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Inquiry into Oversight Legislation
Amendment (Robodebt Royal
Commission Response and Other
Measures) Bill 2024

**Senate Legal and Constitutional Affairs
Committee**

Submission by the Commonwealth Ombudsman, Iain Anderson

19 December 2024

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Introduction and summary

I welcome the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Oversight Legislation Amendment (Robodebt Royal Commission Response and Other Measures) Bill 2024 (**the Bill**).

I support the Bill, which implements recommendations 21.1 and 21.2 of the Royal Commission into the Robodebt Scheme (**Robodebt Royal Commission**) by imposing duties on agency heads and public servants to use their best endeavours to assist my Office in all my functions and providing me with additional powers to obtain information more independently. In this submission, I outline how I intend to use these new powers and my expectations of agencies when these powers are exercised.

Background

The purpose of the Office of the Commonwealth Ombudsman (**the Office**) is to:

- provide assurance that the agencies and entities we oversee act with integrity and treat people fairly, and
- influence systemic improvement in government administration.

We aim to achieve our purpose by:

- independently and impartially considering complaints and disclosures about government administrative action
- influencing government agencies to be accountable, lawful, fair, transparent, and responsive, and
- providing a level of assurance that law enforcement, integrity and regulatory agencies are complying with legal requirements when using covert, intrusive and coercive powers.

Robodebt Royal Commission recommendations

The Bill would implement 2 recommendations of the Robodebt Royal Commission by inserting new obligations and powers into the *Ombudsman Act 1976* (**Ombudsman Act**):

- Recommendation 21.1 – a new statutory duty would be imposed on principal officers to ensure their department or prescribed authority uses its best endeavours to assist the Commonwealth Ombudsman in the performance of



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their functions, with a corresponding statutory duty on all Commonwealth public officers to assist.

- Recommendation 21.2 - new powers for the Commonwealth Ombudsman to obtain information during an investigation.

At their core, the recommendations aim to ensure that agencies provide my Office with the facilities and assistance necessary for the effective exercise of our functions.

In making Recommendation 21.1, the Robodebt Royal Commission noted “the evidence of the readiness to conceal and mislead exhibited by certain departmental staff in relation to the Scheme” (Report of the Royal Commission, p.581).

With respect to Recommendation 21.2, the Robodebt Royal Commission had noted in the course of its investigation that, when asked by my Office to provide a copy of a specific legal advice, the Department of Social Services (DSS) instead created a fresh document which combined text from two separate advices and explained away inconsistencies within the texts. This document was then provided to my office by DHS. The Royal Commission noted that this “was as dishonest a document as the Commission has seen” (Report of the Robodebt Royal Commission, p.578).

When I gave evidence to the Robodebt Royal Commission I noted that, unlike my Office, the Australian National Audit Office (ANAO) directly accessed the IT systems of agencies. I suggested that this would be a very useful power for circumstances where we had a concern that an agency was not engaging in good faith and not providing relevant information.

Duty to assist the Ombudsman

Recommendation 21.1 would be implemented by item 13 of Schedule 1 to the Bill. This duty to assist would underpin my key expectations of the agencies my Office oversees, as captured in my [Statement of Expectations](#).¹ These expectations include that Commonwealth agencies will engage with my Office in good faith and actively assist my staff in the performance of our statutory functions and duties.

¹ https://www.ombudsman.gov.au/___data/assets/pdf_file/0012/305202/Statement-of-Expectations.pdf



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In practice, this means agencies need to be responsive to information requests, provide access to staff, proactively advise my Office of likely delays, and seek extensions. If there is unexplained delay, this is a matter my Office may raise in the context of a public report or statement.

I also expect agencies be honest and transparent in fulfilling requests for information by providing all relevant information that could reasonably be expected to be of use to an investigation. Requests for information should not be deliberately read down to tactically obfuscate or conceal. If an agency uses different terminology to describe specific documents than the terminology used by my Office in requesting those documents as part of our investigation, for example, the agency should draw our attention to this and identify the relevant documents.

At the same time, agencies should not simply dump thousands of documents on us that are of no relevance, such as multiple copies of the same document, merely because they could potentially be caught by a term in our request for documents. The agency should draw this to our attention, inform us of whether for example the multiple copies are iterative drafts (which are likely to be of interest to us, to see how a policy or procedure or advice developed) or simply identical and unannotated copies, and ask whether we therefore wish to see such copies.

In both scenarios, it is critical that agencies do not decide for themselves what we are actually seeking – which was one of the things that occurred in Robodebt, when the then Department of Human Services (DHS) deliberately withheld documents and information we were seeking because they decided that we were only interested in one aspect of those documents and information – but that they engage with us and actively assist us to obtain the documents and information we are seeking.

Agencies should also endeavour to ensure information requests are not led or overseen by individuals or teams who were directly involved in the matters we are investigating and who may therefore have a conflict of interest. If such conflicts are detected, I will call it out.

Subsections 8(10)–(11) of the Ombudsman Act already give me the power to report apparent breaches of duties or misconduct by an officer, a contractor or an agency head to the relevant supervising entity (being the agency head, the Public Service Commissioner or the Minister). In the case of an apparent breach by an officer or contractor, I may make a referral where the evidence is of sufficient force to justify me



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doing so. If the apparent breach is by an agency head of the Code of Conduct, I must report the apparent breach.

It is already the case that misleading my Office can constitute grounds for a breach of the Code of Conduct, for example by breaching the duties to act honestly and with integrity or with due care and diligence. This amendment, by creating an explicit statutory duty to assist my Office, will make clear the requirement that public servants do so and that a failure to do so may in itself constitute a breach of the APS Code of Conduct. I would be prepared to report such conduct appropriate supervising entity, subject to the tests in subsections 8(10)-(11) being met.

New powers to gather information

Recommendation 21.2 would be implemented through the expansion of existing section 14 and the provision of a new power to gather information remotely.

Currently, my Office can enter an agency's premises under section 14 of the Ombudsman Act to inspect any documents relevant to an investigation. The Bill would expand the actions my authorised officers may take and the type of information they may gather while at an agency's premises.

Specifically, this amendment would put beyond doubt that my authorised officers would be empowered to access, take extracts, copy and inspect any document or other records. This would ensure my Office has full and free access to all records and IT systems, not just hardcopy documents, that we identify as relevant to the investigation.

Importantly, these amendments would ensure that my Office is able to independently access an agency's IT or records management systems, search for and take extracts of information my authorised staff determine is relevant to an investigation. It would be an offence for a person to fail to provide my authorised staff with reasonable facilities and assistance for the effective exercise of the expanded section 14 power (new subsection 14(5A)).

The additional information gathering power proposed in new section 14A of the Ombudsman Act would complement my expanded section 14 powers by enabling authorised staff to independently and directly gather information by remote means. This would provide an additional way for my Office to access information and an opportunity for my staff and agency staff to work more efficiently. I do not anticipate



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that this new power of direct remote access will be routinely exercised by my Office. We use our formal powers when we need to.

In relation to proposed subsections 14A(5)-(7), paragraph 58 of the Explanatory Memorandum to the Bill states “[a]gencies would not be expected to give the Ombudsman access to all systems and databases where these were not relevant to the investigation and it is anticipated that agencies would apply access controls or otherwise partition their systems to ensure that the Ombudsman can only access the information and data relevant to the matter being investigated.”

Having regard to the observations of the Robodebt Royal Commission noted above and to the proposed statutory duty to assist my Office, the question of relevance is a matter that must be determined by my Office, not by an agency. If in doubt about the relevance of particular databases, information or data, an agency should openly raise these issues with my Office in the course of our investigation. I anticipate that we will generally be able to readily agree to exclude a range of systems and databases, depending on the nature of any particular investigation.

The Committee may wish to recommend that paragraph 58 of the Explanatory Memorandum be revised to remove any doubt that the purpose of the power is to enable my authorised officers to independently search for relevant information. This intention is reflected on the face of the legislation, which provides that only a certificate issued by the Attorney-General under subsection 9(3) of the Ombudsman Act can prevent the disclosure of specific information to the Ombudsman on public interest grounds.

