THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC/PCC/PWak:1268261

20 March 2017

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

By email: Natasha.Molt@lawcouncil.asn.au

Dear Mr Smithers,

Inquiry into the design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative

I am writing on behalf of the Law Society of NSW regarding the Senate Standing Committee on Community Affairs inquiry into the design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative (the inquiry). The Law Society's Human Rights and Privacy and Communications Committees have contributed to this submission.

We provide the following comments in response to the terms of reference of the inquiry.

The impact of Government automated debt collection processes upon the aged, families with young children, students, people with disability and jobseekers and any others affected by the process

The Law Society is concerned about the reports of high levels of inaccurate debt recovery notices issued by Centrelink, as a result of the automated data-matching system.[1] Specifically, we understand that the primary concern is that the system compares fortnightly income reported to Centrelink with annual pay information held by the Australian Taxation Office (ATO), which has led to errors where people have not worked consistently throughout a financial year.[2] We understand that this may arise because of differences between the actual fortnightly income that a person may have earned over particular periods within a year, and the income averaged out over the course of the year.

[1] See for example: Australian Council of Social Service, 'Centrelink debt fiasco must end immediately', *Media Release*, (11 January 2017), accessed at: http://www.acoss.org.au/media-releases/?media_release=centrelink-debt-fiasco-must-end-immediately.
[2] Victoria Legal Aid, 'Get help with Centrelink's automated debts', *Online*, (updated 15 February 2017), accessed at: http://www.legalaid.vic.gov.au/find-legal-answers/centrelink/get-help/get-help-with-centrelinks-automated-debts#section-header.

Legal Aid agencies have also reported that errors have arisen where an employer's name may be recorded differently in separate systems, which can incorrectly indicate that a person had two jobs rather than one.[3]

We are also concerned that the debt recovery process in practice shifts the onus to the customer to work out whether the debt notice is correct and why it may not be correct, because Centrelink requires the person to respond to the (potentially) inaccurate debt notices to prove that they do not owe the debt. The Law Society considers that such a process impacts on a person's rights to procedural fairness and may also constitute an invalid decision, particularly where the initial debt identification methods are flawed and the decision-maker has made a finding of fact unsupported by evidence.[4] Given the circumstances of disadvantage and the potentially limited literacy of many Centrelink clients, we suggest that the decision-maker should exercise particular caution before seeking to move obligations to a client to work out why a Centrelink notice, which on its face appears authoritative may (and in many cases will) be incorrect. Further, were debt collection companies or credit providers to take an analogous approach, such conduct would likely be regarded by a tribunal or court as "misleading or deceptive".

We also understand that a person is required to verify their correct salary and income information online, rather than in person, which potentially impacts on their ability to explain the particular circumstances of their case. An example of the letter issued by Centrelink states that a 10% recovery fee may be charged, where the person has failed to pay a debt.[5] The Law Society submits that it is not appropriate to impose a recovery fee, where the initial debt notices are automated and likely to be incorrect in a significant number of instances. Referring incorrect debt notices to debt collectors may also constitute a breach of Article 9 of the *International Covenant on Economic Social and Cultural Rights*, which requires State Parties to recognise the right of everyone to social security.[6]

The Law Society supports calls from various social services and legal aid organisations, for the Australian Government to suspend the automated debt recovery system, until the above flaws are addressed. In particular, the Law Society considers that Centrelink should not refer these matters to debt collectors, where such information cannot be properly verified.

The adequacy of Centrelink complaint and review processes, including advice or direction given to Centrelink staff regarding the management of customer queries or complaints

The Law Society understands that, under normal circumstances, a person can apply to have their accounts payable notice from Centrelink reviewed by an authorised review officer (ARO), which is a senior Centrelink officer who has not previously dealt

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[3] Ibid.

[4] Following the reasoning in *Minister for Aboriginal Affairs v Peko-Wallsend* Ltd (1986) 162 CLR 24, the calculation of a debt based on wrongly averaged annual figures is not a question of weight nor a matter so insignificant as to have no material effect on the decision. Such a decision could also be described as "manifestly unreasonable" [at 15].

[5] Emma Reynolds, 'What happens when you get a Centrelink letter', *News.com.au*, (16 January 2017), accessed at: http://www.news.com.au/finance/money/costs/what-happens-when-you-get-a-centrelink-letter/news-story/b6a1ab30d41e82c963fa9b5cdddf579c.

[6] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: http://www.refworld.org/docid/3ae6b36c0.html, (accessed 16 March 2017).

with a client's matter.[7] A person can request an ARO review in person, by phone, online, in writing or by fax.[8]

We submit that the same review options should be made clear on any debt recovery letter sent by Centrelink, to ensure that people are aware of their legal rights to contest the notice. In particular, clear and appropriate information should be provided to persons from culturally and linguistically diverse backgrounds, to ensure there is a proper understanding of the process and timeframes for a review of the decision.

The Government's response to concerns raised by affected individuals, Centrelink and departmental staff, community groups and parliamentarians

The Law Society is concerned about the documented release of personal information by the Australian Government, as part of its response to concerns raised about the lack of procedural fairness of the debt collection process.[9]

We understand that the Australian Government contends that the disclosure was permitted by the legislation, pursuant to section 162 of the *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) and section 202 of the *Social Security (Administration) Act 1999* (Cth). However, it is unclear whether these sections do authorise the provision of personal information (either at all, or to the extent and in the circumstances now under review) to journalists. Further, it appears quite inconsistent with good and reasonable privacy practices among public sector agencies for such personal information to be released to the media, when the possibility of such release is not addressed at all in the Department of Human Services and/or Centrelink's privacy policies and statements to customers.[10]

The Law Society acknowledges that Chapter 6 of the Australian Privacy Principles (APP) Guidelines outline when an APP entity may use or disclose personal information.[11] APP 6.2(a) permits an APP entity to use or disclose personal information for a secondary purpose if the individual would reasonably expect the entity to use or disclose the information for that secondary purpose, and:

- if the information is sensitive information, the secondary purpose is directly related to the primary purpose of collection, or
- if the information is not sensitive information, the secondary purpose is related to the primary purpose of collection.[12]

The Guidelines then go on to state that:[13]

> The 'reasonably expects' test is an objective one that has regard to what a reasonable person, who is properly informed, would expect in the circumstances. This is a question of fact in each individual case. It is the responsibility of the APP entity to be able to justify its conduct.

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[7] Victoria Legal Aid, 'Get help with Centrelink's automated debts', *Online*, (updated 15 February 2017).
[8] Ibid.
[9] Paul Malone, 'Centrelink is an easy target for complaints but there are two sides to every story', *SMH Online*, (26 February 2017), accessed at: http://www.smh.com.au/comment/centrelink-is-an-easy-target-for-complaints-but-there-are-two-sides-to-every-story-20170224-gukr4x.html.
[10] Department of Human Services Privacy Policy, 16, accessed at: https://www.humanservices.gov.au/sites/default/files/dhs-privacy-policy-3.2.1.pdf.
[11] Office of the Australian Information Commission, *Australian Privacy Principles Guidelines - Privacy Act 1988*, (March 2015), accessed at: https://www.oaic.gov.au/resources/agencies-and-organisations/app-guidelines/APP_guidelines_complete_version_1_April_2015.pdf.
[12] Ibid, [6.18].
[13] Ibid, [6.20].

Examples of where an individual may reasonably expect their personal information to be used or disclosed for a secondary purpose include where:[14]

> The individual makes adverse comments in the media about the way an APP entity has treated them. In these circumstances, it may be reasonable to expect that the entity may respond publicly to these comments in a way that reveals personal information specifically relevant to the issues that the individual has raised.

In the above case (*L v Commonwealth Agency* [2010] PrivCmrA 14), the Privacy Commissioner took into account that the complainant had complained publicly about the agency's handling of their application.

The Commissioner found that:[15]

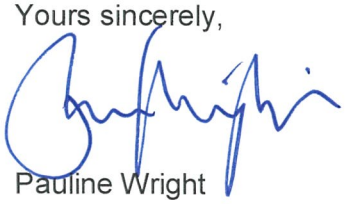
> The information provided by the agency was confined to responding to the issues raised publicly by the complainant. The Commissioner considered that the complainant was reasonably likely to have been aware that the agency may respond, in the way it did, to the issues raised.

However, we query whether the extent of the release of personal information in the present Centrelink matter was similarly confined to responding to the issues publicly raised by the client, and whether a reasonable person would similarly expect their personal information to be disclosed to the media in this way.

The Law Society submits that the inquiry should seek further information from the relevant government agencies regarding the relevant legislative provisions relied on to authorise such disclosure. If it is found that the disclosure was permitted by the legislation, the Law Society suggests that the inquiry should examine whether such permissible disclosures are appropriate and in the public interest, and whether further steps should be taken by the Department to properly notify its customers of the privacy policy. In particular, the inquiry should consider whether such policies accord with Australia's international human rights obligations, to ensure the right to privacy is preserved.[16]

Thank you for considering this submission. If you have any questions, please contact Anastasia Krivenkova, Principal Policy Lawyer, on (02) 9926 0354 or anastasia.krivenkova@lawsociety.com.au.

Yours sincerely,



Pauline Wright
President

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[14] *L v Commonwealth Agency* [2010] PrivCmrA 14 (24 December 2010), Australasian Legal Information Institute website www.austlii.edu.au.
[15] Ibid.
[16] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: http://www.refworld.org/docid/3ae6b3aa0.html, (accessed 16 March 2017), Article 17.