Victoria **Legal Aid**

10 March 2020

Edward Santow
Human Rights Commissioner
Australian Human Rights Commission

By email: tech@humanrights.gov.au

Dear Commissioner

**Submission to the Australian Human Rights Commission's Human Rights and Technology Discussion Paper (2019)**

Victoria Legal Aid (**VLA**) is a Victorian statutory authority, and a major provider of legal advocacy, advice and assistance to socially and economically disadvantaged Victorians. Our organisation works to improve access to justice and pursues innovative ways of providing assistance to reduce the prevalence of legal problems in the community. We assist people with their legal problems at courts and tribunals, deliver early intervention programs, and assist more than 100,000 people each year.

Informed by our work, we have prepared this brief submission on the Australian Human Rights Commission's (**Commission**) Human Rights and Technology discussion paper.

VLA has experience of how technology-assisted government decision-making can have an impact on people's human rights, particularly through assisting clients to navigate Centrelink's robodebt scheme.

Over half a million debts have been raised against Australians through robodebt, including hundreds of our clients. Our clients' experiences consistently illustrated systemic flaws:

- The **failure to engage with key stakeholders** when robodebt was introduced, so that legal services, financial counsellors and welfare organisations were unable to contribute to the development of key processes or provide simple and clear advice to clients about their legal options.
- The **inaccuracy** of robodebt, including the frequency with which debts decrease upon recalculation and the very real risk that people have been paying money to Centrelink that they do not owe.

- The **unfairness** of robodebt's 'reverse onus' where the responsibility lies with people to prove they do not owe the amounts claimed.
- The **lack of clear information** provided by Centrelink in correspondence about how the debt was calculated for people trying to understand and resolve their alleged overpayments.
- The **challenges communicating with Centrelink**, with clients experiencing frustration and despair due to wait times, inadequate explanations of the basis for the alleged debt and pressure exerted on them to repay the alleged debt.
- The **pressure and intimidating contact from private debt collectors** contracted by Centrelink to enforce alleged debts, including during periods when clients are seeking review.
- The **stress and hardship** robodebt caused, including undermining people's mental health.
- The **damage to public trust and confidence** in the integrity of the social security system, as reported by our clients who fear being pursued for inaccurate debts in the future.

Reflecting on our practice experience, VLA notes the following key principles, which we consider should underpin the Commission's analysis of technology and human rights:

1. **Consultation and user-testing:** New technologies including artificial intelligence (**AI**) informed decision-making can play an important role in service delivery and government programs, provided they are implemented with adequate consultation and user testing with people directly affected by them, to ensure they are fair, accessible and compliant with human rights.
2. **Technology informed laws:** Australia needs to modernise its laws to address risks posed by AI-informed decision-making, including overarching legal frameworks to prevent a repeat of the hardship caused to hundreds and thousands of Australians affected by robodebt.
3. **Transparency, accountability and oversight:** Regulations for new technology should focus on transparency, accountability and oversight to ensure systems are well understood, people's human rights are not violated, and there is a process for correcting or winding back programs which are unfair, inaccurate or unlawful.

**Consultation and user-testing**

VLA has consistently reiterated the need for consultation and user-testing with people directly affected by AI-informed decision-making systems before they are implemented by government.

VLA's casework experience assisting clients to navigate Centrelink's robodebt system reveals how a poorly designed and unfair decision-making system can cause stress and harm to thousands of people's lives, and damage public confidence in government decision-making more broadly. The lack of transparency and clarity under robodebt created barriers to access for hundreds of our clients who attempted to comply with their obligations, but were overwhelmed by an inaccessible and confusing process.

For automated decision-making to improve efficiency, any systems must be accessible and user-friendly. This is particularly necessary to ensure that AI-informed decision-making systems do not replicate and further entrench disadvantage and discrimination in access to services and fair decision-making.

> **Recommendation 1:** The Australian Government should pass legislation requiring consultation and user-testing to be undertaken before AI informed decision-making systems are implemented, including requirements for accessibility for affected users.

To prevent a similar situation to robodebt occurring again in the future, AI informed decision-making should only be implemented where these tests are satisfied, where expressly provided for by law, and where there are adequate human rights protections in place. Where public consultations and evidence-based user testing show that an AI-informed decision-making process is not fair or accessible for people most likely to be affected by it, the Government should not implement these processes.

**Transparency about the use of AI in decision-making**

The Commission has asked whether the Australian Government should introduce legislation to require that a person is informed where AI is materially used in a decision that has a legal or significant effect on a person's rights (Proposal 5).

In our experience, the lack of transparency of robodebt processes had a severe impact on people experiencing disadvantage. Many of our clients did not understand how robodebts were raised (i.e. the automated process for calculating a debt by averaging yearly ATO data against fortnightly Centrelink reporting), and therefore did not know how they could 'disprove' these robodebts to Centrelink.

Imposing the burden of proof on a person when they do not have access to enough information to understand how a decision affecting their interests is reached is unfair, and causes significant hardship. Understanding how a debt is calculated – whether by AI, AI-informed decision-making process, or a human being without technological assistance – is essential for a decision-making process to be fair, and for it to be seen as fair. We consider that transparency is integral to procedural fairness, and would serve a critical protective function for our future clients potentially affected by AI-informed decision-making.

> **Recommendation 2:** The Australian Government should pass legislation requiring a person to be informed where AI is materially used in a decision that has a legal or significant effect on a person's rights.

## AI – a rebuttable presumption of liability

The Commission has asked whether Australian law should impose a rebuttable presumption that the legal person who deploys an AI-informed decision-making system is legally liable for the use of the system (Proposal 10).

In VLA's view, this presumption would encourage transparency in decision-making, which would benefit government decision-makers as well as members of the community.

Deanna's story highlights how AI informed government decisions have operated unfairly and unlawfully, and the need for timely and accessible avenues to challenge these systems where they breach people's human rights.

### Deanna's story – Centrelink's robodebt system is unlawful

Deanna is 33 and works in local government. Like hundreds of thousands of Australians, she accessed social security payments while studying just before entering employment.

Centrelink obtained information about Deanna's income from the ATO and averaged out her income into fortnightly amounts over the 2011/2012 financial year. Centrelink concluded that Deanna had not correctly reported her income from April to June 2012 because the averaged figure did not match the fortnightly income she reported at the time. When Deanna did not respond to letters sent to an old address, Centrelink raised a debt based on the averaged ATO information alone and applied a 10% penalty. Centrelink did not use its information gathering powers to contact Deanna's former employer or bank to provide details of actual earnings for the relevant fortnights to determine whether there should be a debt.

Deanna only found out about her robodebt after her full tax refund of $1,709.87 was taken by Centrelink last year. Centrelink had sent eight letters to an address Deanna was no longer living at. Deanna had not updated her new address with Centrelink. She didn't have an obligation to do so because she was no longer receiving Centrelink payments.

After Victoria Legal Aid assisted Deanna to file her case, Centrelink used its powers to contact Deanna's former employer and bank to verify her earnings and decided that the debt amount was wrong. They said she was overpaid only $1.48 and wiped the remaining debt.

In November 2019, the Australian Government sent a letter to the Federal Court conceding that the key elements of the robodebt process raised in Victoria Legal Aid's test case on behalf of our client Deanna Amato were unlawful.

The Australian Government conceded that in Deana's case:

- Raising the robodebt by 'averaging' of ATO data was unlawful;
- Adding a 10% penalty fee to the robodebt based on the information they had was unlawful; and
- Seizing the tax refund when there was no lawful basis for the robodebt was unlawful.

The Australian Government agreed to pay Deanna $92 in interest on the amount that was unlawfully taken. Deanna's test case confirms that a robodebt calculated using only averaging of ATO income data is unlawful.

In late 2019, the Australian Government confirmed that Centrelink would no longer raise robodebts calculated solely using income averaging without additional evidence of an overpayment.

Centrelink is currently undertaking a review of the number of people affected by Robodebt whose debts were calculated solely using averaging. VLA has continued to advise clients, and to request a refund of their robodebts where appropriate. Centrelink has not yet outlined how it will ensure that people who have been affected by unlawful robodebts will have their money refunded, or will be compensated for the harms caused by the robodebt system.

VLA supports the Commission's preliminary view that 'legal liability for any harm that may arise from reliance on an AI-informed decision should be apportioned primarily to the organisation that is responsible for the AI-informed decision.'

> **Recommendation 3:** The Australian Government should introduce legislation imposing a rebuttable presumption that the legal person who deploys an AI-informed decision-making system is legally liable for the use of the system.

We would be happy to provide further information on request. Please contact us on ███████████████████████ or ████████████ with any queries.

Yours faithfully

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