Melbourne Office
Level 9, 570 Bourke Street
Melbourne VIC 3000
GPO Box 4380
Melbourne VIC 3001
DX 210646 Melbourne VIC
t: 03 9269 0234
www.legalaid.vic.gov.au
ABN 42 335 622 126

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Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Senators

Senate Community Affairs Legislation Committee's inquiry into the Social Services and Other Legislation Amendment (Simplifying Income Reporting and Other Measures) Bill 2020

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, our free telephone advice service.

Informed by our work, we have prepared a brief submission to contribute to the Senate Community Affairs Legislation Committee's (**Committee**) inquiry into the Social Services and Other Legislation Amendment (Simplifying Income Reporting and Other Measures) Bill 2020 (**Bill**).

We make the following three key points for the Committee:

1. **Clarification of key aspects of new framework:** There are aspects of the Bill which could be improved by defining key terms and making clear that annualised ATO data cannot be averaged over a 52 week period to raise a debt.
2. **Further consultation:** Further consultation on the potential impacts of the Bill is required to ensure it operates as intended and the newly drafted provisions do not lead to unfairness.
3. **Scheduled review in 1 year:** The Bill should be reviewed in 1 year to ensure it is achieving its purpose and to address any unintended consequences which may arise in relation to how the Bill is interpreted or implemented in practice.

VLA's clients and robodebt

VLA is the leading provider of legal advice and advocacy to people seeking assistance with social security matters in Victoria. Since the commencement of the Better Management of the Social Welfare System Initiative (and the subsequent, differently named programs), colloquially known as 'robodebt', VLA has been involved in responding to the needs of Victorians adversely affected by robodebt. In the last financial year, we provided more than 650 separate services in relation to robodebt matters.

On 27 November 2019, the Australian Government conceded that the key elements of the robodebt process raised in *Deanna Amato v The Commonwealth of Australia* (VID611/2019) (***Amato***) were unlawful.

The Australian Government conceded that in Deanna's case:

- raising the debt by 'averaging' of ATO data was unlawful;
- adding a 10% penalty fee to the debt based on the information they had was unlawful; and
- seizing Deanna's tax refund when there was no lawful basis for the robodebt was also unlawful.

The orders in *Amato* make clear that Centrelink cannot make a determination that a payment was made on a particular day without probative evidence that this occurred. In our view, this should prevent the use of annualised ATO PAYG data to calculate debts and the operation of a 'reverse onus' which were key elements of the robodebt system (i.e. where averaging of yearly ATO data led to incorrectly calculated debts and people were required to disprove a debt to Centrelink). Not only is it clear that such approaches are unlawful, there is an overwhelming body of evidence that they cause unfairness in raising debts, and considerable stress and anxiety to recipients of social security payments.

Clarification on potential operation of the Bill

The Bill would fundamentally change the way in which employment income is taken into account under the *Social Security Act 1991* (Cth) (**Act**): employment income would be taken into account when paid, instead of when earned, derived or received (Division 1AA; Explanatory Memorandum at p 16). This has significant consequences for Centrelink reporting processes and potential calculation of overpayments.

Determining a 'particular period'

The key provisions which outline relevant periods for calculating relevant income are clauses 1073A and 1073BA.

Under clause 1073A, when an amount of employment income is paid "in respect of a particular period" (an "employment period"), the amount will be averaged over an "assessment period". The assessment period will have the same number of days as the employment period, but it will begin on the first day of the (two-week) instalment period during which the amount is paid.

The term “in respect of a particular period” is not defined in the Bill. The Explanatory Memorandum states that clause 1073A will apply if “it is possible to identify the particular period ... to which the employment income relates” (at pp 10-11).

However, it is not clear what is meant by the “particular period to which the employment income relates”. It could be the pay cycle period, the number of days of work or the period during which the person worked.

For example, if a person works only on Tuesday and Thursday in the first week of a month and is paid monthly, the person may be required to report the period as a month, two days or three days. Each different approach will have a different effect. In our reading of the Bill and the Explanatory Memorandum, it is not obvious which approach is correct.

The Bill and Explanatory Memorandum do not include guidance on how the Secretary should exercise their discretion to determine a period. Clearer guidance should be provided on the criteria used for how a ‘particular period’ should be determined.

If a payment of employment income is “not in respect of a particular period”, clause 1073BA applies. Under s 1073BA(2): “The person is taken to have received that employment income over such period, not exceeding 52 weeks, as the Secretary determines”.

In our view, clause 1073BA(1)(d) – “the employment income is not in respect of a particular period” – should be interpreted objectively. The Bill does not appear to include a mechanism to determine the process for attributing employment income where a payment is made to a person, and the amount is considered objectively for a period, but Centrelink is not aware of or is unable to determine the period.

Our concern is that Centrelink may seek to put the onus on the recipient to provide information about a given period, including in situations where the recipient does not or is unable to provide this information. If (contrary to our reading), the Secretary is entitled to rely on clause 1073BA where the Secretary is not *satisfied* that income is in respect of a particular period, we are concerned that a person who has received a payment and does not make clear to Centrelink what the ‘particular period’ is might be subject to a provision where the attribution of income may have little or no correlation to the period during which it was earned. This would also apply where there is a conflict between different sources of information.

Recommendation 1: The Committee should consider whether clauses 1073A and 1073BA could be clarified by inserting provisions to make clear:

(a) what “in respect of a particular period” means;
(b) how such a period is to be identified and by whom; and
(c) the circumstances in which it can be said that “the employment income is not in respect of a particular period”.

Where no period is able to be determined, there is no express limitation on the Secretary’s discretion to determine the period over which the averaging power in clause 1073BA(2) will operate. In the current drafting, there is no reference to the actual employment period worked. Further clarification is required.

Recommendation: 2: The Committee should consider whether clause 1073BA(2) should be clarified by including a provision which guides how the Secretary is to determine the assessment period.

We note similar drafting in provisions relating to setting periods for averaging in the anti-avoidance mechanisms in clause 1073BB and lump sum payment provisions in clause 1072A of the Bill, where similar amendments should be considered.

Single touch payroll

A Single Touch Payroll system which would facilitate people's employment information to be prefilled in their Centrelink reporting dashboard each fortnight, and which allowed a person to confirm or easily amend the information online, would be a significant improvement on the current system.

However, we consider that further information about the implementation of the Bill is needed to clarify how it will operate in practice, including:

- whether the prefilled information will include information about "the particular period ... to which the employment income relates";
- how the recipient will be able to amend, or enter, information about that period, and how the recipient will determine the period (and ensuring that a recipient can amend the information accurately); and
- how the Department will determine whether it is satisfied that a reported period is correct.

Recommendation 3: The Committee should consider whether further information about how the Single Touch Payroll system will be integrated with Centrelink's reporting system should be made available before the Bill is passed.

Self-reporting and people outside the Single Touch Payroll system

We consider that there is insufficient information about how the Bill will affect people receiving employment income outside the Single Touch Payroll system, and how it will change how income is reported and entitlement is assessed for this cohort.

Many of VLA's robodebt clients were affected because of the challenges around accurately reporting income for unpredictable or irregular hours of work without or prior to receiving payslips. For those outside the Single Touch Payroll system, the Bill requires them to know the day their employer paid them rather than the day they received their income.

In addition and as noted above, the provisions do not make clear the particular period for reporting employment income.

We are concerned that our clients seeking to comply with the system may not understand how the new system operates.

Recommendation 4: The Bill should be accompanied by clear guidance on how it affect people who remain outside the Single Touch Payroll System, and who continue to report their income, particularly those working unpredictable hours.

Consultation process on the Bill

We support a social security framework that fairly and accurately identifies and investigates overpayments.

We note that the consultation period for this inquiry was just over one week. Victoria Legal Aid has not had the opportunity to thoroughly review the Bill in the short timeframes allocated.

In light of the potential consequences on a large number of Australians who receive social security payments each year, and the importance of ensuring that any enabling legislation achieves its intended purpose, we consider that further engagement with stakeholders should be undertaken.

Recommendation 5: The Committee should consider whether further time and consultation with stakeholders is required to consider the potential implications of the Bill, to ensure it achieves its intended purpose.

Scheduled review to assess unintended or harmful consequences

If the Bill does come into effect on 1 July 2020, there should be an opportunity to review its practical operation and to ensure any unintended consequences can be remedied.

Recommendation 6: The Bill should include a review date 1 year after commencement to assess its operation.

We would be happy to talk to the Committee about the information set out in this submission.

Yours faithfully

JOEL TOWNSEND
Program Manager, Economic & Social Rights
Civil Justice

ROWAN MCRAE
Executive Director
Civil Justice, Access and Equity