

24 April 2017

Ms Jeanette Radcliffe
Committee Secretary
Senate Standing Committee on Community Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

By email: community.affairs.sen@aph.gov.au

Dear Ms Radcliffe

Senate Inquiry into the design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative

The Law Council of Australia appreciates the opportunity to provide input to the Senate Community Affairs References Committee (the **Committee**) inquiry into the design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative (the **Inquiry**).

The Law Council acknowledges the assistance of the Law Society of New South Wales (the **Law Society**) and members of the Law Council's Access to Justice Committee in the preparation of this submission.

The Law Council acknowledges that since the automated debt recovery system was initially rolled out in July 2016, a number of positive changes have been implemented, improving its accuracy, useability and accessibility. However, it is the Law Council's view, in line with that of social services peak bodies and legal aid organisations, that significant issues remain with the automated debt recovery system and it should be halted at least until these concerns are addressed.¹ In doing so, the Law Council refers to the Commonwealth Ombudsman's report 'Centrelink's automated debt raising and recovery system' (the **Commonwealth Ombudsman's Report**), which has identified several areas where further improvements could be made.²

¹ Victoria Legal Aid, 'We've joined the call for immediate action to end Centrelink's robo-debt system', (8 March 2017), accessed at: <https://www.legalaid.vic.gov.au/about-us/news/weve-joined-call-for-immediate-action-to-end-centrelinks-robo-debt-system>.

² Commonwealth Ombudsman, 'Centrelink's automated debt raising and recovery system', (April 2017), accessed at: http://www.ombudsman.gov.au/_data/assets/pdf_file/0022/43528/Report-Centrelinks-automated-debt-raising-and-recovery-system-April-2017.pdf.

Reversal of onus and reports of inaccurate debt recovery notices

The Law Council is concerned that the debt recovery process in practice shifts the onus to the customer to work out whether the debt notice is correct and then to identify why it may not be correct, because Centrelink requires the person to respond to debt notices to prove that they do not owe the debt. Such a process inappropriately shifts the burden and may constitute a jurisdictional error, particularly where the initial debt identification methods are flawed and the decision-maker has made a finding of fact unsupported by evidence.³

The Law Council notes concerns about the accuracy of the debts raised by the debt recovery system, including the reliability of data and the ability of the system to accurately assess types of income and exclusions.⁴ Specifically, that the system compares fortnightly income reported to Centrelink with annual pay information held by the Australian Taxation Office, which has led to errors where people have not worked consistently throughout a financial year.⁵ The Law Council understands that this may arise because of a difference between the actual fortnightly income that a person may have earned over particular periods within a year, and the income averaged out over the course of the year. Legal Aid agencies have also reported that errors have arisen where an employer's name may be recorded differently in separate systems, which can incorrectly indicate that a person had two jobs rather than one.⁶

The Law Council agrees with the views expressed in the Commonwealth Ombudsman's Report, that it is appropriate for customers to be asked about possible discrepancies in their income and welfare payments.⁷ Nonetheless, the Law Council is of the view that Centrelink should take all reasonable efforts to ensure that the discrepancy rates are as low as possible, given the impact errors may have on vulnerable groups through the potential over-recovery of debts. As suggested in the Commonwealth Ombudsman's Report, it would be appropriate to conduct modelling on the risk of over-calculating and under-calculating debts to guide the accuracy of the debt recovery system.⁸

Centrelink complaint and review processes

The Law Council understands that, under normal circumstances, a person can apply to have their accounts payable notice from Centrelink reviewed by an authorised review officer (**ARO**),

³ Following the reasoning in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, the calculation of a debt based on wrongly averaged annual figures is not a question of weight nor a matter so insignificant as to have no material effect on the decision. Such a decision could also be described as 'manifestly unreasonable' [at 15].

⁴ Ibid n2, p7.

⁵ See for example: 'Australian Council of Social Service, 'Centrelink debt fiasco must end immediately', *Media Release*, (11 January 2017), accessed at: http://www.acoss.org.au/media-releases/?media_release=centrelink-debt-fiasco-must-end-immediately.

⁶ Victoria Legal Aid, '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, (6 April 2017), accessed at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/SocialWelfareSystem/Submissions.

⁷ Ibid n2, p7.

⁸ Ibid, p8.

which is a senior Centrelink officer who has not previously dealt with a customer's matter.⁹ A person can request an ARO review in person, by phone, online, in writing or by fax.¹⁰

The Law Council submits that the same review options should be made clear on any debt recovery letter sent by Centrelink, to ensure that people are aware of their legal rights to contest the notice. In particular, clear and appropriate information should be provided to persons from culturally and linguistically diverse backgrounds, to ensure there is a proper understanding of the process and timeframes for a review of the decision. The Commonwealth Ombudsman's Report noted that in developing new systems and programs there is a tendency to focus attention on solutions for the greatest number, meaning that disadvantaged and vulnerable people may fall through the cracks.¹¹

The Commonwealth Ombudsman's Report highlighted customer's concerns with the lack of information in the letters. Key problems included:

- the compliance number being excluded from letters;
- not receiving a clear explanation about the debt decision and the reasoning behind it; and
- difficulties obtaining information and assistance from service staff.¹²

Managing such issues can be even more challenging for vulnerable people. As such, the Law Council supports Recommendation 2 from the Commonwealth Ombudsman's Report which calls for greater clarity in the initial letters, including providing details on the compliance helpline process and the capacity to seek extensions of time.¹³

The Law Council also supports recommendation 7 from the Commonwealth Ombudsman's Report which calls for additional assistance and support to vulnerable people.¹⁴ In particular, consultation with relevant stakeholders about the difficulties vulnerable groups face would greatly assist the response rates from customers.

Impact on the legal assistance sector

The problems identified with respect to the automated debt recovery system have deleteriously impacted the already overstretched legal assistance bodies. In NSW for example, only two of the 32 community legal centres are currently funded to deal with Centrelink debt cases. According to the Welfare Rights Centre Co-ordinator and Principal Solicitor, Katherine Boyle, individuals with Centrelink debts are now the centre's second largest group of clients. The Welfare Rights Centre has had to heavily triage clients and turn away 20 to 30% of people seeking assistance.¹⁵

⁹ Victoria Legal Aid, 'Get help with Centrelink's automated debts', *Online*, (15 February 2017), accessed at: <http://www.legalaid.vic.gov.au/find-legal-answers/centrelink/get-help/get-help-with-centrelinks-automated-debts#section-header>.

¹⁰ Ibid.

¹¹ Ibid n2, p19-20.

¹² Ibid, p15.

¹³ Ibid, p27.

¹⁴ Ibid, p29.

¹⁵ Christopher Knaus, 'Legal aid services join up to deal with high volume of Centrelink debt cases', *The Guardian*, (1 April 2017), accessed at: <https://www.theguardian.com/australia-news/2017/apr/01/legal-aid-services-join-up-to-deal-with-high-volume-of-centrelink-debt-cases>.

Other jurisdictions in Australia have faced similar strains upon their legal services. Western Community Legal Centre's Chief Executive, Denis Nelthorpe, has said the level of legal assistance available to welfare recipients was extremely limited.¹⁶ Victoria Legal Aid has noted that due to the letters they took the same number of calls from people seeking legal advice in the first seven working days of 2017 compared to all of January 2017.¹⁷

In an effort to cope with the increase in Centrelink debt cases in NSW, Legal Aid NSW, LawAccess NSW, the Welfare Rights Centre and the Illawarra Legal Centre have created a streamlined service for those wanting advice.¹⁸ The service fast-tracks Centrelink debt cases, making LawAccess NSW the single point of contact. Once the hotline receives a Centrelink debt query, lawyers will respond to cases within 48 hours. While such measures are of great assistance to customers, they still do not sufficiently deal with the overwhelming demand.

Noting the impact of the automated debt recovery system on legal assistance sector bodies, the Law Council welcomes the recent cancellation of the impending cut of \$35 million to these organisations.¹⁹ However it is not yet clear whether the funding, which will prioritise family law and family violence services,²⁰ will support welfare and financial advice services more broadly. Clarification should be provided as a matter of urgency.

Recovery fees

The Law Council welcomes Centrelink's recent decision to remove the 10% automatic recovery fee for persons who have failed to pay a debt²¹ The Law Council notes that this was done in response to concerns raised by the Commonwealth Ombudsman, as noted and recommended in the Commonwealth's Ombudsman's Report.²²

Release of personal information

The Law Council is concerned about the documented release of personal information by the Australian Government, as part of its response to concerns raised about the lack of procedural fairness of the debt collection process.²³

¹⁶ Christopher Knaus, 'Centrelink robo-debt 'abject failure' and arguably unlawful, Victoria Legal Aid says', The Guardian, (11 April 2017), accessed at: <https://www.theguardian.com/australia-news/2017/apr/11/centrelink-robo-debt-abject-failure-and-arguably-unlawful-victoria-legal-aid-says>.

¹⁷ Ibid n6.

¹⁸ Legal Aid NSW, 'Help with Centrelink debt notices just a phone call away', *Media Release*, (3 April 2017), accessed at: <http://www.legalaid.nsw.gov.au/for-lawyers/news/news-for-lawyers/media-release-help-with-centrelink-debt-notices-just-a-phone-call-away>.

¹⁹ Law Council of Australia, 'Last-minute cancellation of legal assistance funding cuts a great victory for justice and vulnerable Australians, Media Release, (24 April 2017), accessed at: <http://www.lawcouncil.asn.au/lawcouncil/images/1720--Last-minute-cancellation-of-legal-assistance-funding-cuts-a-great-victory-for-justice-and-vulnerable-Australia-ns.pdf>.

²⁰ Senator the Hon George Brandis QC, Attorney-General, Senator the Hon Michaelia Cash, Minister for Women, Senator the Hon Nigel Scullion, Minister for Indigenous Affairs, 'Record Federal Funding for Legal Assistance', Media Release, (24 April 2017), accessed at: <https://www.attorneygeneral.gov.au/MediaReleases/Pages/2017/SecondQuarter/Record-federal-funding-for-legal-assistance.aspx>.

²¹ Ibid n2, p8.

²² Ibid, p26.

²³ Paul Malone, 'Centrelink is an easy target for complaints but there are two sides to every story', *SMH Online*, (26 February 2017), accessed at: <http://www.smh.com.au/comment/centrelink-is-an-easy-target-for-complaints-but-there-are-two-sides-to-every-story-20170224-gukr4x.html>.

The Australian Government has contended that the disclosure was permitted by the legislation, pursuant to section 162 of the *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) and section 202 of the *Social Security (Administration) Act 1999* (Cth).²⁴ However, it is unclear whether these sections authorise providing personal information (either at all, or to the extent and in the circumstances now under review) to journalists. Further, it appears inconsistent with best practice privacy measures among public sector agencies for such personal information to be released to the media, when the possibility of release is not addressed in the Department of Human Services and/or Centrelink's privacy policies and statements to customers.²⁵

The Law Council acknowledges that Chapter 6 of the Australian Privacy Principles (**APP**) Guidelines outline when an APP entity may use or disclose personal information.²⁶ APP 6.2(a) permits an APP entity to use or disclose personal information for a secondary purpose if the individual would reasonably expect the entity to use or disclose the information for that secondary purpose, and:

- if the information is sensitive information, the secondary purpose is directly related to the primary purpose of collection; or
- if the information is not sensitive information, the secondary purpose is related to the primary purpose of collection.²⁷

The Guidelines then go on to state that:²⁸

The 'reasonably expects' test is an objective one that has regard to what a reasonable person, who is properly informed, would expect in the circumstances. This is a question of fact in each individual case. It is the responsibility of the APP entity to be able to justify its conduct.

Examples of where an individual may reasonably expect their personal information to be used or disclosed for a secondary purpose include where:²⁹

The individual makes adverse comments in the media about the way an APP entity has treated them. In these circumstances, it may be reasonable to expect that the entity may respond publicly to these comments in a way that reveals personal information specifically relevant to the issues that the individual has raised.

In the above case (*L v Commonwealth Agency* [2010] PrivCmrA 14), the Privacy Commissioner took into account that the complainant had complained publicly about the agency's handling of their application.

²⁴ Henry Belot, 'Senate concerned Centrelink information leak could have 'chilling' impact on investigation', ABC News, (3 March 2017), accessed at: <http://www.abc.net.au/news/2017-03-03/centrelink-debt-senate-concerned-about-impact-of-dhs-releases/8321478>.

²⁵ Department of Human Services Privacy Policy, 16, accessed at: <https://www.humanservices.gov.au/sites/default/files/dhs-privacy-policy-3.2.1.pdf>.

²⁶ Office of the Australian Information Commission, *Australian Privacy Principles Guidelines - Privacy Act 1988*, (March 2015), accessed at: https://www.oaic.gov.au/resources/agencies-and-organisations/app-guidelines/APP_guidelines_complete_version_1_April_2015.pdf.

²⁷ *Ibid*, [6.18].

²⁸ *Ibid*, [6.20].

²⁹ *L v Commonwealth Agency* [2010] PrivCmrA 14 (24 December 2010), Australasian Legal Information Institute website www.austlii.edu.au.

The Commissioner found that:³⁰

The information provided by the agency was confined to responding to the issues raised publicly by the complainant. The Commissioner considered that the complainant was reasonably likely to have been aware that the agency may respond, in the way it did, to the issues raised.

The Law Council queries whether the extent of the release of personal information in the present Centrelink matter was similarly confined to responding to the issues publicly raised by the customer, and whether a reasonable person would similarly expect their personal information to be disclosed to the media in this way.

The Law Council notes that the Australian Privacy Commissioner has commenced inquiries with the Department of Human Services regarding a release of personal information into the public domain. Additionally, the Law Council notes that allegations arising from the matter have been referred to the Australian Federal Police.³¹ Findings by the Australian Privacy Commissioner will be of relevance to the Inquiry's recommendations arising from term of reference (i). However, it is unclear at this stage whether the findings will be publically released in time to assist the Committee.

The Law Council submits that in the interim, the Inquiry should seek information from the relevant government agencies regarding the legislative provisions relied on to authorise such disclosure. If it is found that the disclosure was permitted by the legislation, the Inquiry should examine whether such permissible disclosures are appropriate and in the public interest, and whether further steps should be taken by the Department of Human Services to properly notify its customers of the privacy policy. In particular, the Inquiry should consider whether such policies accord with Australia's international human rights obligations, particularly Article 17 of the *International Covenant on Civil and Political Rights*.³²

The Law Council appreciates the opportunity to provide comments to the Committee. In the first instance, please contact Simon Henderson, Senior Policy Lawyer, at simon.henderson@lawcouncil.asn.au or (02) 6246 3757, with any inquiries on the submission.

Yours sincerely



Fiona McLeod SC
President

³⁰ Ibid.

³¹ Office of the Australian Information Commissioner, 'Updated statement — Centrelink release of personal information', (16 March 2017), available at: <https://www.oaic.gov.au/media-and-speeches/statements/centrelink-debt-recovery-system#updated-statement-centrelink-release-of-personal-information>.

³² UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html>, (accessed 16 March 2017), Article 17.