NATIONAL SOCIAL SECURITY RIGHTS NETWORK

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Committee Secretary
Senate Community Affairs References Committee

By email: community.affairs.sen@aph.gov.au

Dear Committee Secretary

NSSRN submission to the inquiry into the Better Management of the Social Welfare System initiative

Overview

Thank you for the opportunity to make this submission.

The National Social Security Rights Network (NSSRN), formerly the National Welfare Rights Network, is a national peak body in the area of social security and family assistance law, policy and administration. Our member services are community legal centres across the country which provide free legal services to people with social security and family assistance problems. The NSSRN draws on this front line experience in this submission.

The Department of Human Services' (DHS) online compliance intervention (OCI) system was piloted from July 2016 and became fully operational in September 2016.

For the reasons outlined below, the NSSRN respectfully submits that this Committee should recommend that the OCI system be abandoned.

The OCI involves, in part, the introduction of an online channel for people to respond to discrepancies between their Centrelink records and other data obtained by DHS. At present DHS is using it in relation to discrepancies identified between DHS's records of the employment income people have reported to it when receiving a social security payment and ATO records based on information provided by employers. There are plans, however, to expand it to other types of income recorded in the tax returns people submit to the ATO.

The OCI is also an automated decision-making tool which automatically assesses and calculates debts and penalties in accordance with programmed rules.

The OCI system reflects a fundamental change in approach by DHS to how it follows up discrepancies identified through data-matching.

DHS used to investigate these discrepancies and obtain the further information necessary to enable an accurate assessment and calculation of any debt at first instance. Under the new OCI process, however, DHS uses the OCI system to make a debt assessment based on the data-match information alone, if the person does not provide further information for any reason. As the ATO earnings data

is insufficient to enable an accurate debt assessment in a number of common situations, the OCI system raises a certain proportion of incorrectly assessed and calculated debts, which DHS then seek to recover. It is up to the person to seek reassessment or review of these decisions and provide the necessary information to enable a correct decision to be made.

As such, the OCI system engages, and should be evaluated against, fundamental principles and standards of administrative law and public administration.

It also has a significant human cost. Many of our clients have described distress, anxiety and frustration using this system or receiving a debt notice generated by it. They have also described disruption to their lives as they sought to obtain information to respond to the alleged discrepancy or debt (sometimes from five or six years ago), struggled to access and use the online channel, contacted DHS repeatedly seeking help and dealt with debt collectors. Despite DHS' efforts to exclude the most vulnerable people from the new process, some vulnerable people have inevitably been caught up in it.

This submission is in three parts:

1. Explanation of the OCI system and comparison with the manual process DHS officers used in the past to follow up discrepancies identified through data-matching.

2. Analysis of the compatibility of the OCI system with standards of administrative law and public administration.

3. Preliminary set of recommendations for reform of the OCI system if it is not abandoned, drawing on our experience so far helping clients use the online channel and challenge debts.

It covers material relevant in particular to terms of reference a, b, e, g, i and k.

Case studies in this submission are based on specific clients whose cases illustrate problems with the system. The information in them has been verified from DHS records where possible. Investigating this issue has been complicated by widespread confusion and loss of confidence in DHS processes. We have had a number of inquiries, for instance, from people who do not have "robo-debts", but believe they do and are concerned about whether they are accurate. Names and certain identifying information have been changed to protect the identities of our clients.

We acknowledge a detailed briefing by DHS in January 2017, which helped us understand the OCI system, assist our clients and provide information about the system to community organisations.

Part one – the online compliance intervention system

In this part, we explain the OCI system step by step. We also compare it to the process DHS officers used to follow in the past when investigating and assessing employment income debts identified by data-match in order to highlight the points at which the process under the OCI system differs significantly from that manual process.

Understanding these differences is critical to reasoned debate about the appropriateness of the new system.

There are aspects of the new OCI process which are similar in certain respects to the previous manual process. Under each process, for instance, DHS' first step is to contact the person to give

them an opportunity to confirm the data-match information, correct it or provide more information. What has changed is the default mode of contact, which was by letter and phone but is now via letter and the online platform. Similarly, the OCI system appears to make the same fortnight by fortnight debt calculation as previously (and as required by social security legislation).

But this should not obscure the fundamental change in the process of post data-match follow up and debt assessment.

In the past a DHS officer would seek to obtain sufficient information to enable an accurate debt assessment to be made at first instance, namely details of the person's pay and pay periods, either from the person or directly from the employer. In most cases, the DHS officer obtained this information (exercising coercive powers where necessary) and was able to accurately calculate any debt.

Under the OCI process, DHS does not seek to obtain sufficient information to enable an accurate debt assessment in most cases. If, for any reason, the person does not respond or does not supply complete information about their employment income, the OCI system uses an "averaging" algorithm to work out (or perhaps better, estimate) their income using the ATO data-match information alone. This "averaging" formula was occasionally used under the previous process, but it was unusual and a last resort as in most cases the DHS officer had actual income information for the relevant period.

As the OCI system is programmed to use information which is insufficient to reliably assess the debt at first instance in many more cases, a much higher proportion of the debts raised by the OCI system are inaccurate compared to the manual process.

Step one – data-matching

Data-matching is an important tool for detecting overpayments and DHS engages in data-matching with a number of Commonwealth and State agencies, including the ATO, and private sector organisations.

A discrepancy (outside a margin of tolerance) between DHS and ATO records with respect to employment income is a reasonable indicator that an overpayment may have occurred. However, there is also a significant "false positive" rate, that is, discrepancies which can be satisfactorily explained and where there has not been an overpayment. In 2009-2010 under DHS' data-matching program with the ATO using tax file numbers, about 25% of cases were finalised without a debt being raised after contact was made with the person.[1] Under the OCI system it is reported that 20% of matters are finalised without a debt being raised.

The OCI system does not appear to involve a change to the initial data-matching stage of the process, at least since it was further automated in 2011.

However, the potential consequences of a false positive are now very different. Previously, even if the person did not respond or provide further information, a DHS officer would investigate the discrepancy and usually eliminate false positives by reviewing the person's Centrelink record or verifying employment income with the employer. Under the OCI system, if the person does not provide further information for any reason, the ATO income data alone is used to assess a debt. This

[1] Centrelink, *Data-matching Program Report on Progress 2007-2010*, available at https://www.humanservices.gov.au/corporate/publications-and-resources/centrelink-data-matching-program-report-progress.

means that some false positives that were previously screened out by DHS without a debt being raised may not be under the current process. The false positive rate is therefore higher than the reported 20% and includes at least those debts that were revised to zero when the person sought a reassessment or review.

Step two – contacting the current or former recipient about the discrepancy

After a discrepancy is identified through the data-match, the next step under the manual and OCI processes is to contact the current or former recipient to give them the opportunity to confirm or correct the ATO data and provide additional information.

Under the previous process, a DHS officer would try to contact the person by letter or phone. If they were a current recipient, the officer might use a power to suspend their payment to prompt a response.

If the DHS officer made contact, the person might provide an explanation or further information which the officer could check against their Centrelink record. In a certain proportion of cases, this might indicate that an overpayment had not in fact occurred. It was also an opportunity to check their current entitlement and understanding of their reporting obligations, which could help to prevent more debt arising in the future.

However, in some cases the person did not respond for a range of reasons (including not receiving the letter as their address was not current) or they confirmed, or could not explain, the discrepancy. The DHS officer would then proceed to obtain the additional information necessary to accurately assess and calculate any debt they owed.

The officer needed more information because the ATO data includes an annual income figure only and is therefore insufficient to enable a reliable debt assessment by itself. Simplifying somewhat, an accurate calculation of a debt requires a redetermination of a recipient's past fortnightly rate of payment based on their actual income in each benefit fortnight. Actual fortnightly income cannot reliably be worked out from the end of year figure. In practice, it requires detailed information about pay periods and pay (including unusual components of income such as termination payments), the kind of information normally held by an employer's payroll system or recorded on payslips. DHS does not have this information in the ATO dataset (based on information provided by the employer).

In some cases the person might supply this to the officer (eg payslips for the period in question). But in many cases the officer would obtain it directly from the employer. Normally this involved issuing a notice under social security legislation which imposed a legal obligation on the employer to provide this information.[2] Although there were always a small number of cases where the officer was unable to obtain the information for some reason, in most cases the officer was able to obtain details of actual income from the employer which they used to assess and calculate any debt accurately.

This is where the fundamental difference between the previous manual process and the OCI process lies.

Under the OCI process, the system automatically sends a letter to the person about the discrepancy. The letter attaches the ATO data and invites the person to go online to confirm or update the

[2] Section 192, *Social Security (Administration) Act 1999* (Cth).

information by a deadline, which has now been extended from 21 days to 28 days. There is also a reminder letter.

If the person receives the letter and responds, they may go online to review the ATO information. Originally this was through a Centrelink online account on the myGov portal, which the person might need to create. Many people have struggled with this online process, including difficulties with setting up an online account, with system crashes and errors and difficulties understanding and using the online portal. People can now access the OCI online portal directly using a code in the letter, which may help address some of these problems.

If the person goes online, they are asked to confirm the ATO data concerning their employer, income and employment period. They can finalise the process at this point and, if so, the system assesses a debt, applying the normal fortnight by fortnight debt calculation rules but using the ATO data averaged out over the recorded employment period. As explained below, in some cases our clients have confirmed the ATO data without providing information because it was accurate (as it normally will be) and they did not realise that doing this might result in an inaccurate debt assessment because of "averaging".

They person can also use optional functions in the online platform to provide detailed employment income information, including details of pay and pay periods. If they do this and provide complete information for the period in issue, the system appears to us to calculate the debt accurately (including factoring in matters such as working credits), although we cannot be certain of this at this point. In these cases, the system operates most like an automated, "self service" version of the previous process by which a DHS officer would obtain and enter these details.

There appear to be protocols whereby a DHS officer may review information provided by the person through the online portal if it is complex or unusual and determine whether it should be accepted.

Step three - assessment and calculation of the debt

The next step in the process is the assessment of whether an overpayment has occurred and the calculation of any debt.

In most cases, under the manual process, the DHS officer would enter the detailed information about the person's actual income across each fortnight they were receiving a benefit to assess and calculate a debt. This calculation has two main steps: (i) apportioning the employment income to the benefit fortnight it was earned in, and (ii) redetermining the person's correct rate of payment for each fortnight. This was done with the aid of a calculator in the DHS computer system called the "multical". Where relevant, the officer might also adjust for other factors that may affect the calculation, such as a lump sum termination payment (which is assessed differently from other employment income under social security legislation).

As the officer had DHS' compulsory information-gathering powers available to them, there were only a small number of cases where they did not have this information. In these cases, DHS' guidelines were to "average" the ATO annual income figure over the period the person was working (as recorded by the ATO), that is, apportion it equally to each fortnight in that period. This produced a fortnight by fortnight income figure that could be used to perform the calculation in the same way as if the officer had the person's actual fortnight by fortnight income. As the guidelines recognised,

this could be inaccurate if the person's income varied across the year and was a last resort *[i]f every possible means of obtaining the actual income information has been attempted*.[3]

As noted above, under the OCI process, if the person supplies comprehensive information about their employment income across each benefit fortnight through the online portal, the OCI system assesses the debt in the same way as before.

If they instead supply the same information directly to DHS after the debt has already been raised, then our experience is that the reassessment or authorised review officer review is done manually using the multical tool, like the old process.

If the person does not supply information because they do not respond at all or do not use the optional function in the online platform, the OCI system averages the total income across the period of employment recorded by the ATO. As a result, "averaging" is not a last resort in the OCI system. It is much more prevalent and, as a result, there are more incorrect debt assessments.

In our experience this averaging is maintained on reassessment or review, if the person is unable to provide satisfactory information or evidence about a benefit fortnight.

The number of incorrectly assessed debts seems to have been increased by the fact that it is not uncommon for the ATO data to have an incorrect period of employment, apparently as employers sometimes report an employee's period of employment as the full financial year, even if they only worked for part of it.

Max is in his early 20s and at the start of his professional career. In late 2010 his employer made him redundant. He was unable to find another job, and had to claim the unemployment benefit, newstart allowance. He had a small amount of casual work over the next few months, which he reported accurately to Centrelink. After about nine months he was successful in getting another full-time job, and cancelled his newstart allowance. Recently he received a letter generated by the OCI system asking him to confirm information from the ATO for the 2010-2011 financial year. He went onto myGov and checked the ATO information against his PAYG payment summary. It was the same. It showed that he had earned about $18,000 from his employer in 2010-2011. He therefore confirmed the information. He did not realise he could enter more detailed information, or that by not doing so he might receive an incorrectly calculated debt. The system then averaged the income across each fortnight in that year, including the period he received newstart allowance, and as a result assessed him as owing a debt. It also added a 10% penalty. He located information showing when he lost his job (which he had given to Centrelink when he claimed newstart allowance in 2010 and was on his Centrelink file) and our service helped him give that information to Centrelink as he was unsure what to do. A Centrelink officer reduced the debt to $0 and removed the penalty*.
*Name and identifying information changed

This kind of error is present in many of our clients' cases and many of their debts have been revised down, including to $0. In one sample of six clients assisted by our service based in Brisbane, Basic Rights Queensland, who had completed a reassessment or review process, they reported initial debts raised by the OCI system totalling about $19150, and after reassessment the debts totalled $5900. Each client's debt was reduced, on average, by about $2200.

[3] Department of Human Services, "Acceptable documents for verifying income when investigating debts" 107-02040020, available at http://operational.humanservices.gov.au/public/Pages/debts/107-02040020-01.html.

Step four – penalty determination

Under social security law, a 10% penalty (which DHS calls a "recovery fee") is added to a debt resulting from employment income if the person:

- refused or failed to report their income, unless the Secretary, or a delegate, is satisfied there was a reasonable excuse for this, or
- knowingly or recklessly under-declared their income.[4]

Under the previous process, the DHS officer would consider whether this penalty should be added after assessing and calculating the debt. Normally, they would contact the person to give them an opportunity to explain the under-reporting, including any factors (mental illness, for instance) that might have affected their ability to report correctly. A penalty was not added if the officer was unable to speak to them about the matter.

In our observation, the OCI system automatically adds a penalty to the debt if the current or former recipient does not respond, or responds but only confirms the ATO data. In the majority of our cases, the penalty has been removed if the person seeks a reassessment or review.

Within the online platform, there is an optional yes/no question about whether or not the person's ability to report their income was affected by personal circumstances. If answered, this appears to be taken into account in whether or not the 10% penalty is applied.

Step five - debt notice and debt recovery

The end point of the process is the issuing of a debt notice, which specifies the amount of the debt and any penalty and sets a due date for repayment. This is issued automatically by the OCI system. Information about the debt, including the calculations, is also displayed in the online platform.

DHS' debt recovery processes are then triggered, and vary depending on whether the person is a current recipient and whether they enter into a repayment plan. These are the same as they were in the past, except that under the OCI system, the person can use the online platform to set up the repayment plan.

Part two – administrative law concerns

The OCI system is a change in the decision-making process used to assess and calculate debts and penalties following identification of a discrepancy through data-matching. As such it engages, and should be evaluated against, the standards of administrative law and sound public administration.

In this part of the submission, we set out our main concerns about the OCI system from this perspective.

Legality

The NSSRN has two main concerns about whether the OCI system is compatible with administrative law principles.

[4] Section 1228B, *Social Security Act 1991* (Cth).

Application of the 10% penalty

In our view, it is likely that the application of the 10% penalty breaches the administrative law rule against fettering an administrative discretion.

The application of the 10% penalty is discretionary in the wider sense, in that it involves an exercise of judgment, especially about whether a reasonable excuse exists. Official Department of Social Services policy describes the determination of a "reasonable excuse" as discretionary.[5]

The OCI system is computer-based and makes decisions according to programmed rules or algorithms. It is clear that it is programmed to add a 10% penalty to a debt automatically if the person does not respond or if they respond and merely confirm the ATO data.

It appears that between July and December 2016 more than 97,000 penalties were initially applied, that is to more than 70% of the 133,282 debts raised in that period.

In our view, this is likely to contravene the administrative law principle which forbids the fettering of a discretion, that is, its exercise according to an inflexible rule or policy.[6] The Administrative Review Council reached the same conclusion in its 2004 report, *Automated Assistance in Administrative Decision Making*, where it concluded that automation of discretionary decisions would contravene this rule.[7] It made clear that it included both true legal discretions and powers which, like the power to impose a 10% penalty, require the exercise of a degree of judgment.

The online platform has an optional question about whether a person's personal circumstances affected their capacity to declare their income and whether, and how, a person answers it appears affect whether the 10% penalty is applied.

But this is no answer to this legal problem. In fact, whatever algorithm the OCI system applies to answers to that question is likely to be both over- and under-inclusive, which is the hallmark of a fettered discretion.

Suppose, for example, that a person owes a debt but they in fact reported their income accurately at the time they received a benefit and the debt is the result of administrative error by DHS in failing to record this correctly at the time. They should answer this question "no" (as there were no personal circumstances which affected their capacity to report their income).

Suppose, instead, the person simply made an inadvertent error in their reporting on a few occasions and owes a small debt. Again their answer to the question would be "no".

In both these cases, if they did answer the question about whether personal circumstances affected their ability to report their income, the correct answer would be "no" and they may have a penalty applied to their debt, depending on how the precise OCI system algorithm. This decision would be incorrect, as they have a reasonable excuse (in fact, in the first case, the person did not report incorrectly at all) and did not knowingly or recklessly under-report their income.

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[5] Guide to Social Security Law, 6.7.1.45, at http://guides.dss.gov.au/guide-social-security-law/6/7/1/45.
[6] See also ss 1(e) and 2(f), *Administrative Decisions (Judicial Review) Act 1977* (Cth).
[7] Administrative Review Council, *Automated Assistance in Administrative Decision Making*, Report no. 46 (2004), available at http://www.arc.ag.gov.au/Publications/Reports/Pages/Reportfiles/ReportNo46.aspx, at section 3.2, p 12 ff.

Conversely, suppose a person was affected by personal circumstances during the debt period but was also reckless about reporting their income accurately. They might answer this question "yes", and this may result in the penalty not being applied, depending on the algorithm used, when in fact it should be.

In light of this serious issue of legaality, we respectfully submit that this Committee should recommend that the capacity to impose a 10% penalty be removed from the OCI system, irrespective of the future of the system. The penalty should also be removed from all debts already raised by the OCI system.
The penalty should only be applied if a DHS officer considers the particular circumstances of a case.

Averaging

The legality of the use of averaging by the OCI system is complex. However, any concern about the legality of administrative decision-making is serious and the Committee should ask DHS to justify the legality of the increased prevalence of averaging under the OCI process.

There would be a simple answer to this concern if social security legislation positively authorised averaging. But it does so only in limited circumstances which generally do not apply to the cases presently being processed with the OCI system. Averaging is authorised for pensioners if they earn income over a period longer than two weeks or an undetermined period.[8] Most people affected by the system are current or former recipients of newstart allowance and youth allowance, as a higher proportion of these groups have earnings than for other payment types.

The lack of positive authorisation does not mean that averaging is unlawful. Averaging is a way of making a finding of fact in relation to a person's fortnightly income based on the ATO's annual income figure. This may result in factual error if a person's fortnightly income was not stable across the period of employment recorded by the ATO. Generally, fact-finding is quarantined from review on administrative law grounds. Instead, it is corrected via merits review.

Despite this, we continue to have serious concerns about the more prevalent use of averaging, given that the risk of factual error arises from using information known to be inadequate to reliably infer a person's actual income. For an administrator to design a system that knowingly uses insufficient evidence to make an adverse decision that changes the status quo adversely for a person may well go beyond the kind of simple factual error that is quarantined by administrative law and be incompatible with those administrative law standards which require findings of fact to be open and based on probative evidence and a rational process in fact-finding.[9]

Fairness

The OCI system meets the minimum requirements of procedural fairness by giving people the opportunity to confirm or correct the ATO information through the online portal.

Even here, though, problems have arisen. In a number of cases, people did not receive the initial letter about the discrepancy because of DHS' practice of addressing letters to former recipients at their last known address on its system. We also have concerns about whether the initial letter, and

[8] Section 1073B, *Social Security Act 1991* (Cth). Averaging of income other than employment income is also authorised in certain circumstances. See s 1073, *Social Security Act 1991* (Cth).
[9] See, for example, *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32 at [16] per French CJ; *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16.

the online platform, are sufficiently transparent about the way the system operates. These issues are discussed further below.

The retrospective application of the OCI system as far back as 2010 also raises serious concerns about the substantive fairness of the new process.

Under the OCI system, it is up to the person to obtain and provide the information necessary for an accurate debt assessment, either through the online portal or in a reassessment or appeal. If they do not provide this information for any reason, they may end up repaying an incorrectly calculated debt. The difficulties people have faced when confronted with an alleged discrepancy or debt from as far back as 2010 should not be underestimated.

The decision to apply the OCI system to data-match results so far in the past was a flawed policy decision. Consider the policy alternatives that were available. DHS could instead have introduced the system for future financial years after taking a range of measures to alleviate its impact on current and former recipients such as:

- Updating information about how to report income and the need to keep records for a set period on its various communication channels
- Providing IT support for people to keep records (compare the ATO which has an app for people to record and upload photos of receipts to support expenses claims)
- Improving its capacity to contact former recipients
- Investigating improvements to its data-matching process with the ATO to reduce false positives

For some of our clients, it has been possible to get this information fairly readily, although many have experienced distress and anxiety while doing so, especially if DHS had already initiated debt recovery action. But for others, even if not vulnerable, it has been very difficult and time consuming. Allowing net income from bank statements to be entered into the online platform is helpful, but will not alleviate all these problems.

Carolyn received youth allowance from Centrelink when she was a university student between 2009 and 2014. During her studies, she supported herself with seven part-time or casual jobs and reported her income every two weeks to Centrelink. When she finished her studies, she moved for work and she did not receive the initial letter generated by the OCI system. She received notices of debts over periods from 2010/2011 to 2014/2015 totalling over $14,000 with a 10% penalty added and was contacted by debt collectors. Although she didn't think the debt was correct, she felt she had to make a repayment and paid $500 with her credit card. She continued to receive phone calls from the debt collectors. She began to put together her payslips with the help of an accountant. She still had some payslips, but others were online and she could not access them as she no longer worked for the employer. One employer told her it had moved its corporate services overseas, and she had trouble calling the overseas service centre and getting a response. Another employer did not provide payslips in response to her request. Carolyn appealed with the information that she was able to collect. After reassessment and review the debt was reduced to about $8000 and the penalty removed. Some income had been double counted, as one of her employers was a business that was in fact owned by a unit trust and the OCI system had treated the unit trust as an additional employer. Income from her employers had also been averaged, and this was partly removed for period where she provided payslips. However, as she had not been able to obtain all her payslips, some of her income was still averaged. One of our services is now helping her to appeal her debt to the Administrative Appeals Tribunal. A lawyer contacted the employer that had not provided payslips and now has them. They are also going through the revised debt calculations to identify where averaging has still been applied, and then match this to an estimate of her gross income from the net*

income recorded in her bank statements to show the averaged figures are wrong. Carolyn has so far spent many hours calling former employers, contacting Centrelink and responding to debt collectors and will now have to spend more time preparing for the appeal to the Administrative Appeals Tribunal. This has occurred while completing further studies and working full-time.
*Name and identifying information changed

A range of problems like the ones in the case above have come up including: employers being uncooperative in responding to requests for payslips (as unlike DHS, our clients do not have coercive powers), payroll information not being readily available (including if the employer has gone out of business) or practical issues for low income people, such as the significant cost of requesting past bank statements. Our services have helped some people, but many people do not have access to help.

Phil approached our service with a debt of about $2400 from 2010-2011. He could not remember the details of his income during the period and did not have any payslips, so the OCI system had raised a debt when he did not provide this information. He had been working for a labour hire company that had gone into administration and was currently receiving newstart allowance. A lawyer from our service contacted the administrator who confirmed that the company had not provided information about the wages of particular employees. Our service then helped Phil get his bank statements. The bank had indicated it would charge him $45 for bank statements for the relevant period. He was unable to afford this. Our lawyer went with him to the bank and was able to persuade them to waive the fee in his case. He is now waiting for the outcome of a reassessment.*
*Name and identifying information changed

The OCI system also removes the opportunity for a DHS officer to consider a number of matters which contribute to the fair administration of the social security system.

First, there is no longer an opportunity for the DHS officer to ensure that the person is aware of and understands their reporting obligations and make sure that their current rate of payment is correct. There is no longer this opportunity to prevent further debt arising.

Second, there is no opportunity to consider waiver of the debt at first instance, including for sole administrative error by Centrelink, at the time the debt is raised. It is up to the person if they try to investigate the existence of error (by a freedom of information application for their records) or raise the issue through an appeal.

Transparency and accountability
Current and former recipients who are notified of a debt by the OCI system have the option of a reassessment through the online portal or from a DHS officer. They also have a right to internal review by a DHS authorised review officer or review on the merits by the Administrative Appeals Tribunal.

Reassessment and review rights are critical to the basic fairness of the system. In our experience so far, the DHS processes of reassessment or internal review are helping correct debts where the person requests a review and is able to provide complete information about their employment income.

However, the availability of reassessment or review is insufficient to safeguard the transparency and accountability of the OCI system.

We have two main concerns.

First, in our view, DHS' communications in relation to the OCI system are not sufficiently transparent to put people properly on notice of how the OCI system works and the consequences of their response to it. The initial letter warns the person that they may get a debt and penalty if they do not respond to it, but is confusing to someone who does not understand the system and how it operates.

Bec received a letter generated by the OCI system asking her to review and confirm ATO information from 2012. She read the warning about a possible debt, but she then checked the ATO information and it seemed correct. So she did not think she needed to respond to the letter. When she failed to respond the OCI system raised a debt by averaging the ATO income amount and added a penalty. This was very distressing, but after a number of calls to her employer and Centrelink she eventually got her payslips and sought a reassessment of the debt. The penalty was removed and the debt reduced to a small amount.*
*Name and identifying information changed

As this example, and Max's case referred to above, show, people have not responded to the OCI system in the way that DHS may have anticipated in part because the communication about the system has not been sufficiently transparent. People have been confused about the request to confirm ATO data that in most cases is accurate because there is no advance warning that the data might be used by itself to calculate a debt.

This lack of transparency, which flows throughout the new process, raises a further concern which is that some people may not realise that the debt may have been incorrectly calculated and therefore not take action to respond to the initial letter or challenge a debt. We are particularly concerned that the more vulnerable among the people affected by the OCI system may not understand or exercise their right to reassessment or review.

This is not an abstract concern.

Some people affected by the OCI system are vocal, effective people who have resolved their own matters, though often only after much time and disruption to their lives. But some people affected by the system are vulnerable people who may find it hard to respond to DHS or challenge its decisions.

We acknowledge that DHS has sought to exclude vulnerable people from the OCI system, using a number of different markers on its system. But the coverage of these triggers is imperfect. It is using "vulnerability indicators", for instance, but these indicators are applied to job seekers and, as the example below shows, may not be applied to recipients of non-activity tested payments such as sickness allowance.

Our experience is that vulnerable people may also fail to take action in response to adverse Centrelink decisions (an experience consistent with wider research into the responses of disadvantaged people to legal problems).[10] We have already come across clients who only came to us because they were pushed by community workers, supports that not all vulnerable people have.

Hailey developed a serious and persistent mental health problem, including anxiety, and took leave from work. When her leave ran out, she claimed sickness allowance, a payment for people who have*

[10] See, for example, H McDonald and Z Wei, "How people solve legal problems: level of disadvantage and legal capability", Justice Issues, Law and Justice Foundation of NSW, Paper 23 (March 2016), available at http://www.lawfoundation.net.au/ljf/app/&id=4752B67A5D6A030FCA257F6A0004C3C5.

a job to return to but have run out of paid leave. She gets support from a community service for people with mental health conditions. Late last year she received notices from Centrelink's online system, but failed to respond to them due to her anxiety. The system raised a debt and Centrelink began to recover it at its standard 15% rate of witholdings. She was in hardship but felt unable to ask Centrelink to reduce her repayments, even though she thought the debt was wrong because it related to income she earned before she received sickness allowance. She eventually told her support worker about this, who got in touch with our service. We began the process of helping her collect evidence, but in the meantime encouraged her to try to talk about it with DHS. She eventually did so, and the matter was quickly resolved with the debt set aside, as it was clear that her income was earned before she began to receive a benefit.
*Name and identifying information changed

In the example above, Hailey was not identified as vulnerable in DHS' system, probably because she was a sickness allowance recipient and so her work capacity and any vulnerabilities had not been formally assessed by DHS. Her matter was easily resolved once she was encouraged to contact DHS, but not before she began to repay the debt at a level causing her financial hardship. Many vulnerable people do not have the support that helped her resolve the issue.

Part three –improvements to the online compliance intervention system

If the OCI system is not abandoned, it should at least be suspended until necessary improvements are identified and made in consultation with stakeholders, including people affected by the system and community organisations.

This is especially important, given that the plan to expand the OCI system to other forms of income than employment income may lead to a higher proportion of more vulnerable people, including pensioners, being affected by the system.

In this part of the submission, we set out our preliminary view of where improvements are needed, based on our experience helping clients navigate the system so far.

Removal of the 10% penalty

The capacity to apply the 10% penalty should be removed from the OCI system. The penalty should also be removed from all debts raised by the system so far.

A DHS officer must exercise the discretion to determine the application of this penalty.

Improving the fairness of the process

The process for making initial contact by letter with the current or former recipient is critical to the procedural fairness of the system. It is also important to the efficiency of the new system, as it an opportunity for people to explain discrepancies and for DHS to screen out false positives.

A number of people affected by the system so far did not receive the initial or reminder letters because they were sent to an out-of-date address. This reflects DHS' longstanding practice of sending letters to an person's last known address on its system, even if the person has not received a benefit for some time and may no longer be living at that address.

It is unreasonable to expect that a person who has not received a benefit for some time should keep their address details up to date with Centrelink. They do not have a legal obligation to do so.

We welcome the announcements that registered mail and other address information will be used to ensure that people receive the initial letter and that cases where the person did not receive the initial letter will be recalled from debt collectors and contact attempted again.

But in our view, if DHS is going to expand its use of online processes like the OCI system it should provide people with an easy to use, integrated online platform through myGov that allows them to update their address across Commonwealth government agencies.

The wording of the initial letter also needs more work. It should provide clear, plain English information about the OCI system to prompt people to respond. Inviting people to go online to confirm ATO data which is correct is confusing and may explain why fewer people responded than DHS anticipated even when they received the letter. The initial letter needs to explain that if the person does not respond a debt may be raised based on the ATO data and this debt may be inaccurate if they do not provide additional information about their employment income. The announcement of the inclusion of the 1800 number to speak to a compliance officer on the initial letter is welcome, as it gives people the opportunity to get a further explanation of the letter at an early stage.

The functionality and transparency of the online platform through which most people are supposed to respond is the second critical element.

The main response of our clients, regardless of background, education and so forth, is that they have found the online platform confusing and hard to use. It appears there have been IT problems at times, where the system has been down.

The online portal suffers from problems with design, interface and messaging. We understand the DHS have made changes, but it needs comprehensive review and redesign.

A number of our clients, for example, had no idea that you could use the online portal to request an extension of time, find the phone number for a DHS compliance officer or, more critically, input detailed pay and pay period information. At least in part, this reflects a poor interface.

To give one example, we are all familiar with the online design feature whereby when we try to navigate from one page to the next of a web-based form, we are not allowed to progress until certain questions are answered. Alternatively, there may be a pop-up message advising of the result of navigating without completing certain questions.

But in the OCI's online platform, there is no clear advice about the basic feature of the OCI system, including how it assesses a debt if additional information is not provided and a warning that this may be inaccurate if the person's income varied across the relevant period.

Enhancing the data-match process

As we noted above, it does not appear that there has been a change to the pre-existing data-matching process as part of the roll out of the OCI system.

However, in our view, DHS must reduce the risk that a false positive may result in an incorrectly assessed debt that a person does not challenge by investigating ways to enhance the data-match process and particularly to screen out false positives.

First, DHS should investigate technical improvements that would improve the capacity of the system to recognise differences between the name of the employer used by the person when receiving a benefit and the name recorded by the ATO, or the possibility of screening by Australian Business Number. If improvements can be made, this would reduce instances of "double counting".

Should the system continue into the future, DHS also needs to urgently review the information it provides to people about how to report their income. DHS is not prescriptive about how employers are named (for good reason, as that might delay reporting and therefore delay payment to people in need). But it should provide guidance to people about the best way to name their employer to minimise the issue of double counting in the future.

It also needs to investigate ways to improve the quality of the ATO data in relation to employment period. One of the main causes of incorrectly assessed debts in our clients' cases is the fact that the ATO data, provided by employers, often records the period of employment as the full financial year even when a person has only worked for part of a year.

Finally, DHS should also investigate the possibility of introducing a level of human oversight to screen data-match results for false positives. It may be possible, for instance, to use a risk-based assessment to identify data-match results most likely to be false positives for preliminary screening by a DHS officer (for instance, cases where the employer is the same, but the ATO records a full year employment and the person has declared part-year employment to DHS). This may have an efficiency dividend, as it may help to avoid some false positives resulting in debts followed by unnecessary reassessments, reviews or recovery action.

Transparency

The OCI process needs to be made more transparent and up front with people, especially where averaging may be, or has been, applied to assess a debt. This would mitigate the risk that people do not seek reassessment or review of debts which may have been incorrectly calculated due to averaging.

Where averaging has been applied, this should be clearly stated (as well as the risk of inaccuracy it creates), including on letters, debt notices and in authorised review officer decision letters. Information about this should also be built into the debt recovery script for DHS and for external debt collection agencies when in contact with a person about repaying a debt calculated through averaging.

Revised communications should be re-sent to all people with debts already raised, which also inform them about other changes not originally available to them such as use of net income from bank statements.

Reassessment, review and appeal

Reassessment is an established process within DHS and helps to alleviate pressure on the internal and external review system.

It needs to be accompanied by robust processes for ensuring people have had a matter reassessed are aware of their option to seek formal internal review.

Although we are now starting to see clients progress to the AAT, we are concerned at further cost and delay of external merits review by the AAT in some of these cases. In some cases people will

progress to the tribunal level because they were unable to collect all the necessary evidence at the internal review stage.

Ordinarily where a person has applied to the AAT for review, authorised review officers will not reopen the matter even if the person presents new evidence. This practice is generally sound, but unhelpful in relation to debts raised by the OCI system if new evidence would enable the authorised review officer to recalculate the debt accurately using the multical.

In our experience it is likely that in many cases, even if the AAT identifies error in the calculation of a debt, it will be reluctant to redo the calculation itself given the difficulty of doing this accurately. It is more likely to send the matter back to DHS for recalculation, leading to further delay.

In our view there is merit in modifying this approach for reviews relating to the OCI system and giving people the option of seeking reassessment based on new evidence, even if an appeal to the AAT has been lodged.[11]

Alternative processes for vulnerable people

We are aware that DHS has excluded a number of cohorts from the OCI system although we are not aware of the full list of exclusions, or the alternative process these groups will be offered.

One of the main grounds of exclusion is of people with a "vulnerability indicator" on their Centrelink record. A vulnerability indicator is a flag added to the computer record of people receiving a payment with mutual obligations such as newstart allowance, if they have vulnerabilities that might affect their ability to comply with their obligations. There are indicators for a range of circumstances including mental illness, substance abuse, homelessness and family or domestic violence.

This is a useful way to exclude some vulnerable people from the online process. But it has limitations. Our experience is that appropriate vulnerability indicators are not always flagged on a person's record due to a range of circumstances such as a failure to disclose those circumstances to DHS during the claim process. Further, these flags are not used for recipients without mutual obligations such as sickness allowance recipients.

DHS does not have the capacity to exclude all vulnerable people from the system using markers like this or other categories. There needs to be a robust process for identifying vulnerable people on a case by case basis, supported by administrative guidelines and training for compliance officers. This process should support officers in DHS customer service centres to help vulnerable people who attend the office, such as by putting them in contact with a compliance officer or assisting them to use the online platform.

There should also be an escalation process for people who claim, with good reason, to be unable to access any records or information to respond to the discrepancy or debt notice. Where a person can justify this and raises doubts about a debt, there should be a last resort process where a DHS officer reviews the file and may use DHS's coercive powers to assist the person obtain the information.

[11] The Secretary has the power to conduct a review, even if an appeal to the AAT has been lodged. See s 126, *Social Security (Administration) Act 1999* (Cth).

Debt recovery

We welcome the announcement that debt recovery will be paused if a person asks for review of a debt and requests a pause. However, the simple truth is many current and form recipients will not realise they can ask for a pause on debt recovery.

The pause on debt recovery should be automatic and apply if a person requests reassessment or internal or external review of the debt. Information about this should be included in the online platform, on debt notices and in the debt recovery scripts for DHS and external collection agents.

Public information about the operation of the OCI system

DHS should produce a report at regular intervals on the operation of the OCI system, if it continues, which should be publicly available on its website (in the way that the Department of Employment reports on the operation of the job seeker compliance framework).[12]

The reports should include core information such as number of matters initiated, debts raised, and number and outcomes of reassessments and reviews. It should also include data that would support an assessment of the accuracy of debts raised by the OCI system, including changes in debts after reassessment or reviews and reasons.

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[12] See https://www.employment.gov.au/job-seeker-compliance-data.