues1.pdf>.

*reasoning, or advert to those over-rulings when pursuing debts in the AAT. A clear breach, surely, of the Commonwealth's 'model litigant' obligations.*¹¹⁶

100. The Law Council recommends that the Department review and ensure its engagement in all legal proceedings regarding the Online Compliance System conforms with its obligations under the model litigant protocol.
101. The Law Council also considers that selective publication of relevant AAT1 decisions would provide greater insight into, and transparency regarding, the legal reasoning and processes undertaken by the Department and Centrelink.

Recommendations:

- **The Department should review and ensure its engagement in all legal proceedings regarding the Online Compliance System conforms with its obligations under the model litigant protocol.**
- **The AAT is encouraged to consider selective publication of relevant AAT1 decisions, facilitated by the provision by Government of resources necessary for that purpose.**

The impacts of the Online Compliance System on individuals, legal advisers and the justice system

Individuals

102. The impact of the Online Compliance System, particularly on vulnerable people within the community, remains a key concern. Dr Cassandra Goldie, CEO of the Australian Council of Social Service (**ACOSS**), stated in February 2019:

*It has been a devastating abuse of government power that has caused extensive harm, particularly among people who are the most vulnerable in our community.*¹¹⁷

103. Numerous individual cases continue to be reported. By way of recent example, in October 2019, it was reported that a disabled man under an arrangement whereby he is not required to report his income was notified of a claimed debt in excess of \$15,000. That debt was subsequently recalculated down, and an offer later made to waive it in its entirety, however the recipient and his carer report experiencing significant stress and anxiety, perceived as 'disability bullying'.¹¹⁸
104. *The Saturday Paper* reported in March 2019 that more than 2,030 people had died in the period following receipt of a Centrelink debt notice, including 766 people who

¹¹⁶ Terry Carney, 'Bringing robo-debts before the law: why it's time to right a legal wrong', *LSJ Online* (1 August 2019), <https://lsj.com.au/articles/why-robo-debt-bringing-robo-debts-before-the-law-why-its-time-to-right-a-legal-wrong/>.

¹¹⁷ ACOSS, *Robodebt taken to Court over dodgy debts, reconfirming it needs to go*, media release 6 February 2019, https://www.acoss.org.au/media_release/robodebt-taken-to-court-over-dodgy-debts-reconfirming-it-needs-to-go/.

¹¹⁸ Paul Farrell, 'Centrelink accused of 'disability bullying' after man with intellectual disability receives \$15,000 robodebt', *ABC News* (online), 8 October 2019, [https://www.abc.net.au/news/2019-10-07/centrelink-accused-of-disability-bullying-over-\\$15,000-robodebt/11570920](https://www.abc.net.au/news/2019-10-07/centrelink-accused-of-disability-bullying-over-$15,000-robodebt/11570920).

were aged under 45 years.¹¹⁹ There was no clear evidence of a causal link between the debt notice and the deaths, however the levels of stress associated with receipt of a possibly unfounded debt notice have been posited as contributing to self-harm and, in some instances, suicidal ideation.¹²⁰

105. The legal profession has observed the impact of the Online Compliance System on many individuals. The Law Institute of Victoria (**LIV**) reports that many Beneficiaries do not access their legal entitlements regarding review of claimed debts, in part because of a lack of clarity or awareness of their rights and the review options available. Overall, the LIV reports that the Online Compliance System 'has caused severe hardship to those who rely on Centrelink benefits while they are studying or seeking employment'.¹²¹ As discussed above, the placing of an effective onus on the individual to disprove a claimed debt creates considerable stress to locate documents and records, in some cases going back more than seven years.
106. The *Justice Project*¹²² reviewed in detail, from an access to justice perspective, the situation of people falling within population groups heavily affected by the Online Compliance System. In many instances, multiple barriers and points of disadvantage may compound and greatly increase the difficulties that vulnerable people face in responding to a possible debt or a complex and unfamiliar process such as the Online Compliance System. The Justice Project outlined common barriers which may be expected amongst many income support recipients to a greater or lesser extent. These included language difficulties experienced by migrants, literacy and education barriers, common experiences of trauma and family violence, poverty including periods of homelessness, disability and mental health conditions. These barriers may greatly increase the challenges in understanding and responding to an Online Compliance System debt notice. In the separate context of legal proceedings, the Justice Project found that:

*...complex, technical language and reluctance to adopt flexible procedures can make it extremely difficult for people with disability to effectively participate in proceedings on an equal basis with others and can compound an already intimidating, stressful and overwhelming experience.*¹²³

107. Similarly, people facing economic disadvantage may lack the time to deal with complex legal issues, particularly if they are primary caregivers. They are likely, in addition, to have limited resources to seek advice or assistance and may be unsure how to respond. Some people experiencing economic disadvantage may also have personal or psychological barriers affecting their capacity to resolve such issues. People who are homeless or responding to episodes of trauma, family violence or

¹¹⁹ Alex McKinnon, 'Robo-debt's potential toll', *The Saturday Paper* (online), 2-8 March 2019, <https://www.thesaturdaypaper.com.au/2019/03/02/robo-debts-potential-toll/15514452007563>.

¹²⁰ Gerry Georgatos, 'Robodebt claims the life of a 19-year old mum' *Independent Australia* (online) 21 September 2019, <https://independentaustralia.net/politics/politics-display/robodebt-claims-the-life-of-a-19-year-old-mum,13127>.

¹²¹ Law Institute of Victoria, *Centrelink Compliance Program and related automated processes* (Memo, 19 July 2019), 8.

¹²² Law Council of Australia, *The Justice Project*, final report published August 2018, <https://www.lawcouncil.asn.au/justice-project/final-report>.

¹²³ Law Council of Australia, 'People with Disability', *The Justice Project* (Final report published August 2018), 5, <https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/People%20with%20Disability%20%28Part%201%29.pdf>.

upheaval in their lives may struggle to receive correspondence from Centrelink, or to locate and provide requested documentation.¹²⁴

108. The Justice Project relevantly recommended that:

Government agencies (for example, social security, immigration, housing, child protection) which frequently deal with people experiencing disadvantage, and whose frontline decisions can increase demands for civil legal assistance, should:

- *be responsive to the legal capabilities of target system users;*
- *consult with key communities affected by administrative policies and practices to enable the design of responsive and accessible service delivery;*
- *adopt plain English, accessible formats and the use of translators/interpreters in dealings and correspondence with the public;*
- *design internal departmental processes to handle complaints or mistakes to provide clear explanations to clients in accordance with a fair process;*
- *resource independent, accessible complaint systems, equipped with effective investigative and reporting powers; and*
- *enable effective recourse to judicial review for administrative decision-making, as well as full merits review for administrative decisions that will, or are likely to, affect the interests of a person.*¹²⁵

109. The Law Council is concerned that the design of the Online Compliance System does not meet many of the above criteria. In particular, it does not appear to be responsive to the capabilities and needs of its users, and lacks accessibility and fair, effective and investigative processes, which vastly undermines its effectiveness.

110. The Law Council further understands that, as a consequence of the Online Compliance System, many charities have struggled to respond to individual needs presented. Community support services such as Anglicare, which already operate with limited resources, have reported an increase in the number of people seeking help to navigate the Centrelink system or respond to claimed debts. Anglicare reports supporting benefit recipients, especially young people and those with disabilities, by helping them to contact Centrelink and providing support for stress and anxiety caused by those interactions. Additionally, Anglicare provides assistance to cover rent arrears, basic necessities and pay accounts for essential services where a person's benefits are reduced or suspended as a result of the operation of the Online Compliance System. In 2017-18, Anglicare estimated that its staff in direct contact roles 'were spending the equivalent of 6.6 full time equivalent (FTE) positions just on dealing with Centrelink issues'.¹²⁶

¹²⁴ Law Council of Australia, 'People Experiencing Economic Disadvantage', *The Justice Project* (Final report published August 2018), 3, <https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/People%20Experiencing%20Economic%20Disadvantage%20%28Part%201%29.pdf>.

¹²⁵ Law Council of Australia, 'Broader Justice System Players', *The Justice Project* (Final report published August 2018), 68.

¹²⁶ Teresa Hinton, *Paying the Price of Welfare Reform: The experiences of Anglicare staff and clients in interacting with Centrelink* (May 2018), 6, <https://www.anglicare.asn.au/docs/default-source/default-document-library/full-report.pdf?sfvrsn=0>.

111. Finally, in this respect, the Law Council notes its concern that individuals may be reluctant to speak up or give evidence in contexts such as the Inquiry due to fears that doing so may draw a negative response from the Department or result in the release of personal information.¹²⁷ Many people affected by the Online Compliance System may, given its complexity, also lack confidence in their ability to present their concerns effectively and may be hesitant to attempt to do so.

Legal advisers and the justice system

112. In terms of impacts on service providers, the Law Council has previously observed:

*The problems identified with respect to the automated debt recovery system have deleteriously impacted the already overstretched legal assistance bodies.*¹²⁸

113. Many legal assistance services have reported increased demands on limited available resources since the commencement of the Online Compliance System. In its 2017 submission to the Committee, Victoria Legal Aid reported that it had experienced an obvious increase in demand since the initiative was implemented.¹²⁹ Further, it reported that inaccuracies in the system place a significant burden on lawyers, tribunals and courts to address and rectify mistakes made by Centrelink or the Online Compliance System, when these should in fact have been corrected at the systemic level once initially identified.¹³⁰ Victoria Legal Aid has, since that time, continued to experience ongoing demand for legal assistance in responding to Online Compliance System debt notices:

*We have helped over 500 people who have received robo-debt notices, and every day we continue to receive phone calls from recipients of robo-debt letters.*¹³¹

114. In a context where less than three per cent of legal aid funding is available to civil matters,¹³² the Productivity Commission in 2014 noted that a failure to fund civil legal assistance 'can be a false economy as the costs of unresolved problems are often shifted to other areas',¹³³ and recommended the allocation of \$200 million as an urgent interim measure, pending longer-term analysis of required funding.¹³⁴ This observation of an acute lack of funding for legal services continues to be experienced by the legal profession.

¹²⁷ As occurred, for instance, in 2017. See: Christopher Knaus and Paul Farrell, *The Guardian* (online, 27 February 2017), <https://www.theguardian.com/australia-news/2017/feb/27/centrelink-recipients-data-released-by-department-to-counter-public-criticism>.

¹²⁸ Law Council of Australia, *Senate inquiry into the design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative submission*, 24 April 2017, 3, <https://www.lawcouncil.asn.au/resources/submissions/senate-committee-centrelink-inquiry>.

¹²⁹ Victoria Legal Aid, *Senate inquiry into the design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative* (Submission No 111, 6 April 2017), 7-8.

¹³⁰ *Ibid* 7.

¹³¹ 'Centrelink accused of chasing debts that don't exist', *ABC 7:30 Report* (27 June 2019), <https://www.abc.net.au/7.30/centrelink-accused-of-chasing-debts-that-dont-exist/11259084>, citing Rowan McRae, Executive Director, Victoria Legal Aid.

¹³² Productivity Commission, *Access to Justice Arrangements* (Inquiry report, Vol 2, No. 72, 5 September 2014), 678.

¹³³ Law Council of Australia, 'People Experiencing Economic Disadvantage', *The Justice Project* (Final report published August 2018), 31, citing: Productivity Commission, *Access to Justice Arrangements* (Inquiry report, 3 December 2014), 30-31.

¹³⁴ *Ibid* 23.

115. Community legal centres and legal aid commissions across Australia have limited resources for meeting the demands for assistance with Centrelink debts. This results in many members of our community who are already marginalised and vulnerable, being left in a position where they are not able to access legal advice or secure representation in a timely manner. As noted above, less than three per cent of legal aid grants are made for civil matters nationally, while community legal centres reported turning away nearly 170,000 people in 2015-16. The Law Council notes experiences such as that of the Welfare Rights Centre, which reported in 2017 having to turn away 20 to 30 per cent of people seeking assistance for related issues,¹³⁵ and which it understands is not an isolated occurrence. Additionally, significant resources are required of legal services to deal with individual cases, which often involve attempting to ascertain pay, locate payslips and contact previous employers on behalf of clients.¹³⁶
116. With regard to the impact of the Online Compliance System on the tribunals, the AAT reports that, in 2018-19, 'applications for review of Centrelink decisions comprised 85 per cent of all lodgements in the [Social Services and Child Support] Division and increased by 29 per cent from 2017-18'.¹³⁷ Within that overall figure, it reports that 40 per cent of those lodgements related to a Centrelink debt, and that 'applications seeking review of one or more decisions about a debt increased by 16 per cent' from 2017-18.¹³⁸
117. Although the AAT does not here distinguish between debts arising from the Online Compliance System and others, it is likely that Centrelink's compliance program is a significant contributor to increasingly high demands on the time and resources of the tribunal, as well as those of legal assistance services and the courts. The Law Council considers this unnecessary and inappropriate, in particular to the extent that those demands are exacerbated by high error rates, as discussed above, and possible systemic flaws in the Online Compliance System which remain to be rectified.
118. The Law Council recommends that additional funding be provided to legal service providers, including through increased allocation of legal aid funding to civil matters, and that additional resources be allocated to the AAT and affected courts to address demand for services in this area.
119. Further, the Law Council maintains its recommendation in the Justice Project that 'Justice Impact Tests should be introduced at the Commonwealth... level to facilitate the smoother development of laws and policies which have downstream impacts on the justice system'.¹³⁹ In the context of the present Inquiry, the Law Council recommends that any future amendments to Centrelink's compliance program, including the Online Compliance System, be assessed in advance through a Justice Impact Test conducted by Government in close engagement with key justice sector representatives.

¹³⁵ Law Council of Australia, 'People Experiencing Economic Disadvantage', *The Justice Project* (Final report published August 2018), 43, citing Christopher Knaus, 'Legal aid services join up to deal with high volume of Centrelink debt cases', *The Guardian* (online), 1 April 2017.

¹³⁶ *Ibid* 44.

¹³⁷ Administrative Appeals Tribunal, *Annual Report 2018-19* (Report, 2019), 41, <https://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR201819/AAT-Annual-Report-2018-19.pdf>.

¹³⁸ *Ibid*.

¹³⁹ Law Council of Australia, 'Governments and Policymakers', *The Justice Project* (Final report published August 2018), 26, Recommendation 7.3, <http://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Governments%20and%20Policymakers%20%28Part%20%29.pdf>. See also further discussion of Justice Impact Tests at 14-26.

Recommendations:

- **Additional funding should be provided to legal assistance service providers, including through increased allocation of legal aid funding for civil matters, community legal centre and Aboriginal and Torres Strait Islander-specific legal services funding.**
- **Additional resources should be allocated to the AAT and affected courts to address demands arising in this area.**
- **The implications for the demands upon justice and legal assistance services of any future amendments to Centrelink's compliance program, including the Online Compliance System, should be assessed in advance through a Justice Impact Test, conducted by Government in close engagement with key justice sector representatives.**

120. Finally, the Law Council supports the Ombudsman's outstanding recommendations that correspondence should explain more clearly how the given debt was raised, noting the relevance of personal circumstances to the review process, as well as the consequences of failing to update information and the consequences of ATO averaging.¹⁴⁰ The Law Council remains concerned regarding the more than one million letters that were sent during the initial operation of the Online Compliance System without adequately explaining how the debt was raised, penalties and review options. The Law Council suggests that the Department should take steps to ensure that all necessary information, including the above, is provided to recipients of the initial letters.

¹⁴⁰ Commonwealth Ombudsman, *Centrelink's automated debt raising and recovery system*, Report No 1 (2019), [4.10]-[4.12] (Further recommendations 2 and 3).