Victoria Legal Aid

ATTACHMENT 1

Responses to Questions on Notice from the Senate Community Affairs References Committee, Public Hearing, 11 April 2017

QUESTION 1: VLA Response to Ombudsman Report

1. VLA welcomes the opportunity to provide further comment on the report and recommendations contained in the Commonwealth Ombudsman report, 'Centrelink's automated debt raising and recovery system: A report about the Department of Human Services' online compliance intervention system for debt raising and recovery' (the **Ombudsman's report**). We provide this additional statement in answer to Question on Notice 1 and the Additional Question on Notice sent to VLA on 24 April 2017.

2. At the outset we confirm that we share many of the concerns expressed in the Ombudsman report about the scale of the intended roll-out of the Better Management of the Welfare System initiative (**the Initiative**) by the Department of Human Services' (**the Department**), given its lack of consideration for the profound impact it was always going to have on the public. These matters are canvassed in detail in our existing submissions (**VLA Submission**) to the Committee and we do not repeat them here in answer to these further questions.

Broad comment on the Recommendations

3. We do not disagree, in terms, with the recommendations made in the Ombudsman's report.

4. However, in our view, the Initiative – which has at its heart an:
    a. irresponsible shifting of the burden of complex public administration from the Commonwealth to individuals; and
    b. arguably unlawful and, if not unlawful, profoundly irresponsible method of purporting to calculate overpayments and raise alleged debts;

    should be suspended. Accordingly, we do not embrace the Recommendations of the Ombudsman as a solution to the real, and continuing, risks and harm created by the Initiative. This is because the Recommendations do not, and can not (especially given the operational scale of the Initiative) change the two critical flaws in the Initiative raised above.

Limitations of report and recommendations

5. As is unavoidable, the Ombudsman report is also limited in certain ways. Among other things, it is limited by:

    a. The Ombudsman's decision not to comment on the policy rationale behind the OCI process (see, p 4 [1.3] of the Ombudsman's report).

b. Issues the Department did not self-report and which were not known to oversight bodies and individual complainants at the time of the Ombudsman's inquiry (eg, the issues around access to the public program protocol for the Initiative's data-matching exercise, which we discuss below).
c. Key, unknown, facts about the rate at which the OCI as applied by Centrelink was (and will) continue to overcalculate debts (see, p 42 [2.33] of the Ombudsman's report).
d. The Ombudsman's Report does not fully apply or consider its Better Practice Guide for Automated Assistance in Administrative Decision-Making, particularly in respect of findings about accuracy, transparency and accountability.

6. Each of these matters are, in our view, fundamental to understanding and evaluating the design, scope, cost and benefit of the Initiative. While they did not form part of the Ombudsman's report, they remain of considerable importance. The Ombudsman's report should, therefore, also be read in light of these limitations.

Burden shifting and Recommendation 4

7. At p 23 [3.54], the Ombudsman's report concludes that:

> **The OCI Project effectively shifted complex fact finding and data entry functions from the department to the individual…**

8. We note that Recommendation 4 attempts to preserve this critical element of the Initiative while mitigating some of its most obvious, easily recognisable, failures (eg, in relation to customer's incurring financial cost in attempting to obtain bank statements).

9. In our view, shifting of the burden of complex public administration from the Commonwealth to individuals is not appropriate. In this respect, we refer the Committee to the VLA Submission, especially from pgs 7 to 14.

10. We are also concerned that if the threshold criteria for requiring the Department to perform its fundamental administrative functions is that a person has already made failed 'genuine and reasonable attempts to obtain income information from a third party' (see, Recommendation 4(b)):
    - That person will **already** have experienced much of the burden of public administration.
    - There is a real likelihood that the bar for what is 'genuine and reasonable' will:
        - Be applied conservatively by the Department given that the Initiative **is defined by and relies (given its design and scale) on shifting of the burden of public administration from government to the public**.
        - Be applied inconsistently across the large number of people affected by the Initiative.
        - Adversely affect people who have a lesser capacity to demonstrate diligence. This is partly because it does not appear possible given the scale and design of the Initiative for Centrelink and Departmental staff to be meaningfully aware of and

consider the myriad vulnerabilities of those affected by it. Among other things, it does not appear to us that staff will have accessible to them the time and information available to identify what the individual's circumstances may be and make an assessment of whether their efforts are sufficient to discharge the burden. In this respect we refer the Committee to the VLA submission from pgs 10 to 14. We discuss vulnerability further below.

The OCI algorithm, overcalculation of debts and Recommendation 8(b)

The flawed operation of the algorithm within the Initiative

11. At p 8 [3.5], the Ombudsman's report states that:

> **DHS makes a decision about whether a debt exists based on the information is has available within the OCI system. This relies on the person being both willing and able to accurately verify their earning for the review period. If the information about to DHS is incomplete, the amount of the debt may be affected…**

> **We asked DHS whether it had done modeling on how many debts were likely to be over-calculated as opposed to under-calculated. DHS advised no such modeling was done. In our view the absence of modeling means DHS cannot say how many debts may be under-calculated or over-calculated and by what margin.**

12. At 42 [2.23], the Ombudsman's concludes that:

> **In our view the risk of over-recovery of debts from social security recipients should be the subject of more thorough research and analysis.**

13. The Ombudsman's report also further highlights the risk raised by averaging ATO data to calculate debts from p 41 - 44 [2.27] – [2.34]. In particular, at [2.28] – [2.29] the report makes clear that:

> **…the business rules in the OCI that support the debt calculation are comprehensively and accurately capture the legislative and policy requirements…**
>
> **However, the calculation relies on the customer accurately entering variously types of income into the OCI for each previously unverified fortnight of income during the debt period.**

14. We make three comments about these matters. First, the failure of the Department to analyse **at all** the risk of overcalculation of debts when the raw business rules in the OCI were applied under the Initiative is highly regrettable. In our view, given the real and substantial risk that the Initiative will have (and will continue to) lead many people to acquiesce to overcalculated debts is not a tolerable flaw in a government system. Accordingly, the Initiative must be suspended.

15. Second, what the Ombudsman's report makes clear is that the Initiative in its operation was **always** (and remains) primed to produce incomplete data sets as it shifted the burden for reconstructing a verifiable fortnightly employment record up to five years old onto individuals. At the same time, the accuracy of the alleged discrepancies and debts produced by the business rules in the OCI were always going to be undermined by incomplete data sets. In our view, this is a fundamental design flaw. This much was recently accepted by the Administrative Appeals Tribunal in a matter which we refer to in answer to Question 3 below.

16. Third, for the above reasons and the reasons set out in the VLA submissions from pgs 5 to 9, debts raised under the Initiative and based on incomplete data sets are:
    a. Likely to be overcalculated
    b. Arguably raised in an unlawful way
    c. Fundamentally irresponsible and a breach of proper government administration.

17. In these circumstances, we consider that Recommendation 8(b) that the Department 'give further consideration as to how to mitigate the risk of possible over-recovery of the debts' is insufficient to address the risks and realities of overcalculation. In our view, until modeling of overcalculations are performed and made public the Initiative, must be suspended.

Vulnerability and mental illness

18. At 20 [3.40], [3.43] and [3.45], the Ombudsman's report highlights that:

> **DHS has told our office the fully automated system will not be rolled out to vulnerable people**

> **[W]e are concerned the existing vulnerability data may not cover all vulnerable people for the purposes of the OCI**

> **In some instances, customers may become vulnerable because of the debt raising and recovery process itself…**

19. We make three comments about these elements of the report.

20. First, we endorse without reservation, the Ombudsman's conclusion **that the debt raising and recovery process itself is making people vulnerable** (or more vulnerable, in some cases). We have witnessed this in the stories of our clients, some of which are captured in the VLA Submission. We refer the Committee, for example, to Jan and June's stories at pgs 10 to 11 of the VLA Submission.

21. Second, in our experience, it is incorrect that people who are objectively vulnerable have not been subject to the standard form of the Initiative. Whether or not the Department is aware of (and can ever be, in the context of the Initiative) a person's vulnerabilities is, therefore, an important question.

22. Third, while we agree that the Department's:
    a. definition of 'vulnerable' should obviously be extended to include people who have been or are experiencing homelessness; and
    b. VI tool is inadequate to identify vunerable people for the purposes of the OCI;

    we are concerned that these modifications do not address the real and substantial risk that the Initiative will be applied to people who Centrelink is **unable to readily identify as vulnerable**.

23. We anticipate that the Initiative has heightened the undeniable challenge Centrelink faces to identify individuals who will experience difficulties in navigating the specific debt recovery process. This is because, under the Initiative:

    - debt notices are generated and sent to individuals if they fail to respond to the initial 'discrepancy letter' in the short, specified, period. This appears to occur without any contemporaneous human consideration or inquiry whether or not the person may have a vulnerability which would merit a different type of approach;
    - a person who is no longer a recipient of a Centrelink payment or who has not had cause to connect with Centrelink in any intensive way for years will be the subject of the blanket discrepancy letters and debt notices. As a result, Centrelink will be necessarily unable to evaluate these people's vulnerabilities before they embark on the standard format of automated, written, communication.

Transparency and usability

24. At 9 [3.14], the Ombudsman's report asserts that:

> **Good public administration requires a transparent and open decision making process that clearly sets out the issue the person needs to address to challenge a decision and the facts on which the decision is based. This principle continues to apply when decision making is automated.**

Letters

25. We refer the Committee to the VLA submission at pgs 15 – 19 which extends on the lack of transparency which the Ombudsman's report highlights.

26. While we agree that the letters the Department sent to customers before 20 January 2017 were deficient, the current letters are also flawed. In particular, in order to fulfill the transparency requirements of good public administration we remain of the view (for the reasons set out in the VLA submission) that every letter sent to a Centrelink customer asserting a discrepancy or debt which has relied on some form of data-matching should state clearly in the body of the letter (a) the specific legal authority relied on to conduct the relevant data-match and (b) the available public information setting out the data-matching exercise.

Program protocol for the data-matching exercise

27. Access to the public program protocol developed in accordance with the Office of the Australian Information Commission *Guidelines on Data Matching in Australian Government Administration* is not addressed in the Ombudsman's report. We anticipate this is because the Department did not raise with the Ombudsman its refusal to provide access to the public program protocol developed under the Guidelines and notified in the Government Gazette as being available for public collection.

28. We refer the Committee to pgs 15 to 17 of the VLA Submission in relation to the background to the protocol and its function as a key transparency measure in any data-matching exercise. Under the OAIC Guidelines '[t]he purpose of the program protocol is to inform the public about the existence and nature of the data matching program'.

29. We confirm that we know of no entity who has had access to the program protocol. Further, we confirm that on 1 May 2017, VLA received a letter from Minister Tudge which refused VLA access to any 'policies… relating to the online compliance system'. We do not understand, at this stage, whether this refusal extends to the program protocol. We also confirm that we have received no response from the Secretary of the Department following our specific request for access to the program protocol.

Comprehensive evaluation of the OCI in its current form and Recommendation 8(a)

30. VLA understands that the Department states that it 'agreed [to Recommendation 8(a)] on the basis that PWC has been engaged to work with the department on the implementation of this and future measures' (p 51, Ombudsman's report). We fully endorse Recommendation 8(a). We make two comments about the Recommendation and the Department's response.

31. First, it does not appear to us that the description of PWC's involvement with the Department in **implementing** future iterations of the Initiative and future measures will necessary require or include 'a comprehensive evaluation of the OCI in its current form'. VLA is concerned that the description of the work PWC has been briefed to complete will not lead to any genuine exposure of the issues raised by the OCI. At a very minimum, it is clear that PWC's involvement is premised on the continuation of the scheme; such that it seems very unlikely that any consideration will be given to whether or not the scheme should be continued.

32. Second, in our view, the Department's brief to PWC, as well as the comprehensive evaluation completed by PWC, must be made available to the Committee and to the public. In this respect we refer the Committee to Mr Bevan Warner's evidence to the Committee on 11 April 2017, where this issue was the subject of some comment and discussion with the Committee.

QUESTION 2: Impact of the initiative on services and service demand

33. Victoria Legal Aid has experienced a significant increase in demand for legal advice in relation to Commonwealth entitlement and Centrelink matters. In January, we saw a 150% increase for legal information services, most of which were calls to VLA's Legal Help call centre and phone advice provided by the Commonwealth Entitlements subprogram (see table below):

Commonwealth Entitlements Legal Info Sessions

YTD 2015/16 versus YTD 2016/17 for January – April

Jan-16	**Feb-16**	**Mar-16**	**Apr-16**
104	96	114	124
Jan-17	**Feb-17**	**Mar-17**	**Apr-17**
262	234	199	160

34. While we expect that a small number of these may be due to greater visibility of VLA's Legal Help line and position on the Initiative, we attribute the jump in numbers largely to Centrelink robo-debt matters.

QUESTION 3: Outcome of debt-related matters in the Administrative Appeals Tribunal where VLA has acted in the last year

35. Of the debt-related matters for which VLA has acted in the last year in the Administrative Appeals Tribunal, Centrelink robo-debt matters have been among the most recent (prior to November 2016, most of VLA legal aid work at the AAT related to Disability Support Pension appeals).
36. Two recent matters in which VLA has acted have resulted in the AAT referring the debt back to Centrelink to be properly determined, suggesting that calculating a debt by way of algorithms does not provide an accurate outcome.
37. In the decision of 2016/M103550 (24 March 2017) AAT Member Treble determined that the Tribunal was not satisfied that the debt had been correctly calculated by Centrelink.
38. At paragraph 17 the Member Treble states that:

> "The relevant income test for Newstart Allowance requires a person's income to be taken into account when it is first earned, derived or received. A fortnightly income test applies. In this case, no effort has been made by Centrelink to obtain actual wage records… even though such records would very likely be readily available if required. Instead it has simply been assumed that the total year earnings can be apportioned equally to each fortnight across the relevant financial year. However, that is not consistent with the requirements of the legislation. The actual pay records are critical to the proper calculation of the overpayment. Accordingly, Centrelink will need to request and obtain those records from the employer in order to arrive at a correct debt calculation".

39. VLA anticipates that a similar approach will be taken to future AAT robo-debt matters.