Submission to the Senate Inquiry into the Department of Human Services' Online Compliance Initiative

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Lawfulness of debts raised through data matching alone (TOR (a), (e), (g), (h) and (k))

Failure to Accord with Principles of Procedural Fairness and Reasonableness for vulnerable recipients

The inquiry has seen some debate around the description of the initial communication provided under the OCI, what may be termed as a "notice of clarification" or a "notice of discrepancy". For the author, another description of these letters is a notice of potential future decision by default. An administrative body is stating to a citizen that unless they supply information in prescribed forms according to prescribed process, the decision may be automatically taken without further intervention. The potentially defaulted decision is initially tied to an evidence source which, while described "factual in character" by the Department, is in a significant number of cases likely be under-inclusive, over-inclusive or otherwise prone to inaccuracy if not clarified.[2] It is the selectivity and imbalanced nature of the information in addition to its automatic character which must be focussed upon. The inappropriateness of ever applying the OCI dataset broadly is underlined by the commitments of the Department at 1.39 of Appendix A of the Ombudsman Report which promises removal all but "relatively" simple employment situations from the automatic system.[3]

It is my view that reliance upon such a limited information default, supplemented by reverse onus procedures (found to be poorly adapted by the Office of the Ombudsman), has resulted in cases where the statutory standard of reasoning and fair procedures required to accompany the issuance of a debt has not been reached. Victoria Legal Aid provide an excellent summary of the complex statutory scheme in their submission:

> "Under the relevant provisions of the SS Act[4] a debt is only recoverable by Centrelink or the Department if, among other things, it is 'owed to the Commonwealth'[5] and 'a person who obtains the benefit of the payment was **not** entitled for a reason to obtain that benefit'. Each of these requirements connote that there is reasonable and sufficient certainty on the

[1] BCL (Hons), PhD. The author apologises for the length of the submission - it reflects the importance of statutory interpretation, circumstances and context to administrative law analysis.
[2] The Department is clearly on notice as the potential insufficiency of this dataset without further intervention. This submission aims to illustrate the specific circumstances where attributing unexplained discrepancies due to the failure of individuals to "clarify" is unreasonable. I shall outline later why relying upon a similar rate in the manual handling of debt is incoherent argumentation – particularly given the linkages between the systems formed by the interim rollout of reverse onus procedures in July 2015.
[3] The implications of this "refinement" for the economic justifications for the scheme should be costed. Definition of 'relatively simple' is of uncertain ambit.
[4] See Chapter 5 of the SS Act.
[5] See, s. 1222A of the SSA Act.

part of an officer that such a debt does exist or that a person was not entitled to a payment. Moreover, in our recent experience, acting in an application for merits review of a robo-debt in the Administrative Appeals Tribunal (AAT), the 'averaging' which the data-match employs appear to fall outside the circumstances in which, under the SS Act or the Guide to Social Security Law, income is permitted to be averaged over a year."[6]

The Department's defence as to unlawfulness of individual decisions on grounds of procedural fairness or reasonableness, hinges on the claim that there were sufficiently effectively and responsive procedures to permit and *ensure* the submission and integration of additional information relevant to the applicant. It is ***only*** the effective operation of such procedures which can moderate the selectivity of its own evidence and ensure all relevant considerations are incorporated into the eventual decision.

A proper exercise of the statutory power to issue debt notices mandates that the Department provide **"a real opportunity to place before the repository of the power such information as is relevant**" to the criteria driving the decision.[7] In order to ensure this, a decision must ensure that there was **"a substantially effective mechanism of communicating … oral and written information"** to and from the person affected, so as to facilitate their engagement.[8] Three ***cumulative*** and ***interacting*** flaws in the OCI system, support a finding by the Committee that the system did not comply with administrative law requirements such as reasonableness and procedural fairness for key categories of vulnerable recipients.

1. Flaws relating to Adequate Notice and Systems for Information Supply

Existing administrative law cases tend to address how government should facilitate the supply of information to and by an applicant in the context of systems of translation and hearing before inquisitorial tribunals,[9] rather than written communication, phonelines or online systems with individual staff. The reverse onus character and reactive structure of the procedure underpinning the OCI is a key variable underpinning any analysis. For the purposes of administrative law, the question is not simply whether there *is* a website or a phoneline, but how that specific procedure maps onto the statutory task at hand (issuing of debt), the particular circumstances of the individual (especially given SS Act's emphasis upon vulnerability as a relevant consideration), the nature of the decision (here a potentially complex, reverse onus burden of justification to a strict time limit) and other relevant policy factors. Regardless of the form of the procedure, the Courts have been very clear about what the key deliverable is "a real opportunity to place before the repository of the power such information as is relevant". This

[6] See, ss 1068 and 1073 of the SS Act.
[7] SZRMQ v Minister for Immigration and Border Protection [2013] FCAFC 142, Allsop CJ at [9].
[8] *Ibid.*
[9] Administrative law is prone to silences or imbalances in its casebook due to 1) Availability of merits review, which is focused upon getting the 'right' answer not always the narrower questions of legality framed by judicial review principles 2) The limited resources of Centrelink clients given the extremely expensive remedy of seeking judicial review through the Federal Court 3) the reality that High Court's treatment of administrative law is often shaped by concentration of certain categories of cases related to its jurisdiction to review for jurisdictional error under s 75(v) of the Constitution. Any alleged "lack" of cases does not mean that clear general principles and identified contextual factors related to analysing the legality of robodebt are not available. In any event, the heavily circumstantial nature of all administrative law principles means every case may be said to possess a unique or "snowflake" quality.

is secured through the provision of "a substantially effective mechanism of communicating …oral and written information to and from the applicant."

The Office of the Ombudsman has found that the following elements marked the OCI system following its roll out:

- Failure to give a consistent message that DHS would accept alternative forms of evidence, such as bank statements, where a customer was having difficulty gathering payslips or other evidence directly from the employer.
- Failure of DHS to give some customers additional support and assistance to obtain bank evidence when they made genuine and reasonable attempts and other available information is not sufficient.
- The Office of the Ombudsman found: "When the OCI system was first rolled out, customers had 21 days to respond to the initial letter. They could ask for two further extensions online and additional extensions if required by contacting DHS, but the process of asking for an extension was unclear. Given the complexity of collecting historical employment information or the possibility that the customer may not have received the initial letter, we consider the 21 day timeframe was not reasonable or fair in all circumstances"[10]
- The initial failure to expand the modes of communication to registered post or other modes which were clearly more adapted to confirm receipt *and understanding* of the discrepancy letter.
- Up until January 20, a failure to list the relevant phone number on the discrepancy letter.
- Rigid reference to internet after the individual had signalled possible vulnerability/inability to use this.
- Unavailability of the data matching protocol to individuals or their lawyers. (see Victoria Legal Aid submission)
- The failure of letters sent to Centrelink customers to outline the specific legal authority relied on to conduct the relevant data-match and the available public information setting out the data-matching exercise. (see Victoria Legal Aid submission)
- Widespread confusing and inconsistent messages to customers when they tried to contact Centrelink to seek assistance, which in turn led to frustration for customers and staff.

Recommendation: The refinements issued by the Department be accepted as *legally required* rather than voluntary service delivery updates.

Recommendation: The findings of the Ombudsman support a finding that procedural fairness protections adapted to vulnerable recipients were not sufficiently designed into the system before it launched.

Recommendation: Full audits of the period September-February must be carried out to evaluate and moderate the practical impact of these failures on individual applicants, and how failures in procedure may have led to substantive injustices in individual cases.

[10] Office of Ombudsman report, para 3.28.

2. Ensuring compliance with any legal obligation to make any critical inquiries prior to the issuing of a debt.

The notification and informational failings were further compounded by a lack of clarity on the use of Department's own information gathering powers. The requirements of reasonableness and procedural fairness must be understood against the backdrop of the Department's power to help individuals obtain information. Where the individual's circumstances (vulnerability) or engagement indicates that a critical inquiry must be made, it should be made. Otherwise there is a danger that decisions would proceed without proper genuine and realistic consideration of mandatory relevant considerations. The department should adapt its procedures to *proactively* consider whether it would be unreasonable, in the circumstances of their case, to expect an individual to obtain information.

In a standard administrative decision, where the relevant decision-maker has themselves actively sought out information, not merely funnelled a data match with an established rate of potential underinclusion,[11] the imposition of a duty to probe evidence further or make inquiries may be viewed as potentially disproportionate. There are strong reasons to argue that this shifts in a reverse onus procedure with serious financial consequences involving a vulnerable individual. This is especially so where the legislation is not expressly designed to require the individual to *prove* they do not own the debt. I would note in this context, that in a recent case involving the use of university enrolment data to cancel a visa, Justice Nettle found there was a duty to make critical inquiry on a matter central to a decision, even where the individual at the centre of the case had (by hanging up on the Department, failing to respond to letters) done nothing to put the Department on notice as to why the enrolment information it was relying

[11] The fact that the manual system possesses a similar dynamic is hardly a justification, especially given the backdrop of the interim rollout of 2015 which marries the two systems to similar reverse onus procedures. The online system presents discrete issues of transparency and system bottlenecks through automated issue. See Office of the Ombudsman, Appendix A at 1.13-1.16. The findings regarding procedures and usability made by the Ombudsman underline the scale of statistical noise accompanying any comparison of revocation rates between manual and automatic. Analyses must proceed not from framework or conceptual assessment of trends at system level, but from first principles empirical study of the operation of procedures in the context of online and manual. I am gravely concerned about the silenced appeals and recalculations which may inhere in any system featuring the procedural elements found by the Ombudsman.

upon was wrong.[12] Concerns for administrative efficiency may not be sufficient to crowd out common sense fairness in specific cases; government decision making is an inquisitorial process: in this legally collaborative decision, only one party enjoys statutory powers to obtain information from third parties.

In assessing Departmental claims that the OCI remains sufficiently alive to this, I would note the adverse findings made by the Office of the Ombudsman in relation to information gathering:

- It recommended that DHS should further support customers to gather employment income evidence to maximise the accuracy of possible debts.
- It highlighted the especially onerous nature of requiring a person to retain or access employment and payroll records for a period of six years, without forewarning. The trigger on the exercise of information gathering should be informed by the fact ATO only requires individuals with simplified tax affairs to retain records for two years for example.
- It found there was a failure to advise clients on what they could do if they had problems obtaining evidence.
- The Office's finding that "it is critical for DHS to give some customers additional support and assistance to obtain this evidence when they have made genuine and reasonable attempts and other available information is not sufficient. The accuracy of debts relies on the customer's ability to obtain and input historical income information into the OCI. DHS should take into account the potential cost to customers to obtain bank statements."[13]

In this context, the planned department response to recommendation 4 of the Office of Ombudsman is legally insufficient:

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[12] *Wei v Minister for Immigration* 2015 HCA 51, 17 December 2015. The author cautions against any easy analogies or selective quotation of this case – in my view the Social Security Act provides a stronger statutory backdrop given the inaccuracy rate on the data match, the confirmed facts regarding the reverse onus nature of the current procedures and the express injunction to have regard to the vulnerability of recipients. There is a fundamental qualitative difference in applying general administrative law principles to an evidence base/reasoning arrived at through critical thought, debate, oral hearing and multiple sources of information than through an "automatic processes" with a confirmed tendency towards inaccuracy with insufficiently adapted systems to facilitate engagement. The statement of the relevant authorities provided by Justice Nettle was as follows:

> "In *Prasad v Minister for Immigration and Ethnic Affairs*, Wilcox J held that, although it is not enough to establish jurisdictional error on the part of an administrative decision-maker that the court may consider that the sounder course for the decision-maker would have been to make further inquiries, where it is obvious that material is readily available which is centrally relevant to the decision to be made, and the decision-maker proceeds to make the decision without obtaining that information, the decision may be regarded as so unreasonable as to be beyond jurisdiction. In *Ex parte Helena Valley/Boya Association (Inc)*, Ipp J, sitting as a member of the Full Court of the Supreme Court of Western Australia, applied Wilcox J's reasoning in *Prasad* in order to conclude that a local council had failed properly to apply its mind to the question which needed to be decided in determining whether to approve a planning application. In *Minister for Immigration and Ethnic Affairs v Teoh*, Mason CJ and Deane J expressly approved of Wilcox J's reasoning in *Prasad* and of its application in appropriate cases. And in *Minister for Immigration and Citizenship v Le*, Kenny J surveyed the course of authority following *Prasad* and held that it was legally unreasonable for the Migration Review Tribunal to fail to make an obvious inquiry. Based on those decisions, in *Minister for Immigration and Citizenship v SZIAI [43]*, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ similarly concluded that there may be circumstances in which a merits reviewer's failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, can be seen to supply a sufficient link to the outcome of review to constitute a constructive failure to exercise jurisdiction."

[13] These findings are outlined at paragraphs 3.22-3.27 of the Ombudsman's report.

> "DHS will use its powers on a case by case basis to obtain where other avenues have been exhausted"

The reference of a "case by case" basis principle risks the potential ultra vires issuing of debt notices. The requirement that "other avenues have been exhausted" should be amended to reflect the operation of legal requirements of reasonableness and procedural fairness and how information gathering powers may facilitate the making of critical inquiries.

Finally, despite media statements that all the recommendations of the Ombudsman have been accepted, it appears recommendation 4(d) of the Ombudsman was not accepted in the Department's response?[14]

Recommendation: The Department amend its response to the Ombudsman's report, to reflect the fact that the issuing of a debt may be unlawful were the Department not to use its powers to obtain information where a requirement to pursue of other avenues would be unreasonable by reference to the person's circumstances.

Recommendation: The Department should specify the key sources of evidence for establishing income in the Guide for Social Security Law as laid out in recommendation 4(d) of the Ombudsman report.

3. Failure to ensure proper and realistic consideration of potential, ongoing vulnerability

The current situation is that individuals previously *identified* by Centrelink processes as vulnerable or as belonging to certain demographics will not be subjected to OCI. The Department must take action to address any potential slippage between vulnerable persons and persons identified as vulnerable. The core population of OCI are those who have been out of contact with the Department. Where a debt is issued automatically, the Department may deprive itself of the opportunity to flag vulnerability; a debt may be issued without a reasonable opportunity to submit information or a penalty may recovered when reasonable excuse was present. It is an accepted part of Centrelink's administration that vulnerability may affect the performance of mutual obligations even where there is person to person contact.

Under current approaches, the Department is capturing those with pre-existing flags, and is using geographical and language data to channel people into staff assisted intervention. The Ombudsman outlined the flaws in relation to this vulnerability flagging:

- the VI assessment process is lengthy and complex
- As the VI is a tool designed for jobseeker compliance purposes, the assessment of risk may focus more on the impact of vulnerability on the person's ability to look for and find work, which may be quite different to their ability to engage with an online system for debt raising and recovery

[14] The author acknowledges the separate public statement that all recommendations were accepted. The inclusion of these sources would also have significant consequences for tribunal appeals given the inquisitorial orientation of that forum.

- People who become vulnerable after they cease receiving income support payments may not have a VI on their record
- staff may not recognise situations where the application of VIs should be considered.[15]

The availability of appeal after the debt offers legally insufficient protection without a system of <u>proactive</u> vulnerability flagging adapted to identifying individuals with active vulnerability (e.g. domestic abuse or serious mental health issue) upon and following receipt of the discrepancy letter.

Recommendation: A reformed vulnerability flagging process must be implemented, including through or in co-operation with debt collection agencies where these are the first point of contact with vulnerable individuals.

The importance of the cumulative and reinforcing nature of the multiple flaws in the system

The author's submission is carefully targeted and structured to reflect that compliance with procedural fairness, at law, is not anchored in the decontextualized existence of particular procedures (e.g. oral hearing, presence of a lawyer). Neither should flaws be presented or justified in false isolation – the overarching goal is the avoidance of practical unfairness in the exercise of a statutory power.[16] **The key to administrative law analysis of the OCI is a ground up analysis of patterns across individual decisions, not making broad decontextualized statements declaring the legality of entire "systems".** The findings regarding procedures and usability made by the Ombudsman underline the potential scale of statistical noise and silences accompanying any comparison of revocation rates between manual and automatic systems. The recent announcement of refinements and audits cannot function to obscure the strain under which community legal centres and citizens were placed by the OCI. Given the systemic nature of the three cumulative flaws outlined above, those experiences cannot be regarded inevitable uneven remainders of a fair process of public administration. To describe the remedial actions now required as minor refinements or continuous service improvements represents a profound undervaluing of the centrality of administrative law principles and scaffolds to the daily practice of government and service delivery. The Department is under an obligation to ensure a practical, realistic translation of the right to procedural fairness for key, identifiable categories of recipients, especially the most vulnerable.

[15] Office of the Ombudsman report, paras 3.40-3.47.
[16] *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 295 ALR 638, Hayne, Crennan, Kiefel and Bell JJ at 682 [157].

Even if the current system is lawful, the policy is undeliverable under the Department's current infrastructure

One of the primary goals of the area of law I research and teach is to preserve the scope for efficient modern government. I regularly find myself in the position of disappointing students or interested individuals by saying that their proposed legal action is unlikely to succeed due to the importance my subject attaches to preserving a space for administrative judgment.

The Department acknowledges that the key to delivering this policy is the engagement of public. Despite assertions regarding a "disappointing" level of engagement, the current dynamics within the system are not surprising. The dynamics being identified before the Committee are underpinned by years of empirical research - Australia possesses some of the most advanced studies on access to justice in the world. The author is concerned that recent comments about a failure to engage reflect a fundamental undervaluing by the Department of the supporting infrastructure it would need to implement this policy. Just as the Department of Defence decisions must be underpinned by logistical studies, or Treasury decisions by economic data, the delivery of the department's services must be informed by the practical reality of access to government and the capacity of citizens. This research is not tainted by political viewpoint: it can underpin conservative or liberal visions of service delivery. Material which existed to inform a proper risk assessment includes:

- The Law and Justice Foundation of NSW LAWS survey, which offers a systemic analysis of how Australian citizens respond to legal problems, the reasons why individuals may not respond adequately to a legal difficulty, and their limited access to legal and non-legal advice.
- the OECD's Programme for the International Assessment of Adult Competencies (PIAAC) provides an insight into the online and documentary capabilities of Australian citizens.
- The systemic research of factors enabling and hindering financial literacy carried out by ASIC: http://www.financialliteracy.gov.au/research-and-evaluation/australian-research-and-evaluation

Understood in this research context, the testimony before the Committee raises serious concerns regarding the adequacy of the regulatory impact assessment or feasibility studies undertaken prior to the introduction of the initiative.

Even if all the legal submissions made earlier were rejected, there is still a clear need for a reverse onus scheme to be underpinned by designed, sustained access to justice interventions. The precarious funding position of community legal centres is of direct relevance to the practical implementation of this inquiry.

The Department places continual reliance upon the fact that only 8% of all debts are placed through OCI – and limit reference to manual debt situations in public debate about this policy. Yet evaluations of the practicality of introducing robodebt must draw upon studies of the existing infrastructure which Department had at its disposal was already subject to

condemnation by the leading oversight bodies in Australia.[17] In evaluating such assertions, the Committee should take into account the findings of the Office the Ombudsman Report that increased reverse onus practices and communication patterns mirroring the OCI were integrated into the debt collection system through an interim rollout from July 2015.[18] Abstract debates about whether the "technology" is working or the initial "government 2.0" design is a good idea cannot cloud the importance of key administrative law principles and structures to systemic policy design.

It is disappointing to see views expressed by lawyers and social services regarded as reflecting "philosophical objections" to debt collection – they need to be understood as communicating implementation feedback whose perspectives is underpinned by decades of expert study.[19] The advice given to Ministers must be frank about the practical realities of the supporting infrastructure which exists for this programme – it is insufficient.

Recommendation: The OCI should be discontinued at least pending a full regulatory impact assessment and third party audits. This recommendation is an appropriate response to scale of the flaws outlined in the Office of the Ombudsman report.

[17] See for example, the 2013 ANAO report into 'Recovery of Centrelink Payment Debts by External Collection Agencies'.
[18] Office of the Ombudsman, Appendix A at 1.13-1.16.
[19] See https://www.theguardian.com/australia-news/2017/mar/09/centrelink-critics-have-philosophical-objection-to-welfare-compliance-checks-says-minister

Ensuring proper, genuine and realistic consideration of legally required factors *following* the issuing a debt.

The administration of the programme must bridge the gap between "individuals identified as vulnerable" and those who are in fact vulnerable at the date their first contact with debt collectors, through positive regulation. The Ombudsman's report secured the following commitment from the Department:

> "DHS has told this office it will pause recovery action while a matter is under internal review, unless the customer requests to continue paying back the debt. DHS also advised it will not commence debt recovery action and is taking debts back from debt collectors, until it is satisfied that a person is aware of the debt and their appeal rights."[20]

The Committee should examine the extent to which an outsourced business activity has become entwined with statutory obligations of procedural fairness related to the reasonable excuse exemption, appeal and vulnerability flagging. There is a danger of complications in the interaction between statutory events following the issuing of the debt ("taking back" the debt, vulnerability flagging to analyse reasonable excuse) and the well-established right of government to outsource the practical *implementation* of statutory decisions. Reliance upon the fact that a debt can be taken back and reviewed underline the possibility that the actions and determinations of debt collectors can affect statutory rights to review and the Department's underlying decision to continue collection.

The situation relating to the potential imposition of 10% penalty without proper, genuine and realistic consideration of the existence of reasonable excuse on grounds of vulnerability is especially serious and I support other submissions made in relation to the potential unlawfulness of this. The Department has accepted the principle that direct phone contact should now occur.[21] The fact it was not occurring when the system was launched and the form and mode of communication instead pursued, underline a system not properly adapted to vulnerable categories of recipients for whom reasonable excuse was likely available.

Recommendations Relating to Debt Collection and the process of "taking back" debts

- **The Department should ensure that a proactive system of vulnerability flagging and reasonable excuse analysis accompanies <u>any</u> interactions <u>*under the effective control*</u> of the Department following the issuing of the debt.**
- **The Department should, if it has not already done so, provide direct guidance to its contractors on how the consumer law concepts of unconscionability and reasonable purpose apply to the collection of a debt which is <u>specifically issued under a statute which allows potential appeal or modification based on concepts of reasonable excuse and vulnerability.</u>** This specific and detailed guidance should underpin all future monitoring, and the phasing out of commission incentives should be accepted.

[20] Office of the Ombudsman report at para 1.28.
[21] Departmental response to Ombudsman's recommendation 7.

H) the Government's response to concerns raised by affected individuals, Centrelink and departmental staff, community groups and parliamentarians;

The Lawfulness of the Disclosure of the Protected Information to "Correct the Record"

1. The author supports the earlier submission of Victorian Legal Aid, and has serious concerns that Section 202(1)(a) of the Social Security (Administration) Act 1999 does not permit disclosure to journalists on the basis described by the department.
2. Even if the Department enjoyed a statutory power to disclose to journalists under section 202, its current operating procedures for such releases do not respect obligations of procedural fairness or reasonableness any such power would attract.

Recommendation: The Department should discontinue disclosure to correct the record under section 202 and instead use the democratically legitimated, structured pathway offered by the section 208/209 certification system.

This submission does not address the referral to the AFP, regulated under section 204 of the statute, and which involves additional factors (intention, reasonable knowledge). It focuses upon the existence and scope of the power of disclosure under section 202 of the SSA Act. This inquiry offers a crucial opportunity for the public to provide a full and balanced unpacking of the legal position to help public understanding, at a time of widespread debate and concern.

Construing Section 202 of the Social Security Administration Act

The author is concerned that the Department has not provided published policy guidance on when the public power to disclosure under section 202 will be exercised. I wish to underline the burden of justification now facing the Department, and the need for their further engagement on this issue, by adding the following specific arguments in favour of a requirement to obtain a certificate prior to disclosing in order to correct a record through private briefing of journalists. Their length is unfortunate but reflects the need for statutory interpretation to properly balance the text, context and purpose of provision.

1. Presumption of Coherent Interpretation

The note at the end of the section 202 – it is part of the text of the Act - states:

"Note: In addition to the requirements of this section, information disclosed under this section must be dealt with in accordance with the Australian Privacy Principles."

This weighs against an interpretation that permits disclosure to the media using section 202. The requirement that information *disclosed* under the section "must be dealt with" in accordance with the Australian Privacy Principles differs from requiring compliance

before or during disclosure.[22] It indicates that intended recipients of the information must be subject to and comply with Australian Privacy Principles. The interpretation forwarded by the Department thus does not cohere with the position of journalistic activities under the Privacy Act 1988. That legislation contains a long-established exemption (section 7B) for media organisations, which centre privacy standards in the press upon industry codes protecting standards, not the Australian Privacy Principles. In reading any statutory provision, there is a presumption that the legislature acts rationally so as to create a law that is "coherent and consistent" with the rest of the statute of which it is part and **other relevant laws**.[23] I thus support the viewpoint that it is section 208 certification, read with section 209 guidelines, that is the appropriate avenue for media disclosure. This reflects the established principle that the preferable interpretation is one that makes sense of the specific legislative text as part of a systemic whole.

2. Reflecting the interpretive principle of the unity of statutory provisions, section 202 needs to be read harmoniously with the disclosure power under section 209. The existence of the section 208 mechanism with ministerial guidelines on factual corrections undermines the Department's stretched s202 claims. An interpretation of section 202 which extends to preserving public confidence through media disclosure would threaten to deprive the 2015 Public Interest Certification Determination of effective use and practical meaning.[24] This danger is further underlined by the references made in estimates hearing to the use of section 202 being "standard operating procedure". The submission that the "public interest certificate" and s202 disclosure are "two separate pathways", underplays the connection the term 'public interest' enjoys with the underlying logic of the statute. In *Hogan v Hinch* French CJ stated that when 'used in a statute, the term [public interest] derives its content from "the subject matter and the scope and purpose" of the enactment in which it appears.'[25] The inclusion of section 209 mechanism for creating binding guidelines of statutory force, reflects the legislative intention for Parliament to take the lead in guiding how the term "public interest" is to be read and this has consequences for how the matters which attract the certification provision are to be construed. The vesting of certification power in the Secretary not the Minister, underlines the provision's intended identity as the mechanism where internal administrative judgments/factors are balanced against policy interests defined or guided through section 209 Determinations.

3. This leads us to the fundamental principle of interpretation submitted forcefully by Victorian Legal Aid:

"Where the legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions

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[22] In the context of release to journalists, the Department's interpretation threatens to apply this clause as "information disclosed under this section must *have been* dealt with in accordance with the Australian Privacy Principles." The phrase "information disclosed" supplies the time of orientation for "must be dealt with".
[23] This principle was underlined the High Court in *Momcilovic*, where Crennan and Kiefel JJ commented that s32(1) of the Victorian Charter, which requires Victorian courts consider the Charter's rights in interpreting other legislation – was "not, strictly speaking, necessary"*Momcilovic* (2011) 245 CLR 1, 217
[24] Determinations are available here: https://www.legislation.gov.au/Details/F2015L01267/Html/Text
[25] (2011) 243 CLR 506

which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.[26]

4. Section 209 Determinations, including the 2015 one currently in force which specifically regulates correcting the record, were laid before the Senate as disallowable instruments. The Committee should investigate whether any notifications were given to the relevant Minister or the Senate as to the fact that section 202 actually represented the standard operating procedure for correcting the record.

5. DHS's own submission to this inquiry refers to section 202(1)(a) as allowing the disclosure for the "purposes of social security law".[27] This is an inaccurate quotation of Section 202. Section 202 allows disclosure "purposes of **the** social security law". This small detail has some significance for the Department's interpretation: the interpretation of phrase must be understood in the light of the statement in section 4 that the entire Act forms part of the social security law. This undermines the proposed sharp two pathway distinction, where section 202 is not interpreted in the light of the existence of the section 208 or the section 208 system "floats" separate outside the statute and does not interrelate with it.

6. Section 202, takes the form of a list, and its interpretation can be guided by considering the character of the other subsections. The sequencing and exhaustive character of section 202 supports the idea that its fundamental intention is to permit the governmental dissemination of information to perform defined statutory tasks and administer the programmes listed elsewhere in the statute.[28] It authorises side by side, in direct sequence, the obtaining, disclosure and recording of personal information – inferring that the fundamental intention is to allow administrators (hence the openness of "a person") to flow information into their decisions. It is significant contextually that the powers to *obtain* information *from third parties* receives direct and specific definition elsewhere in the social security law. It is also significant that section 202 gives direct and specific treatment regulating the scale and nature disclosure to third party service providers and researchers. Section 202(1)(a) understood in its proper context, is not a public or journalist facing provision, and the note at its conclusion underlines this as the favoured interpretation.

7. A narrow reading is also supported by the note at the bottom of the section which starts with "in addition to the section's requirements". This again underlines that the language of the provision is designed to operate as a **requiremen**t alongside privacy law frameworks.

8. A narrow reading is supported by the structure of section 202 which is that of protection, followed by exempted purposes. This is reflected also reflected in the title, a recognised interpretive aid.

9. The Department's creation of an entire administrative rubric of systemised disclosures for the avowed pursuit of achieving entirely undistorted, accurate information in the public sphere is not supported by the schema of administration embraced the Act. Section 8 – the Principles of Administration – refers only to the need for the Secretary to have regard to the "desirability of achieving" the "result" of "readily available

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[26] *Anthony Horden and Sons v Amalgamated Clothing and Allied Trades Union* (1932) 47 CLR 1 at 7.
[27] See page 14 of the Department's submission to this inquiry.
[28] Centrelink's power to obtain information from other parties.

publications" for the public. This specific, and very limited, treatment given to the nature of information dissemination, together with its status as one of the accessory considerations to the general administration of the Act, militate against the Department's interpretation. The principle that something termed an "incorrect record" impairs or affects the fair administration of the Act does not receive comparable emphasis in the Department's argumentation in cases regarding its own inaccurate website information. In any case, to the extent that the public interest – such as public confidence – may support intervention this should be done through section 208 given the character of the interests involved. Parliament has specifically regulated when a disclosure might be justified by reference to securing public understanding of the system in the current 2015 Determination ss 10-11.

10. The Department placed heavy reliance upon the preliminary view of the Privacy Commissioner in *L v A Government Agency*, an approach which risks conflating the question of whether there is a breach of Australian Privacy Principles with how to secure proper authorisation of any disclosure under the Department's empowering statute. The existence of any privacy law principle that it may be reasonable to correct the record is of course, entirely consistent with the existence of the section 208 public interest certification system.

The above list is technical, but the author is attempting to convince the Committee of the need for the discontinuing of section 202 disclosures and the reasons why the Department's position is attracting criticism. Statutory interpretation is a complex process that exists on a balance of considerations, drawing from the text, context and purpose of provisions – we all benefit from a process of justification.

Recommendation: The Department should provide detailed, reasoned justification for its asserted section 202 power to disclose to the inquiry.

The broader consequences of the interpretation adopted by the Department are important to highlight. The phrase "may do X, Y,Z, for the purposes of" is regarded as a generic phrase by drafters. While this (as I've shown) must always be construed according to interests identified by the relevant legislation, the reality is that Department of Human Services is seeking what could arguably be framed a general administrative power to disclose for many government department and agency. There is evidence - specifically a recently issued March 17th statement of the Minister for Veterans Affairs - which appears to indicate that the Department's asserted power can be applied more widely across government.[29]

2. Ensuring Compliance with Safeguards and Conditions

The Committee should also consider the legal safeguards and reasoning which would have to be present were courts to uphold particular instances of an administrative disclosure to journalists through section 202. The issues I identify here are informed by the instances of disclosure so far, but I will not engage in case-specific reasoning about individual situations.

1: Identifying the Grounds for Disclosure

[29] Statement of Minister for Veterans affairs available at: http://minister.dva.gov.au/media_releases/2017/mar/va026.html

The author has tracked the statements of the Department provided to media, in estimates and through the Minister to Parliament. These are inconsistent and provide insufficient guidance to the public as the operation of such a power.

The Department and the Minister has in the past six weeks described its power variously, as being to "correct false statements" "correct the record", correct "a misleading impression", to clarify "unreasonable and inaccurate assumptions".[30] Each of these raises concerns – the concept of "the record" is different from "incorrect statements" – it may permit the disclosure to "correct" by adding to the record. Specific questions arise from each phrase, e.g. does the Department see its section 202 power as extending to the ability to use personal information to add context to or comment upon an individual's subjective experience e.g. of "being terrorised" or "hounded"?

It is also notable that language featured in section 9 and 10 of the 2015 determination, *applicable in the context of section 208 certification,* have, without adequate explanation, featured prominently in parliamentary statements explaining government disclosure powers. A determination of when a disclosure power lies in section 202 or 209, or of the definitional line between facts and impression must be policed closely to ensure the policy/administrative division of labour is preserved. In relation to key terms relating to both sections of the legislation, the Department's interpretation is lacking adequate definition of the situations towards it is directed and the outcome sought.

A key question is a reasonable basis for how a false statement produces a negative effect upon the administration of the Act. Given the existence of the public interest power, a section 202 disclosure must be what can be termed an "administrative" disclosure. A factual inaccuracy which threatens "the integrity of the system" must, according to the Department's own logic, impair the *practical administration* of the Act at the "system" wide level. As noted by Victoria Legal Aid in their submission, the two nominated practical reasons nominated for a section 202 disclosures was (a) enhance public confidence; or (b) avoid staff being 'taken away from dealing with other claims'.[31]

The Department's formal response to the question on notice No 75 regarding their future use of the power was as follows:

> "The Department will, in appropriate cases and in accordance with relevant legal requirements, correct the record where a person makes a public statement, to correct any factual inaccuracies or potentially misleading information that has been published."

Recommendation: Given the widespread public debate, the Committee should secure further information on this answer. Specifically:

- Failure to provide clarity or practical guidance on the ambit of "the legal requirements" or "appropriateness".
- The failure to incorporate requirements necessity or proportionality despite these concepts featuring prominently in oral testimony before the committee at estimates.

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[30] The latter term is featured here: https://www.thesaturdaypaper.com.au/2017/04/08/centrelink-leaks-more-private-data/14915736004474

[31] See ABC News, 28 February, *People who criticise Centrelink's debt recovery could have personal information released to 'correct the record*' Available at: http://www.abc.net.au/news/2017-02-27/dhs-warns-to-disclose-centrelink-recipients-history/8307958.

- The failure to address the question of what impairment or concrete damage a statement must cause, despite previous public statements citing requirements such as the "integrity of the system" or "public confidence" in the administration of the Act. The answer is of such breadth that any public statement, not merely one made in a media outlet, falls within the scope of the power.

2. The Requirements of Procedural Fairness & Section 202

The right to procedural fairness is a universal implication for the exercise of all statutory power. Reflecting established legal principles, prior contact with the individual prior to release should be integrated into a process of disclosure. The author recommends that answers be secured to following questions in order to inform the Committee in relation to the potential need for recommendations to secure adequate procedural fairness:

1. Does the Department (if necessary through the editor of the media outlet) contact the person it feels has made a factual error and ask them to implement a correction?

2. Does the Department notify the individual that it is considering a disclosure or invite them to comment upon the potential extent of that disclosure?

3. Is the individual notified of the eventual content of the disclosure of their personal information? (This safeguard is particularly important in ensure the individual does not volunteer extra information under questioning from the journalist due to lack of knowledge).

4. Given that a disclosure of family tax data may impact the financial interests or reputation of other individuals than the person making a statement, does the Department ensure the notification of third parties who may have their personal reputations or financial interests affected by a disclosure? Given the primary data underpinning a robodebt may have been produced by the ATO, is any process in place for consulting with that organisation regarding the accuracy or nature of the process by which that data was arrived at?

3. Ensuring Compliance with the statutory conditions of reasonableness and the taking into account of relevant considerations

The author is again unable to frame direct recommendations on this issue given the lack of published information on prevailing practice. The author recommends that answers be secured to the following questions to ensure adequate reasoning in any future disclosure:

1. If disclosing is for the purposes of "protecting the integrity of the system" – at what point does an individual's view of the service operated by centrelink rise to the level of impairing the system? Will the Department provide a formal account of the criteria which enable it to make a judgment as to the degree?

2. What is the triggering event for a section 202 power to disclose, is it contact by a journalist writing a follow up piece, publication or where comment on its general procedures is requested from the Department?

3 What procedure does the department possess to ensure that the individual about whom a disclosure is about to be made is not subject to ongoing vulnerability (in addition to any pre-existing flags) that would affect their ability to engage with the Department or render disclosure

disproportionate? (Note: section 7 of the 2015 Determination on public interest disclosure requires consideration of whether there are ongoing circumstances of abuse).

4. How is the goal of protecting the integrity of the system rationally furthered by leaving an original piece unamended, but placing its "correction", following the passage of a materially significant period of time, in an op-ed piece in a different circulation outlet?

5. What is the justification for placing the issuing of the correction under the control of a journalist rather than publishing the correcting statement directly on the departmental website? For instance, if the history of a person's interactions with Centrelink was necessary to correct the record, why did the Department not proceed to publish it via its own channels following the principled editorial decision of *the Saturday Paper* not to disclose it or modify its piece regarding that individual?[32]

6. Where a Minister is briefed on a section 202 disclosure, is he or she briefed to explain the underlying justifications, including how the vulnerability of the individual and the alleged impact on administrative tasks were taken into account? If the briefing only supplies the protected information which has been released, how is the Minister provided with the information necessary to inform the possible creation of a future direction regarding the use of this administrative power? Is any record of the reasons underpinning a disclosure created, including evidence that a "genuine proper and realistic" consideration of relevant factors to a proportionality analysis has occurred?

[32] This alleged course of affairs was reported in the Saturday Paper Editorial of April 8 2017: https://www.thesaturdaypaper.com.au/2017/04/08/centrelink-leaks-more-private-data/14915736004474