

REPORT

# Ten lessons for public servants from Robodebt

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# 1 About this report

Following the release of the final report of the Royal Commission into the Robodebt Scheme (Commission), the Susan McKinnon Foundation partnered with esteemed expert in public administration, Professor Emeritus Richard Mulgan to analyse the Commission hearing transcripts and final report, and produce a series of ten recommended practical lessons for public servants.

## About Richard Mulgan

Richard Mulgan is a Professor Emeritus at the Crawford School of Public Policy, Australian National University. Prior to his retirement in 2008, he was a professor of Public Policy at the Crawford School of Public Policy, and before that he was a Professor of Political Studies at Otago and Auckland Universities.

Richard's academic interests include public administration, and issues relating to public sector accountability, governance, integrity, and transparency. He was on the 1985-86 New Zealand Royal Commission that recommended Mixed Member Proportional representation for elections to the New Zealand Parliament, and his 2000 article "Accountability": an ever-expanding concept?' was selected as one of the twelve most influential articles in the last 25 years of the leading British journal *Public Administration*. Richard has also published works including:

- *Holding Power to Account: Accountability in Modern Democracies* (2003)
- *Politics in New Zealand* (3<sup>rd</sup> ed) (2004)
- *Making Open Government Work* (2014)

Richard taught courses on public sector ethics and public management in the Master of Public Policy and Master of Public Administration at the Crawford School of Public Policy, and regularly publishes in publications such as the *Canberra Times Public Sector Informant* and *The Mandarin*.

## About the Susan McKinnon Foundation

The Susan McKinnon Foundation aims to strengthen Australia's democracy, and its goal is for governments to be more transparent, accountable and inclusive. SMF's aspiration is for Australia to have the world's most effective governments, focused on the long-term interests of the Australian community. SMF's mission focuses on three key areas:

- effective elected representatives, as positive leadership is crucial in a high-functioning democracy
- robust state institutions, as strong, effective and apolitical public institutions are vital assets for a thriving democracy
- quality policy dialogue, as good policy-making is rigorous, non-ideological and implementation-focussed.

SMF incubates, delivers and supports practical improvements that deliver tangible progress to the operation of government. SMF supports or has supported initiatives including:



- the McKinnon Prize in Political Leadership, which was established to recognise political leaders at all levels of government who have driven positive impact through their vision, collaboration, courage and ethical behaviour
- the McKinnon Institute for Political Leadership, which is a non-partisan, not-for-profit organisation that provides outstanding professional development for members of Australia's federal, state and territory parliaments
- research and advocacy on integrity, accountability, and transparency matters, such as 'truth in political advertising' reforms and the campaign to establish a federal anti-corruption commission
- Policymaking in the Public Interest, which aims to strengthen policy-making processes such that they are more transparent, evidence-informed, and focussed on delivering for the public good
- the Analysis and Policy Observatory, which curates and archives a free online library of articles, research reports, evaluations, policy briefs and white papers to help organisation including government, not-for-profits and think tanks access reliable information on public policy
- e61, a not-for-profit, non-partisan economic research institute that analyses big data to help answer Australia's most pressing economic policy questions
- the McKinnon Poll Research Program, which aims to encourage better policy-making by providing a richer and more in-depth understanding of public opinion as an input into the policy-making process.

SMF is non-partisan and motivated only by the public interest.

SMF was founded in 2015 by Grant Rule and Dr Sophie Oh. After the sale of Grant's company, MessageMedia, in 2021, a large donation was made by Grant and Sophie to SMF to further support and expand SMF's scope of operations and mission.



## 2 Ten lessons for public servants from Robodebt

The Commission report into the failed Scheme offers unique opportunities to reflect on the performance of our Federal Government institutions. This project, based directly on the evidence of the Commission's hearings and report, focuses on the distinctive contribution of the Australian Public Service (APS), particularly its culture. It selects three general areas of governance - independence, collaboration and accountability - with the aim of distilling a number of key lessons to guide the behaviour of current and future public servants.

### Independence

#### Lesson 1. Lawfulness is a bedrock value for public servants.

Lawfulness is a fundamental value in public administration which public servants have an obligation to uphold. Not only must they always act within the law themselves but they must also always clearly advise ministers against unlawful action. Experience with Robodebt underlines the damage that can flow from neglecting this principle. Ministers should expect the public service to warn them if the policy faced legal objections. The absence of such advice from the public service licensed ministers to maintain that the Scheme was legally sound. Major responsibility for the Scheme's illegality lies with leaders of in-house legal services divisions who did not pass on doubts expressed by their staff and with senior departmental leaders who did not press for independent expert clarification, all the while promulgating their own suspect narrative that the Scheme was based on longstanding lawful practice.

#### Lesson 2. Truthfulness is a bedrock value for public servants.

All communication from public servants, both internally with ministers and colleagues and externally with the public, is expected to be honest and truthful. Good governance depends on it. While bureaucratic language can tolerate a certain level of persuasive rhetoric and spin, it is expected to draw the line at outright falsehood or misrepresentation. Robodebt demonstrates the political and social harm that can be caused if this assumption is invalidated. Some senior public servants deliberately misled ministers, as well as their own departmental staff and the Commonwealth Ombudsman's (the Ombudsman) office, about the legal status of the Scheme. In addition, by enforcing a culture that did not welcome bad news, they discouraged staff from reporting adverse results from their direct experience in implementing the Scheme. Officials who could have spoken up often chose to remain silent, with the result that departmental advice tended to be neither frank nor fearless.

#### Lesson 3. Public servants should keep an accurate record of significant events and advice.

Government agencies need a comprehensive written record of all significant meetings held, matters discussed and decisions taken. Compiling such a record is the responsibility of all public servants directly involved. A written record is essential to maintaining efficiency and continuity in administration as well as to providing reliable evidence for holding government to account. It is also an important basis for giving frank and fearless advice to ministers. In Robodebt, many key meetings and decisions



went unrecorded, as was advice that raised potential difficulties, thus reinforcing a culture of not speaking frankly to departmental superiors and ministers.

#### Lesson 4. Hasten slowly!

Setting the right balance between speedy implementation and respect for process and risk assessment is part of the overall balancing of responsiveness and independence. Rank-and-file bureaucrats have a common tendency to become immersed in following set procedures, thereby losing sight of the need to deliver tangible results for ministers who often operate within much shorter horizons set by the electoral cycle. An important aspect of public service leadership is therefore to remind staff of the relevant policy and political context while still allocating sufficient time and resources to due process and risk assessment. Robodebt provides a classic example of the administrative harm that can be done by excessive speed. Senior public servants uncritically accepted ministerial pressure for budgetary urgency, thus causing hasty planning and eventual failure to meet the ministers' own objectives.

#### Lesson 5. Department leaders should set a proper balance between responsiveness to ministers and independence from them.

Formulating department advice to ministers is a collective enterprise, involving public servants from different levels of the organisation, under the overall authority of the department secretary. Secretaries, along with their leadership teams, need to ensure that their final advice not only accords with their ministers' political and policy priorities but also contains relevant evidence and assessments that may sometimes be unwelcome to ministers. Achieving this balance between responsiveness and independence depends on an internal culture that welcomes frank communication between different levels of staff and encourages, rather than penalises, dissent. As Robodebt demonstrates, domineering leadership attitudes are inimical to the formulation of soundly balanced advice. So too are excessive caution and fear of upsetting one's political masters.

## Collaboration

#### Lesson 6. Cooperation and collegiality are essential to good administration.

The machinery of government consists of hierarchical organisations based on top-down authority which can easily become rigid and compartmentalised, losing overall efficiency. Counter-measures are therefore needed to encourage cooperation and a sense of common enterprise. These may include formal methods of consultation, such as committees and regular meetings. Equally important, however, is a general culture of cooperation, based on teamwork and collegiality, where members of the same organisation have a sense of belonging to a collective enterprise which encourages cross-sectional communication. Sensitive leadership at all levels is essential to fostering such a culture. While the administration of Robodebt demonstrated much collegial cooperation, at certain critical points mistakes occurred as a result of group isolation and overbearing leadership.



### Lesson 7. Other APS departments and agencies should be treated as colleagues not rivals.

The tendency to uncooperative isolation and silos is most marked at the level of inter-departmental relations. Because individual departments (and executive agencies) acquire their own identity and esprit de corps, often with the encouragement of their leaders, their members tend to look on officials from other departments as competitors and sometimes with suspicion and even hostility. However, all members of all Commonwealth departments and executive agencies belong to a single public service (the APS), unified by its shared mission to serve the general public and the government of the day. As Robodebt demonstrates, lack of collegial cooperation across departmental boundaries can prevent the speedy transfer of vital information and advice, with damaging results.

### Lesson 8. Public servants should welcome input from non-government stakeholder organisations.

When governments implement policies that directly affect the lives and interests of individual members of the general public, they can gain useful insights by listening to feedback from stakeholders representing those directly affected. Even when such groups also take on an advocacy role that may put them at odds with the government's overall policy direction, they can still have important insights to offer on how policies are actually being experienced by recipients. In the case of Robodebt, ministers and senior officials were not interested in learning from stakeholders, and thereby deprived themselves of valuable opportunities to gain a better understanding of how the Scheme was working in practice.

## Accountability

### Lesson 9. Public servants should build a culture of openness and accountability.

Public servants are obliged to be accountable to the public they serve. In our Westminster-style democracy, this accountability is primarily exercised by reporting through the chain of command to agency heads who in turn answer to ministers who are accountable to parliament. Public service agencies are also publicly accountable for their administrative decisions through other channels, such as parliamentary committees, auditors, Ombudsmen, tribunals and courts acting on behalf of the public. The Commission revealed several deficiencies in public service accountability, including reluctance to report evidence of serious problems in the program, lack of a comprehensive written record of key decisions and disrespect for external accountability agencies. These deficiencies stemmed from a general culture of secrecy and over-zealous support for ministers.

### Lesson 10. Public servants should be openly accountable to individual members of the public to whom they are providing services.

Government agencies providing services directly to the public have a duty to be accountable to individual citizens for the particular services those citizens have received. Such accountability entails openly encouraging recipients to query decisions that affect them, responding promptly to relevant questions and listening carefully to complaints through effective complaints mechanisms. Under Robodebt, the Department of Human Services discouraged contact from recipients through the complexity of its procedures and staff shortages. It also used individual complaints as occasions for

reinforcing its own positive narrative rather than as opportunities for genuine feedback, thus treating recipients with disrespect as well as cutting itself off from a valuable source of constructive criticism.

### 3 Lessons from Robodebt: supporting analysis

The Commission report has shone a spotlight on the inner workings of government during a major failure of government policy and offers a unique opportunity to reflect on the performance of our Federal Government institutions. This project focuses primarily on the distinctive contribution of the APS, particularly its culture, understood as the professional practices and values that influence the behaviour of public servants. The wider political context, set by ministers, is certainly crucial to understanding the design and implementation of the Scheme as a whole and interactions with ministers are an important element in the actions of public servants. However, there is value in concentrating on the role of the public service, if only because politicians tend to attract more media publicity and political commentary and also because public servants played such a prominent part in the Scheme's failure.

The Commission revealed serious weaknesses in the culture of the APS, particularly at the more senior levels. It made several institutional recommendations aimed at strengthening the integrity of the APS, all of which the government has accepted either in full or in principle.<sup>i</sup> However, institutional structure is only one element underpinning the culture of an organisation. More important are the deep-seated values that animate the behaviour of individuals and determine the collective performance of an organisation such as a government department. Here, as evidence from the Robodebt inquiry indicates, there is considerable room for improvement in the current APS. This project selects certain critical areas of public service governance and culture, drawing on examples and issues raised by the Robodebt inquiry. The emphasis is on how individual public servants chose to act in particular situations, on whether their actions were professionally appropriate and, if not, why not. The areas of governance selected are independence, collaboration and accountability, which are all legally mandated in the APS values and Code of Conduct.<sup>ii</sup> The overall purpose is to distil a number of key lessons for the future.

The essence of the Scheme was to identify potential overpayments made to welfare recipients by automatically matching the fortnightly amounts paid to them by Centrelink with records of their annual income held by the Australian Tax Office (ATO) averaged fortnightly over the period in question. If discrepancies were found a debt could be raised against the recipient. The Scheme went through a number of distinct phases: proposal and approval (June 2014 - May 2015); development and pilots (June 2015 - June 2016); implementation with various revisions as Online Compliance Intervention (OCI) (July 2016 - February 2017), Employment Income Confirmation (EIC) (February 2017 - September 2018) and Check and Update Past Income (CUPI) (September 2018 - November 2019).<sup>iii</sup>

Public servants from two departments (the Department of Social Services (DSS) and Department of Human Services (DHS) (Services Australia (SA) since February 2020) were involved in administering the Scheme, with frontline implementation and operational policy the responsibility of DHS and





general policy, including overall responsibility for the *Social Security Act 1991*, in the hands of DSS. This division of responsibilities reflected the corresponding functions of the respective ministers. In practice, public servants from DHS were in charge of day-to-day administration while those from DSS played a more distant and intermittent, though vital, role.

## 3.1 Independence

### The general concept

In a democracy, an unelected permanent bureaucracy, such as the APS, is properly responsive to policy directions set by the elected government of the day. In Australia, as a member of the Westminster family of democracies, these directions come via ministers, both individually and collectively as part of cabinet government. However, there are important ethical limits to this responsiveness, which are usefully summarised under the heading of 'independence' and commonly linked with the concept of giving 'frank and fearless advice'. First, public servants have a fundamental duty to act within the law, a duty which requires them to resist any unlawful directions from their political masters, whether explicit or implicit, and also to advise ministers against acting unlawfully.<sup>iv</sup> Second, public servants have a related duty to respect the principles of sound administration, which include following internal rules and procedures as well as dealing honestly and truthfully with each other and with members of the public. Third, when advising ministers on matters of policy, public servants owe ministers the benefit of their objective knowledge and experience in helping them achieve their aims, even if this sometimes means openly disagreeing with the ministers' own opinions or those of other sources of ministerial advice.

Exercising each of these three grounds for independence - lawfulness, sound administration and policy expertise - requires public servants to communicate their disagreement to ministers, typically in confidence. Hence the term 'frank and fearless advice', which is a useful short-hand summary, though it obscures the different grounds for disagreement and the varying degrees of push-back that may be called for in different situations. On issues of lawfulness, for example, public servants can claim an overriding right of resistance, which ministers tend to respect as they rely on public servants to keep them from acting outside the law. This right also applies to certain constitutional conventions, such as caretaker conventions, which establish a similar red line of resistance. On matters of procedure and policy advice, however, it may be sufficient for public servants to firmly register the grounds of their disagreement with ministers before ultimately complying.

In government departments, the formal obligation to communicate with ministers lies with secretaries and other senior officials who report directly to ministers. While departmental secretaries remain ultimately responsible for achieving the right balance between responsiveness and independence in advice to ministers, preparation of departmental advice is a collective task, contributed to by officials at different levels. Being closest to ministers, senior officials are typically more sensitive to the political context of which more junior staff may need reminding. On the other hand, the relative political distance enjoyed by more junior officials, helps to make them an invaluable source of new ideas and



independent expertise. Open, informal communication between all levels is essential to achieving the right balance of experience and intellectual detachment.

Beginning in the 1980s, a managerial reform movement compared government bureaucracies unfavourably with private corporations and reset the balance between independence and responsiveness. Public servants were rightly criticised for being excessively rule-bound and unaccountable while their leaders (then known as 'permanent heads') appeared unwilling to accept political direction. Various reforms followed, including the introduction of performance management and outcome-based budgeting and reporting, greater reliance on the private sector through outsourcing and privatisation, and limited-term contracts for agency heads. Whether the long-term effect of these changes has been to tip the balance too far in favour of responsiveness provides a background question for this study.

### Lawfulness

The Robodebt inquiry focused particularly on the issue of lawfulness because the illegality of the Scheme was its most glaring fault and also because the Commission's own legal expertise enabled it to make a unique contribution in that area. The central legal difficulty with the Scheme stemmed from its method of matching payments to welfare recipients with records of income held by the tax office in order to identify overpayments and therefore raise debts. While the welfare payments were made fortnightly, tax information was recorded annually and, for matching purposes, was therefore averaged into equal fortnightly payments over the period in question. This method of calculating income, known as 'averaging' (or 'smoothing' or 'apportioning'), had already proved useful as an indication of possible overpayment. However, the *Social Security Act 1991* required evidence of actual income for each fortnight which meant that averaging could not be legally used as sole evidence of overpayment without change to the legislation.<sup>v</sup>

During the proposal stage, what later became known as the Scheme was developed within DHS in response to the new government's urgent need to find public savings. Automating the calculation of overpayment had the potential to bring in major savings while also penalising those recipients who had been supposedly abusing the welfare system. The initial minute from DHS (June 2014) claimed, wrongly, that the Scheme could be introduced without legislative change.<sup>vi</sup> But senior officials within DSS, which was later consulted in its role as administrator of the *Social Security Act 1991*, immediately recognised that legal problems could arise and consulted their legal services division which advised that legislative change would be required. However, this advice was not immediately communicated to DHS which continued to develop the proposal independently, spurred on by public remarks of the incoming minister, Scott Morrison, that he wanted to be tough on welfare 'cheats' and by his later stated preference to proceed without legislative change, which would avoid the need to negotiate with the senate.

When DHS eventually received formal advice from DSS about the need for legislative change, the two departments agreed on an executive minute that removed formal reference to averaging (though that was still implicit in the proposal) and mentioned a possible need for unspecified legislative change. However, the final policy proposal that went to cabinet, dropped all reference to legislative change and

claimed (misleadingly) that no change was needed to how income was assessed or overpayments calculated.<sup>vii</sup> As a result, the Government eventually approved a Scheme which was illegal without necessary changes being made to the *Social Security Act 1991*.

How was this major failure allowed to occur? Within DHS, which had major carriage of the proposal, some officials genuinely believed that the policy was an unproblematic extension of current practice. But the senior public servants who were principally involved in developing the Scheme, particularly the general manager of the Business Integrity Division of DHS, and the relevant deputy secretary, were fully aware of the DSS advice and knowingly concealed potential legal issues that might have led to the Scheme's delay or derailment. They were uncritically supported by the DHS secretary.<sup>viii</sup>

Officials in DSS initially acted with greater integrity, particularly members of the legal services division who clearly advised that averaging was not allowed as the sole determinant of income. However, while their immediate superiors recognised the legal issues, the delay in communicating with DHS, combined with their later unwillingness to force these issues in the face of the determination of the DHS hierarchy, facilitated the eventual endorsement of the policy. Given that DSS had ultimate responsibility for relevant legislation, the failure of the relevant DSS deputy secretary and secretary to properly inform the minister and the cabinet of the likely need for legislative change was a major lapse in professional standards.<sup>ix</sup> Their silence allowed DHS officials to subsequently claim that any legislative issues had been safely dealt with.

Legal issues continued to haunt the Scheme after it was implemented. A growing stream of external critics, including academic experts and the Administrative Appeals Tribunal (AAT), claimed that the use of averaging to determine income was not allowed under the *Social Security Act 1991*. The obvious response from DSS and DHS should have been to immediately seek their own independent advice from the Australian Government Solicitor and, if necessary, the Solicitor-General. Instead, this advice was not sought until 2019, nearly four years after the Scheme's inauguration and then only because individual court cases forced the government's hand. Even then, the departments took more than five months to brief the Solicitor-General and a further two months to act on the opinion.<sup>x</sup>

In the meantime, DHS consistently adopted the misleading line that averaging had long been common practice 'as a last resort' and that the new Scheme was therefore consistent with previous practice. As the Commission points out,<sup>xi</sup> this claim would not withstand serious legal challenge, a point that the DHS leadership must have realised, or at least suspected, because otherwise they would not have resisted seeking independent advice for so long.

Occasional questions were asked within DHS. For example an acting secretary and acting chief counsel standing in during the summer break of 2016-17 raised the issue of legality with legal staff and suggested referring the question of averaging to the Australian Government Solicitor.<sup>xii</sup> But the returning chief counsel and secretary took no further action, preferring to allow the Scheme to continue. The fact that other departmental officials coming to the issue for the first time immediately recognised the need for expert independent clarification underlines the extent to which the regular departmental leadership had strayed from the obligation to alert ministers to any potential illegality. The dereliction of duty was most marked in the case of the chief counsel who, as the department's

senior legal officer, had a particular obligation to monitor the department's legal compliance. Staff in her division had informed her that the legal status of averaging was doubtful but she refused to take the matter further. Instead, she complied with her deputy secretary's desire 'not to scare the horses', in other words, not to expose themselves and ministers to political embarrassment.<sup>xiii</sup>

At around the same time (December 2016-January 2017), senior staff in DSS at the group manager level also revisited the question of legality in order to brief ministers. In response to their internal inquiries they were referred to relevant advice, including the original 2014 advice, that claimed that legislative change was required if averaging were to be used as sole evidence for overpayment. Again, however, from an apparent failure of nerve, the briefing was never finalised.<sup>xiv</sup>

The two departments' response to the Ombudsman's first own-motion investigation into Robodebt, begun in January 2017, was a pivotal stage in cementing the two departments' embrace of questionable legality. The terms of the investigation included an inquiry into relevant legislative issues, which should have exposed the obvious legal uncertainty surrounding the use of averaging. In preparing to answer the Ombudsman's likely inquiries about the legal basis of averaging, DSS suppressed reference to the earlier 2014 advice that had argued against averaging as sole evidence. With the support of a principal legal officer, it clearly aligned itself with the DHS position that using averaging as a last resort was established practice and did not require legislative change.<sup>xv</sup> The final decision not to alert the Ombudsman about potential legal problems was taken by the department's relevant deputy secretary and the secretary.<sup>xvi</sup>

The Ombudsman's failure to question the departments' response or even to recommend seeking independent legal advice allowed ministers and officials to spuriously claim his office's authority for the Scheme's supposed legality. For instance, it bolstered the case that adverse decisions from the AAT could be safely ignored. In this way the view that Robodebt was legally sound continued to be defensible government policy until it was finally overturned as a result of impending litigation in the federal court.<sup>xvii</sup>

That two public service departments, backed by the Ombudsman's office, allowed Robodebt to continue for over four years without independent legal clarification amounts to a scandalous dereliction of professional duty. The willingness of senior public servants to actively support the government's aim of making major public savings was entirely appropriate as an exercise in responsiveness to an elected government's policy direction. So too was acceptance of a political imperative to be tough on recipients who may have abused the welfare system, though this may have been hard for many staff, especially in frontline positions. The key professional fault was not the development of a policy that could be seen as cruel but rather the initial failure to advise cabinet that sole reliance on averaging would require legislative change and the subsequent repeated insistence that averaging involved no change in policy.

Through this mistaken deference to the minister's wishes, public servants betrayed their professional obligation to advise against any illegality, actual or suspected, on the part of ministers. They also allowed ministers to claim ignorance of any subsequent possible illegality on the ground that it was the role of the public service to make sure that governments kept to the law. The main culprits were those

few senior public servants who understood the illegality and covered it up, discouraging dissent and preventing the more cautious and objective views of subordinates from being taken properly into account. But they were enabled by a wider group of otherwise professional senior officials who suspected, or should have suspected, that an external legal opinion was needed to clarify the legal situation but chose to do nothing.

### Truthfulness

Apart from failure to pursue the issue of the Scheme's questionable legality, public servants in the departments administering Robodebt also acted with excessive responsiveness to ministers in relation to general respect for sound administration. For instance, truthfulness is an essential process, a value in public administration which was too often contravened in internal communications within government.<sup>xviii</sup> The deputy secretary of DHS, supported by the secretary, knowingly deceived the cabinet over the need for legislative change to introduce Robodebt and later, when the Scheme was being implemented, misled a succession of ministers over the extent to which income averaging under Robodebt diverged from its previous uses.<sup>xix</sup> Along with other senior colleagues she also knowingly misled their frontline staff about the legal status of Robodebt. In response to concerns raised by a whistle-blower, the secretary sent a communication to all staff saying 'there had been no change to how we assess income or calculate and recover debts', a statement she knew to be false.<sup>xx</sup> A similar false narrative was also conveyed by staff to the Ombudsman who had every right to expect public servants to be truthful in their responses.<sup>xxi</sup> The DHS chief legal counsel knowingly misinformed the new secretary about the Scheme's legal status.<sup>xxii</sup>

The determination of senior officials to maintain the false narrative that Robodebt involved no change to the methods of calculating income and assessing debt led to other breaches of procedure. For example, in dealing with the Ombudsman and his office, senior officials from DHS not only deliberately concealed the dubious legal status of the Scheme but also directly involved themselves in drafting the Ombudsman's report, a highly unusual and questionable procedure.<sup>xxiii</sup> Reluctance to query the legal status of Robodebt also led DSS not to finalise a legal opinion on averaging commissioned from the law firm Clayton Utz.<sup>xxiv</sup> For similar reasons, the secretary of DHS aborted a report contracted from PwC consultants.<sup>xxv</sup> These truncated contracts reflect a lack of orderly procedure and good administrative practice.

### Accurate record-keeping

Another neglected aspect of sound administration was the need to keep a comprehensive and accurate written record of important decisions and advice. The personal memory of individual officials is unreliable and incapable of providing the consistency and continuity that efficient administrative procedures demand. Individual officials are often temporarily absent or move permanently to other positions, taking their memories with them. Even if they remain continuously in post, they naturally tend to become forgetful and memories become distorted over time.

By way of illustrating the fallibility of individual memory, the hearings of the Commission include many examples of highly competent and experienced public servants who had difficulty remembering

important events of just a few years before, even when offered access to a department's archive of emails. Some instances of reported forgetfulness, as the Commission suspected, may have been disingenuous, designed to deflect personal culpability. For the most part, however, the loss of memory appeared genuine and reflected a normal incapacity to retain detailed information for any length of time. It underlines the need for accurate and up-to-date written records as part of standard departmental practice. Having an accurate written record provides departments with a reliable archive of collective memory. It also gives public servants objective evidence to draw on when reporting frankly to ministers on issues where their advice may disagree with ministers' views.

The Commission found many instances where important decisions and advice had not been recorded. This reflects a general tendency in the APS that was already evident from a previous Royal Commission report into another major administrative failure, the home insulation ('pink batts') program.<sup>xxvi</sup> The reasons are many and contested. In part, it may be an over-reaction against the bureaucratic sclerosis of traditional bureaucracy with its focus on time-consuming formal processes. In addition, the confidentiality of internal government documents has become harder to protect, because of the ease and scope of electronic communication through email. At the same time, Freedom of Information (FOI) legislation has made governments more sensitive to the possible disclosure of official advice that is at variance with ministerial policy.

These factors combine to produce a culture of caution about the written record, particularly the documenting of adverse evidence or politically controversial or inconvenient advice, which was evident during the administration of the Robodebt Scheme. The culture was epitomised by the reported reaction of a DHS deputy secretary to a division director who raised the question of recording possible risks in the Scheme. She reportedly screamed at the division director, telling her 'in no uncertain terms not to put it in writing'.<sup>xxvii</sup>

### Respect for procedure

Further lapses from normal standards included inadequate preparation of both the original cabinet proposal and the subsequent implementation planning which omitted many of the usual risk assessments. Public servants in DHS who were charged with developing the policy expressed surprise that the policy was to be put forward in that year's budget cycle and complained they were not being given time to work out the details properly. There was an imperative to get the savings and 'a lot of pressure to get it through'.<sup>xxviii</sup> Later, in the development phase, similar time pressure led to inadequate articulation and testing of the complex procedures involved in the Scheme.<sup>xxix</sup> Partly as a result of insufficient planning the Scheme failed to deliver many of the promised economic benefits and also caused unnecessary hardship to many individuals.

These shortcuts in procedure were the result of relentless pressure from senior officials responding, in turn, to ministers' urgent pursuit of major budgetary savings. Certainly, ministers are often justified in demanding greater speed in implementation, particularly as public service profession has a natural tendency to procedural caution. Senior public servants therefore have a duty to respond positively to reasonable demands for speed and are sometimes justified in trying to impress a sense of urgency on their staff. But the pressure for speed can go too far. Robodebt offers a classic example of the harm



that can be done by excessive short-cuts in administrative processes. Its history vindicates those public servants who recorded their disquiet at being unduly rushed and exposes the recklessness of their superiors who failed to properly inform ministers of the risks associated with hasty implementation.

### Policy expertise

Undue speed and commitment to a false narrative also contributed to neglect of a vital aspect of public service independence; the need to give ministers objective and impartial advice on policy. In both DHS and DSS, officials at all levels were discouraged from reporting evidence or assessments of Robodebt that ministers were assumed not to want to hear. For example, an initial pilot Scheme that tested some of the Scheme's procedures yielded alarmingly high rates of non-response from recipients, thus undermining the assumption that failure to respond indicated acceptance of a debt. However, in reporting the results, officials deliberately underplayed their seriousness because they sensed that their superiors, particularly the deputy secretary, did not want to hear bad news.<sup>xxx</sup> The culture of not giving bad news and just getting on with the job, compounded by a general reluctance to record details of meetings held and decisions taken, permeated the more senior levels of DHS and was reinforced by the intolerant and domineering behaviour of a number of leaders. Those frontline staff who raised awkward questions were either ignored or rebutted by stubborn repetition of the official narrative.<sup>xxxii</sup> The overall result of these pressures was to prevent ministers from making informed use of the accumulated knowledge and experience in the staff of both departments.

In summary, the two public service departments administering the Scheme (DHS and DSS) were guilty of insufficient independence from ministers. The most egregious lapses concerned the issue of legality and the failure of the public service to act as guardians of lawful government. Other culpable practices included wilfully misleading those who had a right to expect honest communication, disregard of normal administrative processes and discouraging the expression of potentially awkward and contrary views and evidence. Most at fault were public servants at the very senior levels - secretary and deputy secretary - who were over-responsive to ministers' demands for urgent budgetary savings. Their misplaced zeal led them to override various aspects of the public service values and code of conduct and ultimately to betray their loyalty to their ministers who should have been protected from supporting such a flawed Scheme for so long. The DHS leaders, in particular, through intolerance of dissent, imposed a departmental culture that discouraged careful analysis or the reporting of adverse results. They showed little sympathy for the situation of frontline staff battling with the implementation of a flawed and unpopular program.

The leaders of DSS, by contrast, were less fanatical followers of the government's policy direction. But at critical points they chose not to pursue issues of potential difficulty with Robodebt, particularly the obvious and urgent need to clarify the legal status of the Scheme, a responsibility that lay with DSS as the administrator of the *Social Security Act 1991*. In this respect they were let down by leaders of their in-house legal services division who, along with their DHS counterparts, failed on occasion to deliver soundly based expert judgements to their superiors.<sup>xxxiii</sup> Even so, the department's

leaders should have had the courage to respond to growing public criticism and seek clarity on what must have appeared to be questionable legal advice.

Middle-ranking and junior public servants who were contributing to the formation of advice, for instance through gathering evidence of how the various elements of the Scheme were working, or through working on the relevant legal issues raised by critics, sometimes expressed internal opinions that were at odds with the official line adopted by their superiors. In doing so, they exhibited their own commitment to the public servant's duty to give frank and fearless advice. But they faced little encouragement to voice or record dissent and ultimately had no choice other than to follow the line adopted by their superiors.

## 3.2 Collaboration

### The general concept

'Collaboration', in general terms, refers to two or more parties working together for a common purpose, relying on mutual trust and shared values without any one party having overall control. Instead of the vertical authority typical of bureaucracy and other hierarchical structures, collaborative relationships tend to be horizontal in nature, depending on willing coordination and trust.

In the public sector, collaboration can be found both within particular agencies and between different agencies, wherever people need to work together across the normal lines of top-down authority. Within agencies, collaboration occurs between members of different groups or sections with different functions who must cooperate in order to achieve the agency's collective goals, for example, policy and legal services. Collaboration is also common between colleagues working together in the same group. Even within the standard hierarchical structure of superiors and subordinates, aspects of collaboration arise within a style of leadership that relies more on teamwork and collegiality than command and control.

Between agencies, collaboration is particularly important because individual agencies tend to have their own identity and collective solidarity. Only by cooperating voluntarily across institutional boundaries on the basis of mutual trust can they effectively pursue the government's broader agenda and the public interest. Finally, collaboration is an essential feature of joint partnerships between government and non-government organisations which are formed in order to deliver common policy objectives, for instance in the areas of social or economic policy.

The importance of collaboration has emerged as a reaction to earlier managerial reforms which, though critical of traditional bureaucracy, still assumed a hierarchical structure for each government agency and quasi-contractual relationships between separate agencies and between government and non-government organisations. Criticism of agencies as self-contained silos each pursuing its own narrow objectives led to calls for 'joined-up' government based on collaboration as a means towards more comprehensive and coherent outcomes. Recognition that both government and the not-for-profit



non-government sector had a vital role in developing solutions to complex problems of social policy encouraged a new emphasis on collaborative partnerships across sectoral boundaries.

Collaboration, though indispensable, faces considerable resistance from the institutional structures of distinct organisations based on top-down authority and accountability. It requires understanding of the inevitable tensions in horizontal relationships and a shared willingness to work through them constructively. The Robodebt Scheme offers lessons about the harm that can be caused when cooperation both within and between agencies is weak and when governments show little interest in cooperating with the non-government sector.

### Collaboration within agencies

The Commission report reveals countless examples of effective collaborative relationships within the two leading departments, DHS and DSS. Members of different groups and sections within each department routinely cooperated to gather information, formulate advice for their superiors, and implement government policies. Working relationships based on civility and collegiality appear to be the norm, as they should be. For this reason, occasional lapses from such a high standard stand out as anomalous and as likely factors in the administrative failures of the Scheme.

For example, one of the reasons why the legal problems with the Robodebt Scheme were not picked up much earlier is the general lack of collaboration and feedback in both departments between officials dealing separately with legal and policy issues.<sup>xxxiii</sup> Normal departmental procedures naturally focused on reporting up the chain of command leaving coordination to higher levels and encouraging lower-level officials to stick to their narrow fields of interest. Combined with a departmental culture, particularly in DHS, which discouraged dissent or the reporting of bad news, the system tended to stifle opportunities for valuable lateral communication and the cross-pollination of ideas. Similarly, the unwillingness of the senior DHS officials to listen to the concerns of their frontline staff who were implementing the flawed Robodebt program reflected a lack of collaborative interest in treating all staff as partners in a joint enterprise.<sup>xxxiv</sup>

### Collaboration between agencies

The most serious lack of collaboration, however, was *between* departments, particularly between DHS and DSS. The problem was exacerbated by the longstanding lack of clarity over the respective roles of the two departments, dating from the original dismantling of the former Department of Social Security in line with the then popular management theory that policy purchasers should be institutionally separate from policy providers in the interest of clarifying their respective roles. The department, which had been responsible for both policy and delivery, was replaced by a smaller policy-focused DSS and a delivery-focused executive agency, Centrelink. The relationship has been through a number of restructurings, with Centrelink later folded into a separate department with its own minister (DHS) and most recently, in 2019 when Robodebt was about to be abandoned, returned to an agency format (Services Australia).<sup>xxxv</sup> Throughout, the problem of determining responsibility for social policy has proved troublesome because of the logical impossibility of clearly separating policy from delivery which has bedevilled all complex purchaser-provider splits. Under the two-



department/two-minister model current for most of Robodebt, the DSS had oversight of general policy while DHS was in charge of policy on service delivery, a demarcation that even the secretary with the most experience in the area admitted was difficult to pin down.<sup>xxxvi</sup>

To deal with the inevitable problems of coordination, the two secretaries had established a bilateral management arrangement between the two departments, providing a joint management committee and setting out a number of detailed protocols allocating various functions and requiring consultation on matters of mutual concern.<sup>xxxvii</sup> However, in spite of such good intentions, collaboration was often deficient. As the Commission points out, the early development of the Robodebt policy proposal suffered from inadequate consultation between the two departments. Officials from DHS claimed ownership of the policy and tended to resent what they saw as interference from DSS, even though DSS was responsible for issues relating to social security legislation. For example, the DHS general manager, business integrity, complained to a colleague who had shared preliminary data about the Robodebt proposal with DSS, that he was 'giving away control of the proposal.'<sup>xxxviii</sup>

At the same time, DSS was reluctant to confront DHS and delayed in communicating its legal opinion questioning the proposal. The readiness of DHS to ignore its obligation to consult was reinforced by the fact that its secretary reported on the proposed policy directly to the Minister of Social Services, who was the senior minister in the portfolio, rather than through the Human Services Minister. This direct communication reinforced the role of DHS as owner of the proposal and reduced the influence of DSS and its secretary. Problems of coordination were compounded by the authoritarian leadership style of the then DHS secretary which discouraged collegial relationships across departmental boundaries.<sup>xxxix</sup> Several years later, in the final months of the Robodebt Scheme, a poor relationship between the respective secretaries was a factor in causing DHS to delay informing DSS of the Solicitor-General's adverse opinion on the Scheme.<sup>xi</sup>

Lack of consultation was also an entrenched feature of relations between the two departments' respective legal services divisions, as the Commission documents extensively.<sup>xii</sup> At several crucial times in the Scheme's development and then implementation, the two legal teams failed to share their knowledge and advice, which led to poor policy outcomes. For example, in 2014, during the early development phase, DSS lawyers did not fully communicate to their DHS counterparts their clear advice that Robodebt would require legislative change. Indeed, this 2014 advice was not fully shared with DHS until five years later.<sup>xiii</sup> In 2018, DSS received draft advice from Clayton Utz that sole reliance on averaging was illegal but failed to pass this on to colleagues in DHS who had an obvious interest in the issue. DHS lawyers also failed to share important advice with their DSS counterparts, for instance, in early 2017 when the department was intending to seek external advice on averaging, an intention that was later abandoned but could have been strengthened by access to DSS advice. This lack of collaboration was not only prejudicial to good policy-making but also contrary to official directions issued by the Office of Legal Services Coordination (OLSC) within the Attorney-General's Department. The directions required agencies to consult one another on issues requiring a significant level of coordination or high-level consultation but were generally ignored.<sup>xliii</sup>

The unwillingness of in-house lawyers to share advice outside their department was reinforced by a common belief that they should maintain professional privilege over the advice by not showing it to another client unless asked to do so. However, as the Commission argues, any such privilege belongs to the Commonwealth not the department. The department does not own the advice which could readily be shared with other commonwealth agencies.<sup>xliv</sup> This practice did not formally prevent communication of points made in advice. But it does illustrate a common tendency of public servants to give prior loyalty to what they see as the interests of their own departments at the expense of the collective interest of the government as a whole.

Lack of coordination between the departments was therefore a major problem. Certainly, the two-department/two-minister structure was an impediment to coordinated policy-making and clear ownership of responsibilities (and has since been replaced by a more straightforward department/executive agency structure). However, it cannot be blamed for all the problems of communication within and between the two organisations. Also at fault were misplaced attitudes of organisational identity and loyalty, which tended to support an antagonistic 'us and them' approach to inter-agency relations and sometimes undermined the sense of trust and shared goals needed to effectively implement the government's agenda.

These siloed attitudes were also evident in relations with other agencies. For instance, beginning in late 2016, the ATO became disturbed by media reports that DHS was not complying with service-wide rules about data matching and asked for assurances from the department. DHS initially did not respond and then replied evasively, simply repeating its familiar line that nothing had changed. Not satisfied, the ATO sought further meetings in order to clarify the situation but failed to obtain a satisfactory response.<sup>xlv</sup> Similar unwillingness to communicate with colleagues in other agencies was also reflected in the reactions of both departments to successive inquiries from the Ombudsman's office and in the failure of their legal teams to alert the OLSC about significant issues raising 'sensitive legal, political or policy issues', as required by the directions.<sup>xlvi</sup>

### Collaboration with non-government organisations

Collaboration can also occur between government agencies and non-government agencies when they cooperate in making and delivering policies for the public. The general field of social services is a common site of such cooperation where governments draw on the skills and resources of the community sector to form partnerships based on shared values. The payment of social assistance, however, to which the Scheme applies, is an area where the government typically retains full control over policy and implementation. External firms are sometimes engaged, such as private debt collectors and labour hire firms for Robodebt, but more as agents contracted to perform a specified task than as partners in a shared enterprise. However, even when governments retain control, consultation with stakeholders can provide space for collaborative relationships if government service providers are prepared to engage with outside organisations and obtain useful feedback.

As the Commission documents, the dealings of DHS, the service provider, with its relevant stakeholders over Robodebt were perfunctory and largely uncooperative.<sup>xlvii</sup> In developing the original policy, the department did not seek the views of those representing the interests of recipients. The

main stakeholder was advocacy group, the Australian Council of Social Services (ACOSS) which was not consulted about the policy or its implementation. After the Scheme was in operation, ACOSS made regular submissions to the relevant ministers pointing out the unrealistic expectations imposed on recipients and the difficulties many of them were having in complying. Ministers often delayed their response or failed to give one at all. When they did reply they simply repeated the standard (and misleading) department line that the policy marked no significant change in practice. In the view of the Commission, if the department had taken note of the points raised by stakeholder groups such as ACOSS it might have avoided much of the later damage caused by Robodebt.

In part, the reluctance of the department and ministers to engage with stakeholders stemmed from a fundamental, and legitimate, difference of political values. The government gave priority to the interests of taxpayers over those of welfare recipients and was determined to be tough on welfare cheats. The department, quite properly, took its lead from the government. The stakeholders, on the other hand, all operated as advocacy groups representing the interests of those in need of social assistance and opposed the government's policy direction. Officials were therefore understandably suspicious of the stakeholders' broader agenda.

However, refusal to seriously listen to complaints from the recipients' representatives deprived officials of the opportunity to learn valuable information from the experience of recipients, actual and potential. Much of the input from advocacy groups would have been factual rather than politically slanted and worth careful consideration.<sup>xlviii</sup> Individual recipients also had access to an internal complaints process but any general criticisms were carefully managed to avoid any open challenge to the official policy.<sup>xlix</sup> While the various adjustments made to the implementation of the Scheme from 2017 indicate that the government was prepared to take notice of some detailed complaints, particularly as relayed through the media, any challenge to the Scheme's basic principles was stubbornly ignored. In effect, the approach to external consultation was an extension of the DHS internal culture in which genuine consultation with subordinates was discouraged and dissent suppressed in the interests of reporting good news only.

Overall, Robodebt reveals many missed opportunities for collaborative behaviour in different contexts. While some problems of coordination are inherent in any hierarchical bureaucratic structure, they could have been greatly reduced by a more collegial and cooperative culture and a greater sense of common purpose across the whole public service.

### 3.3 Accountability

#### The general concept

Accountability is the obligation to answer for the performance of duties and involves three main elements: informing, discussing and, where necessary, accepting rectification. Public servants are subject to a complex network of accountability obligations, centred on the upward chain of hierarchical accountability through agency heads to ministers who are in turn accountable to parliament and the



voters. In addition, public servants have always been directly accountable to other accountability institutions such as the Auditor-General and the courts as well as to individual members of the public affected by particular decisions.

Until the latter third of the last century, the accountability obligations for public servants were largely internal within their departments, leaving ministers as the sole spokespeople of government to parliament and the public. Since then, however, while the main principles of ministerial responsibility have been retained, public servants have become more publicly accountable to external institutions of accountability such as parliamentary committees, the Ombudsman and the AAT, and directly to the public through FOI legislation. These changes, while generally improving the extent of government accountability, have also introduced tensions with the public servant's duty of frank and fearless advice delivered confidentially.

Meeting the demands of accountability requires public servants to report fully and accurately to their superiors in the chain of command in order to help ministers to be properly accountable to parliament and to members of the public. They should also keep accurate records of all significant decisions that might become the object of public inquiry. In answering questions from external agencies of accountability, they are required to be scrupulously honest and open.

### Comprehensive and accurate reporting to superiors

The accountability of ministers to parliament depends on their being fully informed about the actions of their departments. This, in turn, requires public servants at all levels to report fully and accurately to their immediate superiors in the chain of command so that their leaders can fully brief their ministers. Conversely, if reporting upwards is partial or perfunctory, ministerial accountability is frustrated.

As noted above, the leadership culture of both Robodebt departments, particularly DHS, strongly discouraged their subordinates from reporting bad news. Senior public servants refrained from fully informing ministers about the difficulties faced by the Scheme<sup>i</sup> and persistently misled ministers about the extent to which Robodebt differed from previous practice and about the legal issues that this divergence raised.<sup>ii</sup> These misrepresentations, inspired by a misplaced zeal to be responsive to ministers' wishes, amounted to a deliberate policy of shielding ministers from the truth and thereby distorting their accountability to parliament and the public. In this respect it was a betrayal of the public servant's legal duty to assist in the proper exercise of ministerial responsibility as required by the public service values ('open and accountable ... under the law and within the framework of ministerial responsibility').<sup>iii</sup>

### Importance of a written record

A comprehensive and accurate written record of key events and decisions is an essential component in public service accountability, providing the firm evidence on which public servants can draw when reporting to their superiors and to other agents of accountability. Actively discouraging the writing down of politically sensitive material, as was the practice in DHS, is therefore not only poor administrative practice (see above) but also blocks ministers from being fully informed about the

actions of their departments. In this way, such a culture is directly at odds with the principles of public service accountability.

Besides helping to underpin accountability to ministers, an accurate and comprehensive written record also offers reliable evidence for public servants to present to external accountability agencies scrutinising the performance of government departments. From this perspective, the Commission, which operated as an ad hoc mechanism of accountability, offers valuable insight into the general unpreparedness of government departments to deal with detailed investigations into particular programs. To meet its terms of reference, the Commission was required to establish a precise sequence of events and to allocate responsibility to those involved. Here, the Commission found many occasions when no record had been kept of decisions, leaving it unable to reach firm conclusions about what had happened and why.

The Commission highlighted a number of significant examples.<sup>liii</sup> Several relate to the summer vacation period of 2016-17, when DHS officials took over acting roles as secretary, deputy secretary and chief counsel respectively. All three, responding to growing public disquiet, had recommended that the Scheme be referred to the Australian Government Solicitor for independent advice on its legality. However, there is no record of how this recommendation was subsequently overturned by the returning DHS leadership. Other actions that went unrecorded were the decisions by DHS and DSS respectively not to finalise the advice that had been sought from consultants PwC and Clayton Utz. These omissions reflect what appears to be a pervasive culture of not recording and not reporting politically sensitive matters, a culture which seriously undermined the public service's obligation to be publicly accountable.

### Answering to external accountability agencies

When being held to account by specialist external accountability agencies, the public service is expected to deal openly and honestly, giving ready access to relevant information and being scrupulously truthful in response to questions. The Commission, however, revealed a pattern of disingenuous and deceitful treatment of external accountability agencies. Most notable was the handling of two inquiries from the Ombudsman's office (see above), particularly the first inquiry in early 2017.

In response to a question about the earlier 2014 DSS advice that legislative change would be required, DSS replied, misleadingly, that subsequent changes to the Scheme had rendered that advice redundant. This response was also endorsed by DHS. In the words of the Commission, 'the DSS explanation was as dishonest a document as the Commission has seen'.<sup>liv</sup>

The Commission also documents other questions from the Ombudsman's office that the departments refused to answer, presumably because the answers would have revealed too many weaknesses in the Scheme. For instance, one question to DHS related to the number of recipients whose debts had been determined by averaging. The compliance branch of DHS prepared an answer that indicated that around 75% of recipients' debts were due to averaging. The chief counsel and deputy secretary initially tried to qualify the proposed answer through distinguishing complexities of different categories



of cases and then ultimately replied, misleadingly, that the information was not available.<sup>lv</sup> The determination of DHS to deflect and mislead the Ombudsman also extended to openly assisting the Ombudsman's staff in drafting their final report and suggesting numerous changes aimed at controlling the narrative in their favour.<sup>lvi</sup>

In addition, both departments failed to give sufficient respect to the AAT which has the power to review individual administrative decisions and either affirm, vary or set them aside. Though the secretary of DSS was under a legal obligation in the *Social Security (Administration) Act 1999* to take due note of AAT decisions, there is no evidence that these were ever drawn to the secretary's attention.<sup>lvii</sup> The two departments operated a joint procedure for considering adverse AAT decisions and deciding whether to change the original decision or to appeal. As the frontline department, DHS was responsible for the initial consideration and DSS became involved on legal issues, including possible appeals. However, as the Commission points out, cases were dealt with individually, with no provision for concerted action to deal with a number of similarly adverse cases, as happened with Robodebt.<sup>lviii</sup> As a result, the growing pressure from a series of adverse AAT decisions about Robodebt did not receive the attention it deserved.<sup>lix</sup>

More generally, though AAT decisions do not set strict legal precedents, the normal expectation with adverse AAT decisions is that the department or agency concerned would either accept the decision and adjust its policy or appeal the decision in order to gain legal and administrative clarity. To persist with a policy that is widely discredited without seeking legal clarification amounts to a flagrant disrespect for an important mechanism of public accountability and is one more example of a culture of resistance to external accountability.

Finally, the departments also failed to deal honestly and openly with the Senate committee responsible for scrutinising its actions. In the regular thrice-yearly Senate estimates hearings, members of the Community Affairs Legislation Committee raised a number of issues in connection with Robodebt, beginning in early 2017, when public complaints began to escalate. While some questions were readily answered, many others were deflected, by being taken on notice or by claims that the information was unavailable.

Such prevarication and resistance is a common feature of estimates hearings, where much opposition questioning is ultimately aimed at government ministers and where public servants, without resorting to deliberate misinformation, try to avoid giving information that could be used against their ministers. The Commission hearings, in which senior public servants were subjected to rigorous and relentless cross-examination from counsel, provide excellent examples of this ability to avoid answering the question without lying.<sup>lx</sup> When facing questions on Robodebt at Senate estimates, however, officials' insistence on the false narrative that the Scheme involved no substantial change crossed the line between prevarication and misrepresentation and amounted to deliberate misinformation.<sup>lxi</sup>

The Senate References Committee on Community Affairs also conducted two separate inquiries into Robodebt (referred to as the 'income compliance program') in 2017 and 2019-22, in which non-government senators were highly critical of the Scheme (while government senators dissented).<sup>lxii</sup> The second inquiry, prompted by growing public concerns over the Scheme's legality, was delayed several

times, partly because of COVID, but also because of the Committee's inability to gain access to relevant government information, including the frequency and dates of any internal legal advice, possible approaches to the Australian Government Solicitor, and advice about the legality of averaging annual income data from the ATO. The Committee made repeated requests for this information in a series of interim reports but was turned down each time.

In justification, the government claimed public interest immunity which allows it to block disclosure of information on various public-interest grounds, such as cabinet confidentiality, legal professional privilege or prejudice to ongoing legal proceedings. In each case, however, these grounds were simply asserted without any serious attempt to provide legal reasoning. The Committee even offered to view relevant documents in camera but was again rebuffed. The decisions not to disclose were formally made by ministers but public servants clearly drafted and supported them. In final frustration at the repeated denials of transparency, the Committee recommended a Royal Commission as the only practicable means of revealing the truth about the Robodebt Scheme.

Overall, the departments' approach to external accountability agencies revealed an attitude of stubborn resistance and an unwillingness to embrace the basic principle of open government, that, within reasonable limits, the public and its accountability agencies have the right to know what governments are doing. This culture of secrecy helped to shield Robodebt from independent scrutiny and so unnecessarily prolonged the Scheme's unlawful existence.

### Answering to individual members of the public

Public servants providing services directly to the public are expected to be accountable to individual recipients of such services who have the right to raise questions about their particular cases. Recovering debts from welfare recipients who were deemed to have been overpaid, which was the issue covered by Robodebt, naturally gave rise to many questions for individual recipients, given the variety of individual cases and the incompleteness of many people's personal records. The main thrust of Robodebt, however, was to speed up the process of debt recovery by relying heavily on automation and reducing the need for personal contact between individual staff and recipients. This objective had the potential to reduce the accountability rights of citizens by restricting their ability to raise questions about their individual cases.

The first iterations of Robodebt were particularly antagonistic towards individual accountability. For instance, the initial letter from DHS informing people of their alleged debt simply referred them to the online portal and did not even give a telephone number to contact.<sup>lxiii</sup> Some improvements were later introduced, including the inclusion of a telephone number,<sup>lxiv</sup> but recipients continued to have great difficulty in communicating with the officials dealing with their particular cases.

In addition to the limited opportunities for recipients to engage directly with those handling their cases, DHS also operated a formal system for those wishing to lodge complaints.<sup>lxv</sup> The large number of customer complaints about Robodebt forced the department to expand the system and to attempt to identify potential systemic issues. However, the more serious complaints were dealt with by the Integrity and Information Group which sought to align its responses with the department's dominant





narrative about the success and legitimacy of Robodebt. The group did not communicate the substance of complaints to other relevant sections of the department. The process thus became more a matter of damage control and media management than the genuine pursuit of feedback which accountability to individuals ought to be. Recipients who took their complaints to the media were likely to find their personal details leaked to media outlets sympathetic to the government.<sup>lxvi</sup>

### 3.4 Conclusion

The Scheme was a dark chapter in the history of Australian public administration. Like all major failures, it was due to a combination of many factors. As the Commission has revealed, one important element was the culture of the public servants involved, particularly at the more senior levels. Their behaviour in many respects fell short of the standards expected of a professional career public service as outlined in the APS values and Code of Conduct. These collective weaknesses predated the Scheme and remain embedded in the APS culture after the Scheme's abolition. Using the Robodebt experience, which has been so clinically dissected by the Commission, all public servants have the opportunity to reflect on their own values and draw lessons for the future.

## 4 References and Elaborations

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- <sup>i</sup> Government Response. Royal Commission into the Robodebt Scheme (2023) ([www.pmc.gov.au/sites/default/files/resource/download/gov-response-royal-commission-robodebt-scheme.pdf](http://www.pmc.gov.au/sites/default/files/resource/download/gov-response-royal-commission-robodebt-scheme.pdf)).
- <sup>ii</sup> See *Public Service Act 1999* s 10 (APS Values) and s 13 (The APS Code of Conduct). Independence is implicit in Value 1 ('professional, objective') and Value 5 ('is apolitical and provides the government with advice that is frank, honest, timely and based on the best available evidence'). Legality is implicit in Value 2 ('acts with integrity') and referred to in Value 4 ('open and accountable ...under the law') and Code of Conduct 4 ('must comply with all applicable Australian laws') and 5 ('must comply with any lawful and reasonable direction'). Collaboration is referred to in Value 1 ('works collaboratively'). Accountability is referred to in Value 4 ('is open and accountable to the Australian community under the law and within the framework of ministerial responsibility').
- <sup>iii</sup> For a summary of the Scheme and its various stages see Report of the Royal Commission into the Robodebt Scheme ('Report') <https://robodebt.royalcommission.gov.au>, xxiii-xxxiii.
- <sup>iv</sup> The right of resistance to unlawful directions is implicit in Code of Conduct 4 ('must comply with all applicable Australian laws') and Code of Conduct 5 ('must comply with any lawful and reasonable direction..').
- <sup>v</sup> Report 14-17.
- <sup>vi</sup> Report 37.
- <sup>vii</sup> The Commission recommended (Recommendation 15.2, a recommendation that the government has accepted), that legal advices should be included with New Policy Proposals (NPPs) Government Response, Royal Commission into the Robodebt Scheme (2023) ([www.pmc.gov.au/sites/default/files/resource/download/gov-response-royal-commission-robodebt-scheme.pdf](http://www.pmc.gov.au/sites/default/files/resource/download/gov-response-royal-commission-robodebt-scheme.pdf)), 17.
- <sup>viii</sup> Report 88-91. The DHS officials referred to are Mark Withnell (general manager, business integrity), Malisa Golightly (deputy secretary) and Kathryn Campbell (secretary). Ms Golightly is now deceased and was unable to be questioned by the Commission. She was a driving force behind the rapid development of the Robodebt Scheme and main drafter of the relevant executive minute and policy proposal. She can be presumed to have known about the deliberate suppression of the need for legislative change. Under cross-examination, Ms Campbell claimed not to have known about the omission of reference to legislative change in the final policy proposal. Overall, her stance was that DSS had carriage of legislative issues and could be relied on to see that they were attended to (Hearing 12, 11 November 2022, 985-7). More generally, Campbell was deeply committed to pursuing the government's agenda of saving money and being tough on welfare cheats. This over-zealous level of commitment is underlined by her later alleged attempts, after moving to the secretaryship of DSS, to undermine her well-respected successor at DHS, Renee Leon, with her minister over the 'extent of her responsiveness' (Hearing 38, 28 February 2023, 3996-7). Ms Leon claimed that her subsequent dismissal by Scott Morrison (along with four other secretaries) was for commitment to 'frank and fearless advice'.
- <sup>ix</sup> The DSS officials referred to are Serena Wilson (deputy secretary) and Finn Pratt (secretary). Under cross examination, Mr Pratt admitted ignorance of the details of the proposed Scheme and claimed complete confidence that his deputy, Ms Wilson, and staff under her direction, would have brought any significant serious problems to his attention (Hearing 11, 10 November 2022, 893, 899). Ms Wilson mistakenly assumed that DHS, after being informed of legal issues with the proposal and not proceeding with legislative change, must have withdrawn it or seriously modified it. She admitted that, in retrospect, she should have put her doubts about the proposal in writing and formally informed the

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Minister through Mr Pratt (Hearing 10, 9 November 2022, 791). This would have brought the issue of legislation to the attention of ministers and the cabinet before the policy was allowed to progress. One factor leading DSS to hesitate over openly confronting DHS included potential confusion over responsibilities. Though DSS had general oversight over welfare policy, including legislative issues, DHS owned delivery policy and was clearly sensitive about suspected interference from DSS. In addition, on the Robodebt proposal, the Social Security Minister, Scott Morrison, dealt directly with the DHS Secretary and her staff rather than working through DSS.

<sup>x</sup> Report 303. The Commission lays much of the blame for delay on the DHS secretary, Renee Leon. At the very end, however, it was Ms Leon who showed professional integrity by officially cancelling the illegal raising of debts when her minister, Stuart Robert, initially demurred.

<sup>xi</sup> Report 14-17 and throughout.

<sup>xii</sup> Report 185-9. The acting secretary was a deputy secretary, Barry Jackson, and the acting chief counsel was a deputy general counsel, Glyn Fiveash. The secretary was Kathryn Campbell and the chief counsel Annette Musolino.

<sup>xiii</sup> The chief counsel was Annette Musolino who was extensively questioned by the Commission (Hearings 27, 30 January 2023; 28, 31 January 2023; 39, 1 March 2023). Under cross-examination, Ms Musolino claimed that the reason she did not support the call for an external opinion from the AGS in 2017 was that the legal case for Robodebt had been endorsed by DSS (which had now repudiated its original 2014 advice that the use of averaging as sole evidence was illegal) and that DSS had responsibility for administering the legislation (Hearing 27, 30 January 2023, 2642-5). Subsequent endorsement from the Ombudsman allegedly gave her additional confidence. The Commission, however, argued that, as a legal expert herself, she must have sensed that the case for Robodebt was weak and would not withstand expert scrutiny. Her real reason for not proceeding with the external reference must therefore have been fear of exposing the unsafe grounds on which the Scheme was based and thereby embarrassing the Department and the Minister (eg Report 268). The phrase 'not to scare the horses' comes from an email written by the deputy secretary, Malisa Golightly to Ms Musolino and another deputy secretary, Jonathan Hutson (Report 189). Ms Musolino was also cross-examined on her department's subsequent reaction to adverse decisions from the Administrative Appeal Tribunal (AAT) (Hearing 28, 31 January 2023, 2746-9). Counsel criticised her decision to neither accept nor appeal the decisions, thus effectively ignoring them. This further revealed the lengths that the department went in order to defend a policy that it ought to have flagged as of questionable legality.

<sup>xiv</sup> Report 192.

<sup>xv</sup> The DSS principal legal officer was Anne Pulford. Like her counterpart in DHS, Annette Musolino, she was a trained and experienced lawyer and was criticised by the Commission for uncritically accepting the argument that using averaging as a 'last resort' could remove the legislative impediment. In her defence, Ms Pulford claimed that her role was to point out legal risks not to recommend how they should be dealt with, a position that would exonerate her from all responsibility for the actions of her superiors (Hearing 5, 2 November 2022, 183).

<sup>xvi</sup> The DSS officials referred to are Serena Wilson (deputy secretary) and Finn Pratt (secretary). Ms Wilson, who had the total confidence of Mr Pratt, was effectively in charge of the oversight of the Robodebt legislation and must carry a large share of responsibility for the prolonged delay in seeking clarification of the legal situation. At the same time, she is one of the few senior officials to show genuine remorse over her role in the policy failure. At the hearing, she admitted to finally realising in 2017, after the Ombudsman's first inquiry and two years after the Scheme was first approved, that Robodebt was using illegal averaging. She also confessed to having kept quiet about her discovery, an omission for which she was now ashamed. One factor in her silence had been that she had a poor relationship with Kathryn Campbell who had by then moved from DHS to DSS and did not tolerate dissent (Hearing 10, 9 November 2023, 794-5).

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<sup>xvii</sup> In 2018-19, a new Ombudsman, Michael Manthorpe, conducted a second inquiry into Robodebt, investigating the administration of the Scheme. This time, in response to widespread public questioning, the Ombudsman considered that the legal situation should be independently clarified and included a comment on legality in a draft report. In the event, after objections from the DHS secretary, Renee Leon, he made no reference to the issue partly because the issue was already before the courts and partly out of a concern to maintain good relations with DHS while he helped improve the Scheme's administration. When appearing before the Commission, Mr Manthorpe described meetings he and a legal colleague had had with DHS legal staff in which the question of legality was raised. DHS steadfastly maintained that the Scheme was legally sound, a position repeated by the secretary (Hearing 44, 8 March 2023, 4741-2). He and his colleague still had doubts and favoured resolution of the issue by external advice. However, given the obstinacy with which the Department held to its (mistaken) view he considered that any recommendation coming from him would be ignored. He therefore considered that the only practicable solution was to wait for a court decision. Under questioning, he agreed that his silence would be (wrongly) interpreted as having provided support for the department's position. He regretfully recognised the irony that his office, though it had all along had legal doubts and favoured referral to the Australian Government Solicitor, should have been used as the main authority in favour of the alleged legality of Robodebt (ibid 4748-9).

<sup>xviii</sup> The value of truthfulness for public servants is implicit in the concepts of integrity and honesty referred to in the APS Values (1 and 5) and the APS Code of Conduct (1). It is reflected, for example, in the convention that any mistaken response to a parliamentary committee must be immediately corrected.

<sup>xix</sup> The DHS deputy secretary was Malisa Golightly and the secretary was Kathryn Campbell. See above note viii.

<sup>xx</sup> Report 174. The secretary was Kathryn Campbell.

<sup>xxi</sup> Report 581.

<sup>xxii</sup> Report 268. The new DHS secretary was Renee Leon and the chief legal counsel was Annette Musolino. Reacting to public criticism from an academic expert and former AAT member, Professor Terry Carney, Leon asked legal counsel whether the department had been at fault. In response, Ms Musolino repeated the department's view that no legislative change was needed, quoting the Ombudsman's (questionable) endorsement but giving no legal reasoning.

<sup>xxiii</sup> Report 224, 582.

<sup>xxiv</sup> Report 270.

<sup>xxv</sup> Report 237.

<sup>xxvi</sup> Report of the Royal Commission into the Home Insulation Program (2014). In his report on the Commission's report (Learning from Failure (2015), Professor Peter Shergold drew attention to the lack of a written record about crucial decisions and recommended that the Australian Public Service Commissioner institute a service-wide policy giving guidance on keeping records, a recommendation referred to by Renee Leon (Hearing 38, 28 February 2023, 4000) and repeated by the Robodebt Commission (Report 646) (recommendation 23.8). This recommendation is among those accepted by the government. Government Response. Royal Commission into the Robodebt Scheme, 39.

<sup>xxvii</sup> The division director was Tenille Collins and the deputy secretary Malisa Golightly (Hearing 41, 3 March 2023, 4034).

<sup>xxviii</sup> Report 46.

<sup>xxix</sup> Report 121-2.

<sup>xxx</sup> Report 124. The deputy secretary was Malisa Golightly. Scott Britton, national manager, Customer Compliance Branch, DHS, told the Commission there was 'difficulty in giving bad news or alternate views to the deputy, Golightly...there was a general cultural view around no one gives bad news. So fix it - get on with it and fix it.' (Hearing 35, 23 February 2023, 3729). The DHS media spokesperson, Hank Jongen, reported an angry and dismissive response from Ms Golightly when he told her about difficulties recipients were having with the system (Hearing 28, 31 January 2023, 2849-50).

<sup>xxxii</sup> Report 126-7, 172-3, 392. Colleen Taylor, a compliance officer in DHS, told the Commission that she had complained to her superiors about new streamlined procedures for ignoring documentation that might be used to reduce or remove a supposed debt from a customer (Hearing 19, 30 December 2022, 1743-52). She likened this to legalised theft from customers. Her advice was ignored. Later, in response to a general message from the secretary (Kathryn Campbell) assuring staff that the new system involved no major changes from previous practice, she wrote again directly to the secretary saying that she, the secretary, must be being misinformed about the major changes in assessing debts. She was then interviewed by two senior SES officers who claimed tendentiously that she was simply pointing out that the new system was quicker than the old. Having made every effort to convince her superiors that the Scheme was flawed and unjust and having not been listened to, she gave up in despair and retired soon after.

<sup>xxxiii</sup> The Commission was particularly scathing of the lack of legal professionalism in the in-house legal divisions and made several recommendations aimed at strengthening their role as independent legal advisers and upholders of legal principles (recommendation 19.1-12), recommendations that the government has accepted. Government Response. Royal Commission into the Robodebt Scheme, 24-9.

<sup>xxxiii</sup> The DHS principal legal officer dealing with Robodebt, Anne Pulford, stated that it was her role simply to report on legal issues and not to be concerned about whether the policy stream had taken them on board (Hearing 5, 2 November 2022, 183).

<sup>xxxiv</sup> The Commission recommended improved procedures to enable frontline staff to give feedback to senior management (recommendations 13.1 and 13.2), recommendations that the government has accepted. Government Response. Royal Commission into the Robodebt Scheme, 14-15.

<sup>xxxv</sup> Report 2-6.

<sup>xxxvi</sup> The secretary was Finn Pratt, secretary of DSS during Robodebt and previously CEO of Centrelink and secretary of DHS (Hearing 11, 10 November 2022, 842-3).

<sup>xxxvii</sup> Report 7.

<sup>xxxviii</sup> The general manager, Business Integrity, DHS, was Mark Withnell (Report 30). Mr Withnell was reported to believe that DHS were the only people who really understood the issues ('we know boats'). This confidence is invalidated by the fact that many in DHS had a poor grasp of the legal issues raised by Robodebt and should have paid more attention to the legal critique emanating from DSS.

<sup>xxxix</sup> The DHS secretary at the time was Kathryn Campbell.

<sup>xi</sup> Kathryn Campbell was now the DSS secretary and Renee Leon was the DHS secretary. Appearing before the Commission, Ms Leon claimed that lack of 'comity' from Ms Campbell and fear of her manipulating a media response prevented her from immediately passing on the opinion. She also claimed that Ms Campbell, as former DHS secretary and architect of Robodebt, still took a keen interest in the Scheme and had undermined her with her Minister, Stuart Robert, saying that she was insufficiently devoted to the government's agenda (Hearing 38, 10 February 2023, 3995, 4042).

<sup>xli</sup> Report 519, 532-9. A senior lawyer who had worked in both DHS and DSS legal divisions, Anna Fredericks, testified that relations between the two divisions were often strained (Hearing 26, 27 January 2023, 2515-6).

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<sup>xlii</sup> Report 532.

<sup>xliii</sup> Report 529-31. As the Commission points out, the injunction to collaborate was largely ignored by most individual agencies, not just DSS and DHS, and the OLSC did not seek to impose compliance.

<sup>xliiv</sup> Report 431. The practice whereby each department kept legal advice confidential unless asked for was reported by Murray Kimber, a DSS branch manager, in his transcript to the Commission (Exhibit 2-2114, 10). In support of its rebuttal of departmental legal privilege the Commission quotes a number of authorities including a briefing from the Australian Government Solicitor and the OLSC's directions, Report 439, note 93.

<sup>xliiv</sup> Report 455. The DHS response was from the deputy secretary, Malisa Golightly, who deliberately avoided answering the ATO's questions.

<sup>xlivi</sup> Report 533.

<sup>xlvii</sup> Report 361-73.

<sup>xlviii</sup> The government has accepted the Commission's recommendations (12.1 and 12.3) about improving consultation with advocacy groups. The government has also accepted in principle a recommendation (12.2) that consideration be given to establishing reference groups of customers to provide feedback to government, Government Response. Royal Commission into the Robodebt Scheme, 12-13.

<sup>xlix</sup> Report 207. In evidence to the Commission, Christopher Birrer, a current official with Services Australia tasked with responding to the Commission, observed that the complaints mechanism under Robodebt did not fully comply with normal standards because it did not provide an adequate feedback loop to the Department as whole. Instead all general complaints were handled by the information and integrity group, reporting to deputy secretary Malisa Golightly, who were determined to suppress systemic criticism and to maintain the official narrative that the Scheme was simply an extension of longstanding practice (Hearing 23, 23 January 2023, 2200).

<sup>i</sup> Report 139

<sup>ii</sup> Report 157, 159, 163, 260

<sup>iii</sup> APS value 4.

<sup>iiii</sup> Report 645-6.

<sup>liv</sup> Report 578. As the Commission pointed out, the deceit lay in the claim that when the original 2014 advice was given it had not been understood that recipients would have the opportunity to correct mistaken information or that averaged income would only be used if attempts had been made to obtain information from the recipient and no other information was available. These assumptions were then allegedly nullified by the actual administration of the Scheme. However, the Scheme always allowed averaging as the sole evidence for debt and the 2014 advice, that legislative change was needed, remained valid throughout the life of the Scheme. The report (221) names three DSS staff as having knowingly misled the Ombudsman: Russell De Burgh, Serena Wilson and Catherine Halbert.

<sup>lv</sup> The chief counsel was Annette Musolino and the deputy secretary Malisa Golightly. Other instances of dishonest responses to the Ombudsman included refusals to give complete figures on compliance activity and data modelling. Report 580-81.

<sup>lvi</sup> Report 224. The Ombudsman's office contributed to its own ineffectiveness by not pursuing its own doubts about Robodebt. Even if the Ombudsman's office did not have sufficient legal expertise to make its own independent legal inquiry, at the very least it should have publicly insisted that the departments seek an expert external opinion from the AGS. That it failed to do so twice is testament not only to the ethical duplicity of senior public servants from DSS and DHS, but also to its own



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professional timidity. Regulators are supposed to act as independent watchdogs calling out wrongdoing without fear or favour. Another external regulator, the Office of the Australian Information Commissioner (OAIC), could also be criticised for not pursuing the issue of potential breaches of privacy under Robodebt with sufficient rigour (Report 627).

<sup>lvii</sup> Report 563. The secretary was Finn Pratt who told the Commission that he could not remember being told about any AAT decisions, in spite of the media publicity. He gave as a reason the fact that he was heavily involved in other issues in his portfolio, including the NDIS (National Disability Insurance Scheme) and that he had full confidence in his own staff, as well as DHS staff, to handle any Robodebt issues, confidence that he now saw to have been misplaced (Hearing 11, 10 November 895).

<sup>lviii</sup> Report 555.

<sup>lix</sup> The Commission recommended (recommendation 20) that DHS and DSS develop better procedures for notifying senior management about AAT cases that raise significant legal or policy issues, a recommendation accepted by the government. Government Response. Royal Commission into the Robodebt Scheme, 30.

<sup>lx</sup> An extended master-class in bureaucratic evasion was delivered by Kathryn Campbell, former secretary of DHS and DSS, over four hearings (Hearings 11, 10 November; 12, 11 November; 15, 7 December; 43, 7 March)

<sup>lxi</sup> For examples of less than transparent responses to questions at Senate estimates see the refusal of DHS senior officials to accept that Robodebt involved a change in the onus of proof for debt (Commonwealth of Australia, Senate Community Affairs Legislation Committee 24 October, 2019, 192-4) and the claim by several senior officials not to be aware of whether any adverse AAT decisions had been appealed against (Commonwealth of Australia, Senate Community Affairs Legislation Committee 29 October, 2020, 117-20).

<sup>lxii</sup> Commonwealth of Australia, Senate Community Affairs References Committee (2017), Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative; Commonwealth of Australia, Senate Community Affairs References Committee (2022), Accountability and Justice. Why we need a Royal Commission into Robodebt.

<sup>lxiii</sup> Report 143-4.

<sup>lxiv</sup> Report 161.

<sup>lxv</sup> Report 207.

<sup>lxvi</sup> The practice of publicly disclosing details of media complainants was later abandoned, according to Christopher Barrer, deputy Chief Executive Officer, Services Australia (Hearing 23, 23 January 2023, 2182)



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