

Submission to the Robodebt Royal Commission

3 February 2023

ACOSS's submission

ACOSS welcomes the opportunity to make a submission to the Royal Commission into Robodebt. ACOSS (Dr Cassandra Goldie) provided a Witness Statement dated 21 November 2022 (attached) to the Commission. ACOSS gave evidence to the Commission on 16 December 2022 and we seek to incorporate that evidence into this Submission.

We now set out reform proposals to ensure that Robodebt or something like it, can never be repeated.

How to ensure Robodebt never happens again

We propose a range of reforms and protections to ensure that people who receive social security are treated with respect and dignity and are protected against poor decision making, improper practice and unlawful schemes.

There needs to be much stronger protections for people in the social security system, not only to prevent another Robodebt but to also improve fairness in other parts of the system including where there is automated decision making. This is also important for government in its use of digital decision making, artificial intelligence or automated processes.

Protecting people from poor or unlawful automated decision making

Legality of automated interventions must be tested before introduction

As the Royal Commission has heard, questions of illegality were raised within the bureaucracy well before Robodebt was inflicted upon the population, and yet the decision was made for it to proceed without legislation. If the government had decided legislation was required for Robodebt, it at least

would have been subjected to public scrutiny, which would no doubt have shown how deeply flawed and unjust it was.

As the former Special Rapporteur on Extreme Poverty and Human Rights Philip Alston remarked, it's surprising how often governments have proceeded with automated decision making without due regard to it complying with the law.¹ Government must test the legality of proposals that use automated decision making (ADM) and artificial intelligence (AI) before their introduction, in an open and transparent way. Government must also ensure proposals, legislation and regulations comply with Australia's human rights obligations. Given the power of ADM and AI, we consider that human rights standards should be strictly followed.

We note that Department of Employment and Workplace Relations (DEWR) has been drafting a legislative instrument for a Digital Protections Framework (DPF) as required under Subitem 159A (9) of Schedule 1 to the Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Act 2022. As a stakeholder consulted in the development of the instrument, ACOSS believes it is critical that this DPF is drafted in such a way that it optimises the protections available for users of online employment services and guarantees human rights obligations are met. Further, the DPF could provide a model for providing protection against adverse decisions made unlawfully by IT systems. It is therefore important that the DPF instrument and the processes that give life to these protections are considered in relation to the improvements that government considers pursuant to the recommendations of the Royal Commission.

Use of automation should be co-designed

The use of digital decision-making, AI and automation in the social security system must be developed through an open and transparent co-design process with people using the system and other expert stakeholders, including social security lawyers, advocacy organisations, human rights experts and academics in the field. This is the best way to detect problems in a program before they do harm.

Disclosure and rights of appeal

ACOSS supports the recommendation from the Australian Human Rights Commission in its final report on Human Rights and Technology that anyone

¹ Special Rapporteur on Extreme Poverty and Human Rights Philip Alston 'Report of the Special rapporteur on extreme poverty and human rights' Item 72(b) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/312/13/PDF/N1931213.pdf?OpenElement> pp.14-15

affected by digital decision making or artificial intelligence “is notified where artificial intelligence is materially used in making an administrative decision.”² This notification should be clear (not just in fine print).

In addition, the Commission recommends that “notification should include information regarding how an affected individual can challenge the decision.”² We support this recommendation. People should have the right to know how their information has been used, as well as how a decision was made (and people should not need to lodge a Freedom of Information request to determine how a decision was made). One of the major problems with Robodebt was that people could not get basic information about how Services Australia had determined they had a debt and how it was calculated. With the continuation of automation in our social security system (for example, Single Touch Payroll and pre-filling of employment income data) there must be an easily accessible way for people to gather information about their record, how their data has been used, and how a decision has been made. Equally, this information should readily be available to people working at Services Australia, so they can easily provide it to people when they call or visit an office.

Human involvement in decision-making about debt, loss or suspension of payment

As a first principle in the administration of social security payments, any decision to raise a debt, deny someone income support, suspend or remove a payment must be made by a human being and these decisions must have a basis in law. Decisions that would reduce someone’s income should not be automated or made without human involvement. More generally, where a decision engages a person’s basic human rights, for example, the right to an adequate standard of living or the right to social security, a human being must be the decision-maker and the person affected must be given all reasonable opportunity to be heard (in real life, not online) by that decision-maker before the decision is made. This requirement is an important part of preventing a repeat of Robodebt and also addressing the major problems in other areas of society security and human services, for example, payment suspension in the employment services system.

Clear understanding that digital is not universal

The Federal Government must always have non-digital options readily available for people to participate in the administration of social security

²Australian Human Rights Commission (2021) ‘Human Rights and Technology Final Report 2021

processes that affect them. There is a host of reasons why someone may not be able to engage with a process online, ranging from inability to afford online access through to poor digital literacy or a distrust of digital platforms. People should be able to complete any interaction with our social security system via phone and in person, and these services should be suitably resourced to facilitate this engagement.

Debt recovery practices

ACOSS has put to government a range of changes to current debt recovery practices to improve fairness.

Reason for debt on debt notices

Currently, debt notices are opaque and arguably contravene the Social Security Act in that they do not sufficiently detail how a debt arose. This makes it difficult for someone to contest a debt because they don't have the information they need to do so. Section 1229 of the Social Security Act 1991 states that debt notices must include 'the reason the debt was incurred, including a brief explanation of the circumstances that led to the debt being incurred'.³ It is our view that many debt letters fail to meet this bar. We recommend that debt notices are revised so that is clear how the debt arose and how it was calculated, with sufficient information for the person to determine whether or not there has been a mistake made by Centrelink. For example, a debt letter should advise why the debt arose (eg., because the person failed to notify us within 14 days of a change in relationship status), how the decision was made (eg., was it automated?), and whether a review to determine if there was any administrative error involved had been done.

Appeal rights

Rights to appeal a debt are not made clear in debt notices, often buried at the end of the letter in small print. Notices are also described as an 'accounts payable letter', leading the recipient to believe that there is no avenue for appeal. The Federal Government should change the wording of debt notices so that there are clear information on the front page about people's right to appeal the alleged debt and instructions on how to do so.

Abolish the 10% recovery fee

Services Australia can apply a 10% recovery fee to debts or part of a debt that accrued because the person 'knowingly or recklessly' failed to report to

³ Commonwealth Social Security Act 1991 – Section 1229 'Notices in respect of a debt'
http://classic.austlii.edu.au/au/legis/cth/consol_act/ssa1991186/s1229.html

Centrelink earnings from physical exertion. It is difficult to determine how Services Australia would be able to decide if someone had 'knowingly and recklessly' incorrectly reported income that was a result of physical exertion, raising questions about whether this fee is ever fairly applied. ACOSS also suspects that very few people receiving income support know of the fee's existence, so it's unlikely that it is serving as a warning against not reporting earnings. This fee merely exacerbates hardship, is difficult to apply fairly and should be abolished.

Abolish interest charges on debts

Services Australia may apply interest on debts owing where there is no repayment plan in place 28 days after the debt being raised and the person concerned no longer receives income support. The interest rate is the General Interest Charge rate, which is currently 10.06%.⁴ The interest compounds daily, which may lead to a substantial penalty for not repaying a debt or entering into a repayment arrangement on time.

ACOSS understands that charging of interest on debts is not in line with best practice in other jurisdictions. For example, the Victorian Electricity and Gas Act prohibit the charging of late fees on overdue accounts.⁵

Considering that interest may only be applied to former recipients of income support payments, there is a higher likelihood of debt notices or information not reaching the person concerned because they are no longer in the Centrelink system. They may have moved address, and not updated their details with Centrelink. This increases the risk of interest accruing on debts levelled against them because they aren't aware of the need to engage.

We do not think there is justification for the imposition of a daily interest charge for people who may have a social security debt and recommend charging of interest be abolished.

Reinstate the six-year statute of limitations on debt recovery

ACOSS calls for the reinstatement of the six-year statute of limitations on debt recovery so as to avoid the raising of debts from extended periods of time ago. In 2017, the existing six-year statute of limitations on Centrelink debt recovery was abolished. Returning this statute would increase fairness for people receiving social security and reduce the administrative burden on

⁴ Australian Taxation Office (2023) General Interest Charge (GIC) Rates [https://www.ato.gov.au/Rates/General-interest-charge-\(GIC\)-rates/](https://www.ato.gov.au/Rates/General-interest-charge-(GIC)-rates/)

⁵ Victorian Electricity Industry Act 2000 – Section 40C 'Prohibition on late fees for late payments' http://classic.austlii.edu.au/au/legis/vic/consol_act/eia2000261/s40c.html

Services Australia staff with seeking evidence of income from a long time ago.

Amend Social Security law to reduce domestic violence

ACOSS supports the work and recommendations by Economic Justice Australia to stop perpetrators of domestic violence using the social security system to perpetrate that violence against their partner or ex-partner. For example, we support EJA's recommendation that legislation be amended so that whoever benefits from an overpayment is liable to repay it. This would support victims of domestic violence whose abusive partners have accrued income support debts in their name.

Routine phone communication with people with substantial debts prior to sending a debt notice

Services Australia should phone people before sending a debt notice, particularly if the debt is large (for example, over \$3,000). The stress of receiving a debt notice should not be underestimated, particularly if the person is still receiving social security payments. It is therefore recommended that phone contact be made first to ensure the person is aware of their rights to review, and where they can get assistance and support. Services Australia should take all reasonable steps to discuss the debt with the person affected and make sure the person has all opportunity to either challenge the debt, if it is disputed, or to enter into a reasonable repayment arrangement to protect the person from financial distress and unable to meet essential needs.

Services Australia should comply with industry guidelines

ACOSS recommends that Services Australia complies with the guidance issued by the Australian Consumer and Competition Commission and the Australian Securities and Investment Commission for companies in how they manage and recover debt. As a Commonwealth entity, Services Australia is not bound by these guidelines. However, it would be good practice for Services Australia to abide by them to improve debt recovery.

Suspend debt recovery while debts are under review

Debt recovery should be automatically suspended where someone has requested a review of the debt. It should be made clear that if someone wants to continue to pay the debt while it is under review, they have the right to do so.

Establish clear privacy protections in the Social Security Act

To avoid the publication and broadcast of people's personal information, ACOSS strongly recommends that the Social Security Act be amended so that personal information is protected in all circumstances. This includes

information of whistle-blowers and people who no longer receive social security.

Use of external debt collectors

ACOSS recommends that debt recovery be conducted by Services Australia alone. Services Australia has responsibility for debt recovery and should retain this responsibility at all times. This would ensure that there was accountability for debt recovery, and remove the risk of poor practices being driven by commission-based contracts for external debt collectors. It should be noted that many people who are pursued for a debt by an external debt collector would be unaware of their right to request that Services Australia handle the debt, and so are left to deal with a private company.

Compensation

To date, we are not aware of compensation provided to victims of Robodebt. While Services Australia has a scheme for compensation, it is unclear if Robodebt victims have used this scheme.⁶ Equally, the same applies with respect to the Federal Government Services (Scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme)).

ACOSS is deeply concerned that while Robodebt victims have received repayment of monies paid plus interest, there has been no compensation for the harm Robodebt caused. Many people were driven to suicidal ideation, there were relationship breakdowns, and many people refused to apply for social security or accept paid work following Robodebt for fear of incurring another debt. There were media reports of at least two people committing suicide after receiving a Robodebt.

There has been no formal apology by the Federal Government for the scheme.

We note that the European General Data Protection Regulation (GDPR), which regulates use of data in the EU and beyond, includes an article affording the right to compensation where someone has suffered material or non-material damage as a result of non-compliance with the regulation.⁷

⁶ Services Australia 'Claiming Compensation from us' <https://www.servicesaustralia.gov.au/claiming-compensation-from-us?context=26266> last updated 18 January 2023

⁷ General Data Protection Regulation, Article 82 <https://gdpr-info.eu/art-82-gdpr/>

The Dutch Government has compensated victims of its Child Benefit scandal, whereby families were accused of benefit fraud and forced to repay money they did not owe.⁸ Families will receive a minimum of 30,000 euros in compensation, unless they repaid a higher amount.

We believe that the Federal Government has a responsibility to compensate victims for the harm and distress caused by Robodebt.

Reform of the bureaucracy and service delivery

Employ people with direct experience of social security

ACOSS firmly believes that both the Department of Social Services and Services Australia would greatly benefit from actively employing people who have experience of using the social security system. This employment strategy should be aimed at the highest levels in the departments to improve policy and decision-making in the bureaucracy responsible for social security.

ACOSS has been deeply concerned by the lack of basic understanding and compassion by some in DSS and Services Australia displayed during the Robodebt hearings. For example, the widely-held view by people who approved Robodebt (including ministers) that it was reasonable to expect people to provide information to Services Australia of fortnightly income earned from years ago – reversing the onus of proof – is preposterous. We recognise that some of the views expressed are not shared by all in the departments and there are many bureaucrats with an excellent understanding of the reality for people who need social security. However, we are concerned that key decision-makers thought it was entirely reasonable to implement Robodebt.

ACOSS recommends that both DSS and Services Australia actively recruit people who have direct experience of our social security system, especially at the highest levels in the departments.

Ensure Centrelink staff have sufficient training

ACOSS has heard from people who received a Robodebt who said they were treated with contempt by staff at Centrelink, where staff assumed they had done the wrong thing because they had a debt and consequently were given

⁸ Joe Henley (2021) 'Dutch Government faces collapse over child benefit scandal'
<https://www.theguardian.com/world/2021/jan/14/dutch-government-faces-collapse-over-child-benefits-scandal>

no compassion. We have also heard from others who were treated with kindness and understanding.

It is important for Centrelink staff to have sufficient training so that everyone they serve is treated fairly and with compassion. We appreciate that Centrelink staff will do their best to support people, but there should be consistency across the agency to ensure that everyone dealing with Centrelink is treated with respect.

Oversight bodies

Commonwealth Ombudsman

ACOSS recommends that there be a review into how the Commonwealth Ombudsman conducts its investigations to ensure there is independence, transparency, and that the Ombudsman is able to get all information relevant to its investigation. The 2017 investigation into Robodebt by the Commonwealth Ombudsman failed to uncover the illegality of Robodebt, essentially finding that the reversal of the onus of proof and averaging were fair. Parts of the report were seemingly drafted by Services Australia, throwing into question the independence of the findings. This report was used repeatedly by the former government to defend the scheme.

The public must have trust in its institutions, especially those responsible for holding government to account. This is even more important when these institutions are looking into matters regarding people who are vulnerable or who lack power. If the Ombudsman had found that Robodebt did not comply with the legislation, then it may have ended in 2017. We recommend that there be a review into the Ombudsman to ensure that it always operates independently of government.

Other oversight bodies

ACOSS recommends that staff at Services Australia have access to a body that they can raise issues, concerns or complaints about anything pertaining to the administration of social security payments.

ACOSS also recommends there should be an independent body to review automated decision-making processes proposed by government to ensure they comply with human rights, legislation and best practice guidelines.

Funding arrangements

The power imbalances highlighted through the Royal Commission between, on the one hand, the resources and powers of the Commonwealth, and on

the other hand, the civil society organisations that represent or act in the interests of people on low incomes need to be urgently addressed.

Funding for representative, community legal and advocacy organisations needs to be substantially increased. People directly affected, and their representatives, must be able to adequately engage with the Commonwealth, including Services Australia, both with respect to protecting the rights of individuals dealing with Services Australia and Centrelink, and in participating in policy and law reform processes, including digital decision-making.

In addition, any specific reform proposals affecting the rights of people dealing with Centrelink, should include a specific appropriation to resource relevant civil society groups, particularly people directly affected and their representative groups.

Federal Government Process following Royal Commission

We urge the Commonwealth to fund a specific co-design process with civil society groups that develops the Commonwealth Plan to respond to the Royal Commission recommendations. The Commonwealth should be required to report to the Australian Parliament with a clear set of commitments with deadlines in order to confirm all recommendations have been implemented within the shortest timeframes feasible.

Contact:

To discuss this submission, please contact Charmaine Crowe, Program Director Social Security at charmaine@acoss.org.au or 0431 432 620.