



THE LAW SOCIETY
OF NEW SOUTH WALES

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16 July 2019

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: mike.clayton@lawcouncil.asn.au

Dear Mr Smithers,

Centrelink Compliance Program and related automated processes

Thank you for the opportunity to provide input on the discussion paper 'Centrelink Compliance Program and related automated processes' to inform possible Law Council advocacy and recommendations in relation to the Online Compliance Intervention (OCI) automated debt recovery system operated by the Department of Human Services (DHS) through its agency Centrelink.

We understand that the OCI has been the subject of investigation and two reports by the Commonwealth Ombudsman (2017 and 2019 Ombudsman Reports)¹ and a Senate Committee Inquiry in 2017² which may address some of the relevant issues.

We appreciate the purpose of the discussion paper is to identify key issues, provide additional background and make preliminary observations. The Law Society's views on the key issues are informed by our Public Law, Privacy and Data Law, Indigenous Issues and Human Rights Committees. The headings below are those used in the discussion paper.

1. The soundness of the legal basis for the OCI system and any legal implications relating to its implementation

(a) Creation of a debt

The Law Society echoes the Law Council's concern, as outlined in the discussion paper, about whether the calculating of debts by way of averaging income from Australian Taxation Office (ATO) data satisfies the requirements of sections 1222A and 1223 of the *Social Security Act 1991* (Cth) (the Act) to create a debt.

The Law Society suggests that further consideration be given to Professor Terry Carney's argument that raising debts by averaging ATO income data is inconsistent with the

¹ Commonwealth Ombudsman, *Centrelink's Automated Debt Raising and Recovery System* (April 2017); Commonwealth Ombudsman, *Centrelink's Automated Debt Raising and Recovery System: Implementation Report* (April 2019).

² Senate Standing Committee on Community Affairs, *Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative*, Report, 21 June 2017.

provisions of the Act because section 1222A requires a debt be raised “if and only if” the Act provides for it. As Carney notes, the allowances (Newstart and Youth Allowance) affected by the OCI are required to be assessed fortnightly to account for income fluctuations,³ a requirement that is not being undertaken as part of the OCI system. The OCI algorithm assumes the customer has earned a consistent income over the payment period, despite Newstart and Youth Allowance recipients typically being employed on a casual or temporary basis. We note also that the DHS references only one type of data – taxable income provided by the ATO – even though over the relevant period customers will have reported to Centrelink a range of other data. As such, the OCI substitutes the “legally required precise and variable specific fortnightly amounts” of these allowances,⁴ arguably rendering the raising of debts inconsistent with the provisions of the Act and unlawful.

The Law Society also suggests that if raising debts under the OCI system is inconsistent with the provisions of the Act, this has implications for Australia’s compliance with the *International Covenant on Economic, Social and Cultural Rights*, which at Article 9 provides for the right to social security. General Comment 19 of the Committee on Economic, Social and Cultural Rights states that violations of the right to social security can include “the failure to enforce relevant laws or put into effect policies designed to implement the right to social security”.⁵

(b) Addition of a penalty

The Law Society is concerned that the application of a 10% penalty fee for debts that may be incorrectly calculated is fundamentally inappropriate.⁶ We welcome positive changes made by the DHS such as the removal of an automatic application of a 10% penalty; the penalty now only applies to persons who do not go online, telephone the DHS or respond to DHS calls to provide evidence of a reasonable excuse.⁷ We also welcome the amendments to initial letters flagging the penalty, avenues for review and the ability to provide information about a reasonable excuse to a compliance officer.⁸ We support the Ombudsman’s recommendation that for debts raised prior to 27 May 2017 additional correspondence should be sent detailing why the penalty was applied and providing an option to advise of personal circumstances that may affect the likelihood of a successful review.⁹

(c) Requirement to prove or disprove a debt

The Law Society considers it is unreasonable for Centrelink effectively to reverse the onus of proof by requiring recipients to disprove the debt raised by the OCI. We agree that, without a provision for ‘onus of proof’ in the statute, the practice may not withstand judicial review in accordance with the Full Federal Court decision of *McDonald v Director-General of Social Security*.¹⁰

³ T Carney, “Vulnerability: False Hope for Vulnerable Social Security Clients” (2018) UNSW Law Journal 41 (3), 7 citing sections 1068 and s 643 of the *Social Security Act 1991* (Cth).

⁴ T Carney, “Social Security and Robo-Debt” (5 June 2018) Austaxpolicy: The Tax and Transfer Policy Blog, accessed 11 June 2019 < <https://www.austaxpolicy.com/social-security-robot-debt/> >.

⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 19: The right to social security (art. 9), 39th session, UN Doc E/C.12/GC/19 (4 February 2008).

⁶ See also Law Society of NSW, *Submission to LCA: Senate Inquiry into the design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better management of the Social Welfare System initiative* (2017), 2.

⁷ Commonwealth Ombudsman, *Centrelink’s Automated Debt Raising and Recovery System*, Report No 1 (2019), [2.13].

⁸ *Ibid*, [2.2].

⁹ *Ibid*, [4.8] (Further Recommendation 1 (Recovery Fees)).

¹⁰ (1984) 1 FCR 354.

We note further Carney's assertion that the OCI system effectively replaces Centrelink's exercise of its coercive statutory powers for information gathering.¹¹ By requiring the recipient to disprove the debt, the OCI arguably fails to give effect to the objective of the information gathering powers which were intended to make social security "easy to administer" with a "logical structure and flow", reflecting "best practice in administration and customer service".¹²

(d) Standard of evidence

In our view, the argument in the discussion paper concerning the appropriate "standard of evidence" would benefit from further development. We note the suggestion in *Briginshaw v Briginshaw* that the standard of evidence required should reflect the seriousness or gravity of consequences flowing from the finding,¹³ and Carney's suggestion that the standard of evidence required of the Department was published in Centrelink guidelines predating the OCI, stating that "the raising and recovery of debts must satisfy legislative requirements. Evidence is required to support the claim that a legally recoverable debt exists."¹⁴ The Senate Inquiry found that it is "basic legal principle that in order to claim a debt, a debt must be proven to be owed. The onus of proving a debt must remain with the department. This would include verifying income data in order to calculate a debt."¹⁵

2. The availability and effectiveness of review and redress in response to contested actions of the OCI

(a) Tiers of review

The Law Society welcomes the amendments made to the review process.¹⁶ Revised procedures for first contact with recipients now provide an option to request a review, which is conducted by a compliance officer who reassesses the person's whole debt including recovery fees. If the recipient pursues further review or would prefer a formal initial review, a further review is conducted by an Authorised Review Officer who considers any original and new information or evidence the person may provide.¹⁷ The recipient is subsequently entitled to an appeal at the Social Services and Child Support Division of the Administrative Appeals Tribunal (AAT) and can request a further review at the AAT. We note recipients are not subject to any time limit for reassessment which can occur at any point once the recipient contacts the Department.¹⁸

¹¹ T Carney, "Vulnerability: False Hope for Vulnerable Social Security Clients" (2018) UNSW Law Journal 41 (3), 7.

¹² Commonwealth Parliamentary Debates, Senate, 20 September 1999 (Senator Ian Campbell).

¹³ (1938) 60 CLR 336.

¹⁴ T Carney, 'The New Digital Future for Welfare: Debts without Legal Proofs or Moral Authority' (2018) *University of New South Wales Law Journal Forum*, 1, 3 citing Department of Human Services, 'Acceptable Documents for Verifying Income when Investigating Debts' (Operational Blueprint 107-02040020).

¹⁵ Senate Community Affairs References Committee, *Parliament of Australia, Design, Scope, Cost-Benefit Analysis, Contracts Awarded and Implementation Associated with the Better Management of the Social Welfare System Initiative* (2017), [6.13].

¹⁶ Commonwealth Ombudsman, *Centrelink's Automated Debt Raising and Recovery System*, Report No 1 (2019), [2.4], [2.56].

¹⁷ Australian Government (Department of Human Services), Submission to the Senate Community Affairs References Committee: Design, Scope, Cost-Benefit Analysis, Contracts Awarded and Implementation Associated with the Better Management of the Social Welfare System Initiative, p 10.

¹⁸ Commonwealth Ombudsman, *Centrelink's Automated Debt Raising and Recovery System*, Report No 1 (2019), [2.8].

Additionally, we note that initial correspondence failed to clearly identify review rights, timeframes and the process available to recipients.¹⁹ While there have been amendments to the initial letter to recipients,²⁰ information about rights and the review process is lacking for recipients who received their initial letter prior to the amendments.

(b) Model litigant protocols

The Law Society notes Carney's position that the DHS has contravened model litigant protocols through deliberate non-acquiescence as evidenced by several AAT1 decisions invalidating the processes, failure to amend the system and the failure to publish these decisions.²¹ The Law Society supports Carney's suggestion that selective publication of AAT1 decisions and potential future judicial challenge to determine the legal basis of the scheme may remedy the situation.²² We suggest the AAT should be approached to publish decisions relating to the OCI.

(c) *Masterton v Secretary, Department of Human Services of the Commonwealth*

In the Federal Court case of *Masterton v Secretary, Department of Human Services of the Commonwealth*, whilst the DHS has dropped the debt, the matter remains on foot pending further submissions which are expected to be heard in early August 2019. The decision in this matter is likely to be influential.

We note also the matter of *Amato v The Cth* which was recently filed by Victoria Legal Aid in the Federal Court, and which challenges the OCI. A case management hearing is set for 26 July 2019.

3. The impacts of the OCI on individuals, organisations and/or legal advisers

We understand the DHS is endeavouring to produce clearer information for recipients by engaging language and literacy experts, and ensuring the OCI service is sensitive to vulnerable persons by conducting user testing and consulting with welfare groups.²³ We recommend these initiatives be a continuing focus for the DHS.

Additional measures should also be considered which alleviate the impact of the service on community lawyers and legal aid commissions. As outlined in the Law Council's discussion paper, CLCs and legal aid commissions across Australia have limited resources for meeting the demand for assistance with Centrelink debts. We note reports of the Welfare Rights Centre having to turn away 20 to 30 per cent of people seeking assistance,²⁴ and the significant resources required to deal with individual cases which often involve attempting to average pay, locate payslips and contact previous employers on behalf of clients.²⁵

¹⁹ Law Society of NSW, *Submission to LCA: Senate Inquiry into the design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better management of the Social Welfare System initiative* (2017), 3.

²⁰ Commonwealth Ombudsman, *Centrelink's Automated Debt Raising and Recovery System*, Report No 1 (2019), [2.28].

²¹ T Carney, *The New Digital Future for Welfare: Debts without legal proofs or moral authority?* 2018, 14.

²² T Carney, "Vulnerability: False Hope for Vulnerable Social Security Clients" (2018) UNSW Law Journal 41 (3), 7 citing *Social Security Act 1991* (Cth) ss 1068 and s 643.

²³ Commonwealth Ombudsman, *Centrelink's Automated Debt Raising and Recovery System*, Report No 1 (2019) [2.31].

²⁴ Law Council of Australia, *The Justice Report: People experiencing economic disadvantage*, August 2018, 43.

²⁵ *Ibid*, 44.

The Law Society supports the Ombudsman's recommendations that correspondence should explain more clearly how the debt was raised, noting the relevance of personal circumstances to the review process, as well as the consequences of failing to update information and the consequences of ATO averaging.²⁶ We continue to have concerns regarding the more than one million letters that were sent prior to the improvements in their failure to explain adequately how the debt was raised, penalties, and consequences of ATO averaging and review options. We suggest the DHS send further correspondence (both electronically and in hard copy) that clearly identifies how the debt was raised, penalty amounts and when penalties will be applied, the steps involved in reviewing the debt, the consequences of ATO averaging, and avenues for review.

4. The effectiveness, necessity, and proportionality of the OCI

The Law Society has concerns about privacy considerations arising from the documented release by the DHS of personal information and whether this falls within the legislative provisions available to the DHS under section 162 of *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) and Chapter 6 of the Australian Privacy Principles.²⁷

Additionally, we note amendments have been made to the system by the DHS through additional assistance for vulnerable customers,²⁸ a soft roll-out of the Check and Update Personal information (CUPI) system for recipients as of 1 October 2018 and assurances that no customer will be using the previous Employment Income Confirmation (EIC) system without staff assistance by March 2019.²⁹ However, the Law Society suggests that although these processes work towards making the process more transparent generally, they must continue to be monitored through consultation of relevant stakeholders to ensure their compatibility and procedural fairness.³⁰

We note ongoing instances where the conduct of the DHS towards customers seeking to resolve their disputes lacks transparency. An example is provided by the recent case of *Justin Warren and Department of Human Services (No 2) (Freedom of information)*.³¹ In that case the DHS refused to release documents which the Information Commissioner had ordered be released pursuant to an FOI request. The documents, relating to risk plans, weekly reports and issues reports, were to be released on Friday 5 July and on that day, the Applicant was informed that the DHS would appeal the Information Commissioner's decision to the AAT.

Additionally Centrelink's conduct appears disproportionate to the public benefits gained from the OCI. Our members report instances of Centrelink continuing to pursue recovery of wrongly calculated debts, charge interest and threaten to implement Departure Prohibition Orders for debts already identified as incorrect. As reported in the media,³² costs expended to date exceed \$400 million with approximately \$500 million recovered.

²⁶ Commonwealth Ombudsman, *Centrelink's Automated Debt Raising and Recovery System*, Report No 1 (2019), [4.10]-[4.12] (Further recommendations 2 and 3).

²⁷ Law Society of NSW, Submission to LCA: 'Senate Inquiry into the design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better management of the Social Welfare System initiative (2017), 3.

²⁸ Commonwealth Ombudsman, *Centrelink's Automated Debt Raising and Recovery System*, Report No 1 (2019) [2.71].

²⁹ *Ibid* [4.4].

³⁰ *Ibid* [2.74].

³¹ [2019] AICmr 30 (6 June 2019).

³² See for example "Robodebt scheme costs government almost as much as it recovers", *The Guardian*, 22 February, 2019, <https://www.theguardian.com/australia-news/2019/feb/22/robodebt-scheme-costs-government-almost-as-much-as-it-recovers>.

5. Potential amendments or alternatives to the OCI by means of which any concerns relating to the above could be addressed whilst meeting the objectives of the current system

Noting the findings of the 2019 Ombudsman Report that the system has improved, the Law Society maintains that the substantive issues relating to onus of proof and incorrect calculation of debts remain unresolved. The introductions of the CUPI and amendments to the notice of decision letter sent to recipients using this platform are positive steps. However, failure to amend the process for existing debts and EIC users does not address concerns about transparency or adequate understanding of how the debts have been raised, review options, the consequences of failing to provide updated information to the Department and of the use of averaging ATO income in calculating the debts.

The Law Society supports the need for evaluation of future implementation and expansion of the OCI, as raised in the 2019 Ombudsman Report. To this effect the Law Society endorses the Law Council's recommendation of implementing a Justice Impact Assessment to consult with relevant stakeholders to insure the appropriateness of expansion particularly for vulnerable groups.³³

Further, the Law Society questions the appropriateness of the data matching system in its entirety now that the Single Touch Payroll process has come into effect for all employers as of 1 July 2019.³⁴ Single Touch Payroll requires the "real-time reporting" of "employee salary or wages and ordinary time earnings and superannuation contributions,"³⁵ rendering the average income assessment by the ATO as unnecessary.

We would welcome the opportunity to work with the Law Council on any proposed advocacy. If you have any questions please contact Sue Hunt, Principal Policy Lawyer, at (02) 9926 0218 or sue.hunt@lawsociety.com.au.

Yours sincerely,



Elizabeth Espinosa
President

³³ Law Council of Australia, *The Justice Report: People experiencing economic disadvantage*, August 2018, 54.

³⁴ P Hawkins, Parliamentary Library of Australia, *Bills Digest*, No 24 of 2018-19, 13 September 2018, 8.

³⁵ Explanatory memorandum, Treasury Laws Amendment (2018 Measures No. 4) Bill 2018, [3.7].