



13 February 2024

Tēnā koe

### **Official Information Act request**

Thank you for your email of 12 January 2024, requesting any advice relating to 'Robodebt' and its relevance in New Zealand.

I have considered your request under the Official Information Act 1982 (the Act). Please find my decision set out below.

***I request please, any advice that was developed inside MSD, either for internal consideration, or to brief Ministers, relating to the 'Robodebt' issue in Australia, and subsequent Royal Commission on this topic. This would include advice on:***

- ***The idea of income averaging, as used in Robodebt***
- ***Commentary on relevance to a New Zealand environment***
- ***Broader lessons for social policymakers***

The Ministry does not use income averaging as used in the Robodebt issue. As this advice has been created in the wider context of advice on automated decision making, I have excerpted the content that relates to Robodebt, in accordance with section 16(1)(e): where the information requested may be made available by giving an excerpt or summary of the contents.

I refer you to **Appendix One** which provides the following:

1. Thoughts on RC Robodebt report, 2 August 2023. This document was produced by staff within the Ministry's Information Group as an informal record of their reactions to the report
2. Excerpt from Report to Minister REP-23-7-640 (August 2023) - Update on the ADM work programme
3. Excerpt from Report to Minister REP-23-12-958 (December 2023)- Automated decision-making
4. Excerpt from LT Memo (November 2023) on Income Charging

You may find the following page on the Ministry website to be of interest:

- [www.msd.govt.nz/about-msd-and-our-work/work-programmes/initiatives/phrae/index.html](http://www.msd.govt.nz/about-msd-and-our-work/work-programmes/initiatives/phrae/index.html)

You may also like to refer to the general income provisions used by the Ministry:

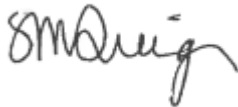
- [www.legislation.govt.nz/act/public/2018/0032/latest/DLM6784812.html](http://www.legislation.govt.nz/act/public/2018/0032/latest/DLM6784812.html)
- [www.legislation.govt.nz/act/public/2018/0032/latest/DLM6784849.html](http://www.legislation.govt.nz/act/public/2018/0032/latest/DLM6784849.html)

I will be publishing this decision letter, with your personal details deleted, on the Ministry's website in due course.

If you wish to discuss this response with us, please feel free to contact [OIA\\_Requests@msd.govt.nz](mailto:OIA_Requests@msd.govt.nz).

If you are not satisfied with my decision on your request, you have the right to seek an investigation and review by the Ombudsman. Information about how to make a complaint is available at [www.ombudsman.parliament.nz](http://www.ombudsman.parliament.nz) or 0800 802 602.

Ngā mihi nui

pp. 

Magnus O'Neill  
**General Manager**  
**Ministerial and Executive Services**

## **Appendix one**

<b>Title</b>	<b>page</b>
Thoughts on RC Robodebt report, 2 August 2023	2
Excerpt from Report to Minister REP-23-7-640 (August 2023) - Update on the ADM work programme	6
Excerpt from Report to Minister REP-23-12-958 (December 2023) - Automated decision-making	7
Excerpt from LT Memo (November 2023) on Income Charging	8

## **Title: Thoughts on RC Robodebt report**

Date: 2 August 2023

### **Culture**

- Siloed and bullying culture "just get on with it"
- Active obstruction with the Ombudsman investigation, as well as withholding key pieces of legal advice
- *things can go wrong through venality, incompetence and cowardice.* - important to have mechanisms to raise concerns without fear of reprisal
- Many people knew the program was unlawful but never stopped it – as above
- No regard for the sheer unreasonableness – context of asking for docs from years ago
- An obliviousness to, or, worse, a callous disregard – regarding welfare recipients

### **Legal advice**

- Lack of independent professional legal privilege
- In-house lawyers took a remarkably passive approach to the provision of legal services. Little attention was paid to social security legislation or judicial authority
- Alarming common practice of leaving advice in draft form
- Failure by one department to share their internal legal advice or to report it to the AG. Recommendation 19.13 encourages consultation and disclosure between agencies where any overlap of legal work is identified
- Delay in disclosing SG's advice to the Minister.
- Government lawyers overtly criticised throughout – recommendation 20.1 is hard to believe that this needs to be pointed out - *"Services Australia should put in place a system for identifying AAT1 cases which raise significant legal and policy issues and ensuring that they are brought to the attention of senior DSS and Services Australia officers"* - lawyers need to pay attention to decisions that relate to their work! Also references training in stat and case law needed in advice writing

### **Data Matching**

- Voluntary data-matching guidelines applied rather than a legislative provision
- Compliance risk rating calculated based off discrepancy between employment income as reported and AOT PAYG data, series of risk identification criteria applied, and if risk threshold is met a "case" is raised
- Concerns raised by ATO were not responded to substantively by DHS
- Discrepancies were not manually checked in line with the protocol
- DHS started warehousing ATO data in breach of the protocol, giving gold mines of data
- Some evidence of mistaken identity matches e.g. twins, "medium" matches
- Lack of proper governance and controls around the data matching scheme

### **ADM**

- once the client had either verified their income, or failed to respond so that averaged data was used, a calculation was automatically made of any debt and the recipient was notified. It was at this point that the client's interaction with DHS was automated in the Scheme- there was no human interaction or review

- Once issued, the onus of disproving the debt fell to the client. Providing evidence from years back was challenging and even more so in circumstances where the client had left the employment under bad circumstances or the employer had ceased business.
- Automation did not look at what information DHE already had on file that may explain a discrepancy, there was no investigative step. Automated risk validation rules were applied instead e.g. where a recipient's changes to their income confirmation or confirmation of correctness resulted in the income not being within 1% of the income details from ATO (later increased to 5%).
- Some clients that were flagged as having vulnerabilities were funnelled through a staff assisted scheme. This only involved the staff member assisting the client to use the portal or entering the information on their behalf. It is not clear how clients were assessed as vulnerable. Not sure if MSD has vulnerability flags/ management, but regardless, better management of those identified as having specific vulnerabilities, how to record this, when these expire, etc AND thinking through how these communities of clients will be dealt with under a new ADM process could only be good for clients.
- Staff could not answer questions about why the debt was raised when asked or provide detailed calculations
- Clients did not understand they had a right to challenge and were bewildered and frightened by the process
- The address held on file was often out of date and so clients didn't receive the original debt notification. Some only found out when contacted by external debt collectors- **this address risk is also an issue with MSD**
- DHS did not check clients had received the notice of debt before referring to the external debt collectors
- 10% penalty was automatically applied when a debt was raised where a customer did not make contact or indicated there were no personal factors that affected their ability to correctly declare their income. This was the case for most of the life of the scheme
- The Commonwealth Ombudsman, in his 2017 investigation, highlighted that in the Administrative Review Council's (ARC's) report Automated Assistance in Administrative Decision Making, "*a key question in the design of automated decision-making systems in administrative law is whether the system is designed 'so that the decision-maker is not fettered in the exercise of any discretion or judgement they may have'.*" The Ombudsman's observation was that a recipient may have indicated that there were no personal factors that affected their ability to correctly declare their income, and so the penalty was automatically applied "*in situations where a human decision maker, able to review the person's Centrelink record, ask relevant questions and consider all the relevant circumstances of the case, may have decided the penalty fee should not apply, or the discretion not to apply the fee should be exercised.*"
- The Scheme fell short of Principles 7 and 10 outlined in the ARC report: Principle 7 is that the construction of an expert system must comply with the administrative law standards if decisions made in accordance with the rule base are to be lawful, while decisions made by or with the assistance of expert systems must comply with administrative law standards in order to be legally valid. Principle 10 is that expert systems should be designed, used and maintained in

such a way that they accurately and consistently reflect the relevant law and policy.

- OECD principles of AI apply, incorporating requirements around human-centred values and fairness, explainability and transparency etc. Current Australian position is that AI includes ADM and thus the Australian AI Ethics Principles also apply. OECD principles provide that administrative law, privacy requirements and human rights obligations are integrated into the design. Our ADM Standard does do this but not as explicitly (e.g. privacy and human rights are taken care of by the requirement for a PHRaE, administrative law is taken care of by signoff regarding policy intent and any legal issues identified).

**The two principles not already substantively covered in our ADM Standard are Human, societal and environmental wellbeing:** *AI systems should benefit individuals, society and the environment.* **Human-centred values:** *AI systems should respect human rights, diversity, and the autonomy of individuals.*

- The Commonwealth Ombudsman, in his 2017 investigation into Centrelink's automated debt raising and recovery system, highlighted that in the Administrative Review Council's (ARC's) report Automated Assistance in Administrative Decision Making, "*a key question in the design of automated decision-making systems in administrative law is whether the system is designed 'so that the decision-maker is not fettered in the exercise of any discretion or judgement they may have'.*" The Ombudsman's observation was that a recipient may have indicated that there were no personal factors that affected their ability to correctly declare their income, and so the penalty was automatically applied "*in situations where a human decision maker, able to review the person's Centrelink record, ask relevant questions and consider all the relevant circumstances of the case, may have decided the penalty fee should not apply, or the discretion not to apply the fee should be exercised.*"
- The Commission considers that stakeholder consultation should be standard and provided for in relevant government documents- they specifically call out advocacy organisations, administration law experts, social security lawyers, human rights experts and academics as stakeholders. **Our ADM Standard does not contain a requirement like this.**
- The Commission agreed with some submissions that considered human oversight of the system is needed to mitigate the risk of error in the social security context, and that in some cases partial automation with the final decision made by a human arbiter is the ideal outcome.
- Lastly the Commission also considered that "*in the absence of compelling reasons against, business rules and algorithms should also be made available, to enable independent expert scrutiny*". **Our ADM Standard does not go this far in terms of transparency.**

## **New legislation to use ATO information to administer social security law**

- Piecemeal statute reform with deeming provisions in a number of statutes is an exercise in patching over problems rather than addressing the fundamental need for a consistent approach.
- Social Services and Other Legislation Amendment (Simplifying Income Reporting and Other Measures) Bill 2020 provides that:

The Australian Government will use taxation information (primarily Single Touch Payroll data) to administer the social security law, including for the purpose of assessing employment income when it is paid, rather than when it is earned...To engage in these information exchanges, Services Australia will obtain, make a record of, disclose and use protected information, as that term is defined in subsection 23(1) of the Social Security Act (referred to in this Explanatory Memorandum as 'protected social security information'). These information exchanges may be automated using computer programs. The amendments to the Social Security Administration Act in this Part remove any doubt that these things can be done.

- Notably, the Explanatory Memorandum also provides that "the amendments made by these items also do not provide for the automation of debt recovery under the social security law." However, uncertainty may still exist as to whether a fully automated decision under the SSA Act would be a "decision" for the purposes of the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act) or even s 75(v) of the Constitution, on the basis of a majority decision in *Pintarich v Deputy Commissioner of Taxation* which held that an automatically generated ATO letter advising of a tax debt was not a "decision" because the letter did not demonstrate that a mental process of deliberation had occurred.
- Interestingly, the Commission cited s23 of the OIA with approval, which provides a person with a right of access to reasons for a decision made by a public sector agency or Minister, including a written statement of findings on material issues of fact, a reference to the information on which the findings were ,and the reasons.

## **Need for oversight**

- The complexity and incohesiveness of the legislative landscape in respect of automated decision making indicates that oversight is warranted, and the Robodebt experience demonstrates the need beyond argument. This was a massive systemic failure.
- The Commission considers that there should be an **independent oversight entity capable of monitoring and auditing both the technical aspects and human impacts of government automated decision making**. That might involve expansion of the role of the OAIC; it might entail the creation of a new role, because of the broader need for oversight of AI processes generally

## **Excerpt from Report to Minister REP-23-7-640 (August 2023) - Update on the ADM work programme**

Paragraph 53 - We note that other jurisdictions take all-of-government approaches to the use, governance, and monitoring of ADM and related Standard/s, with independent entities overseeing the use of automated decisions across all public agencies to ensure uniform safeguards.

Paragraph 55 - In this regard, we particularly note the example of the failed Robodebt Scheme in Australia which involved the use of automated welfare debt assessment and recovery. The Royal Commission into the Robodebt Scheme in its recent report recommended the establishment of a government body with the power to monitor and audit ADM processes across all government agencies. The Commission also recommended considering legislative reform to introduce a consistent legal framework in which ADM in government services could operate.

Paragraph 56 - While the way we use ADM is very different to how it was used in the Robodebt Scheme, we have been and will continue to be mindful of not repeating the mistakes that were made in that context. We are commencing internal work to assess the Royal Commission's report to identify any detailed potential learnings for MSD.



## **Excerpt from Report to Minister REP-23-12-958 (December 2023)- Automated decision-making**

Paragraph 21 - Notwithstanding the benefits of ADM, there are some inherent risks if ADM is not implemented rigorously. We particularly note the example of the failed Robodebt Scheme in Australia which involved the use of automated welfare debt assessment and recovery. While the way we use ADM is very different to how it was used in the Robodebt Scheme, we have been and will continue to be mindful of not repeating the mistakes that were made in that context.

### **Excerpt from LT Memo (November 2023) on Income Charging**

Paragraph 27 - Robodebt involved automatically comparing annual PAYG (pay as you go) data provided by the Australian Taxation Office with income declared by welfare recipients, and automated calculation, establishment and recovery of debts. In 2023, the Australia Royal Commission into the Robodebt Scheme deemed it a 'costly failure of public administration' and made 57 recommendations aimed at avoiding a repeat of the scheme.

Paragraph 28 - The ADM standard has been created to establish a rigorous process around any potential use of ADM, and provide safeguards to ensure any automation is lawful, aligns with policy intent and is implemented in accordance with MSD's Privacy, Human Rights and Ethics Framework. Detailed policy analysis, continued engagement with internal and external reference groups, and planning for transitional arrangements will be needed to mitigate many of the risks highlighted by the Robodebt scheme.