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DOCUMENT 1

In the matter of the Royal Commission into the Robodebt Scheme

No NTG-0203

STATEMENT

Name	Iain Anderson
Address	Address available to the Commission
Occupation	Commonwealth Ombudsman
Date	22 February 2023

1. I refer to the Notice to Give Information in Writing and Produce Documents (NTG-0203) dated 15 February 2023 directed to me by the Royal Commission into the Robodebt Scheme **(Notice).**

2. I currently hold the position of Commonwealth Ombudsman.

3. This statement is true and colTect to the best of my knowledge and belief, having made relevant inquiries and examined documents made available to me to prepare this response. I make this statement in response to the Notice.

4. Should further documents or matters be brought to my attention in the course of the Royal Commission, I will seek to assist the Commission including by providing a supplementary response if necessary.

5. This statement has been prepared with the assistance of lawyers f'om the Australian Government Solicitor **(AGS).**

QI. Set out your relevant qualifications and professional experience, including the positions held before your appointment as the Commonwealth Ombudsman

6. I hold a Bachelor of Economics and a Bachelor of Laws f'om the University of Sydney, a Graduate Diploma of Legal Practice from the University of Technology Sydney, a Graduate Management Qualification f'om the Aush·alian Graduate School of Management and Tam an Executive Fellow of the Australia and New Zealand School of Government. I am admitted as a legal practitioner in New South Wales and my name is on the High Court Roll of Practitioners.

7. Before completing my degrees, I worked for periods in junior clerical roles in the Australian Public Service in the Deparbnent of Special Minister of State, Department of Community Services and Depaitrnent of Housing and Construction. After completing my degrees I worked for thirty-two yeal·s as a Commonwealth public servant, f'om 1990-2022.

8. Initially 1 practiced as a solicitor at the Australian Government Solicitor for over four years, then spent a year as Executive Advisor to the Australian Government Solicitor, then a year as a Depaltmental Liaison Officer to the Attorney-General. In 1997 1 was promoted to the Senior Executive Service in the Australian Govenunent Solicitor (again practising as a solicitor).

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9. In 1999 I transferred to the Australian Taxation Office, to set up an in-house legal practice. In 2002 I was promoted to SES Band 2 at the Attorney-General's Department, where until late 20151 led Divisions with a range of policy and program responsibilities.

10. In 20161 was promoted to SES Band 3 at AGD, and in 2021 I acted as Secretary of AGD for eight months. In 2022 I was appointed Commonwealth Ombudsman and commenced in that role on 1 August 2022.

Q2. Outline your view of the role and functions of the Office of the Commonwealth Ombudsman, and the value of the Commonwealth Ombudsman as an accountability mechanism in relation to Commonwealth policies and program delivery.

Ombudsman functions

11. The Commonwealth Ombudsman has a number of statutory roles. Under the *Ombudsman Act 1976* **(Ombudsman Act)** I am the Commonwealth Ombudsman, Immigration Ombudsman, Law Enforcement Ombudsman, Defence Force Ombudsman, Postal Industry Ombudsman, Overseas Student Ombudsman, Private Health Insurance Ombudsman and Vocational Education and Training Student Loans Ombudsman. Under the *Ombudsman Act 1989 (ACT),* the Commonwealth Ombudsman is also the ACT Ombudsman unless the ACT Government chooses to specifically appoint an ACT Ombudsman.

12. The function of the Ombudsman under each of the above roles is to investigate complaints about government administration and to perform such other fonctions as are conferred by Acts or Regulations.

13. In addition, the *Telecommunications (Interception and Access) Act 1979,* the *Surveillance Devices Act 2004,* the *Crimes Act 1914* and the *Telecommunications Act 1997* bestow specific oversight functions on the Ombudsman with respect to the exercise of covert and intrusive powers by law enforcement. The *Australian Federal Police Act 1979* bestows an oversight function with respect to the handling of complaints about AFP conduct and practices.

14. Under the *Public Interest Disclosure Act 2013* the Ombudsman has a range of functions in relation to the Commonwealth Public Interest Disclosure scheme.

15. Under section 4860 of the *Migration Act 1958* the Ombudsman is required to give the Immigration Minister assessments of the appropriateness of the arrangements for the detention of i,ndividuals who have been in immigration detention for longer than two years.

16. . Under the *Ombudsman Regulations 2017,* the Ombudsman is also the National Preventive Mechanism under the Optional Protocol to the Convention Against Tolture for places under the control of the Commonwealth where people may be detained, and the coordinator of the network of National Protective Mechanisms in Australia.

The primary function: independent and impaltial grievance body

17. Notwithstanding the range of roles set out above, in my view the primary function of the Ombudsman is to be an independent and impartial entity able to receive and consider grievances that people have with respect to matters of Commonwealth government administration. The

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function of receiving and considering grievances is intended to be an accessible and relatively informal palt of the Commonwealth administrative law scheme, as opposed to formal merits review by a federal tribunal or judicial review by a federal coult. Receiving and considering complaints enables individuals to have their concerns heard. It can also provide assurance to the broader community and parliament that agencies are being ap"propriately held to account and are acting fairly and reasonably, including to resolve issues.

18. The other statutory oversight functions of the Ombudsman also provide assurance to the community and to parliament that agencies are properly exercising their powers and provide transparency about that, including through the publication and/or tabling of regular reports.

19. Complaint investigation is confidential and is conducted in such manner as the Ombudsman see fit, under section 8(2) of the Ombudsman Act, but the Ombudsman has the power under section 35A of the Ombudsman Act to disclose information publicly if the Ombudsman believes it is in the public interest to do so.

20. The breadth of the Ombudsman's jurisdiction and the volume of complaints - approximately 25,000-35,000 per year - entails that the Ombudsman makes discretionary decisions as to which complaints to investigate and to what extent. Section 6 of the Ombudsman Act gives the Ombudsman the discretion not to investigate a matter, for example if the person making the complaint has not first complained to the relevant department, if the complaint is f'ivolous or not made in good faith, or if an investigation is not warranted having regard to all of the circumstances. At the same time, some matters will require deeper and more extensive investigation. The outcome of an investigation could be formal or informal action by the Ombudsman, depending on the nature of the issue, the remedy that is believed to be appropriate and the manner in which the agency involved is engaging.

The Ombudsman makes recommendations, rather than directing actions

21. While the Ombudsman has powers to compel the provision of information and documents in order to be able to investigate the matters complained about and is able to make reconunendations, suggestions and comments about the resolution of the issues, the Ombudsman does not have the power to direct an action or outcome nor compel an agency to act on a recommendation. This means that an Ombudsman typically seeks to persuade an agency of the merits of the Ombudsman's views and recommendations and may use both formal and informal means to seek to do so.

22. One formal option is to make comments or suggestions arising out of an investigation to a person or entity under section 12(4) of the Ombudsman Act. Section 12(4) provides however that this option is not available if the Ombudsman has already provided that person or entity with a rep01t under section 15 in respect of the same matter.

23. The reconunendations made by the Ombudsman have the potential to lead to significant and systemic improvement in government administration, in addition to the resolution of an individual complaint or of a coh01t of complaints. Most recommendations made by the Ombudsman are accepted and implemented by agencies.

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24. At the same time, in most matters investigated by the Ombudsman the outcome of an investigation is not public, including any individual or systemic responses by the agency involved.

Section 15 and Own Motion Investigations

25. Section 15 rep01ts generally result f'om the most significant investigations, which are referred to as Own Motion Investigations. However, an Own Motion Investigation is not a precondition of a section 15 report and a section 15 report can be issued at any time the Ombudsman believes the statutory tests in section I5 are met.

26. Section 15 has a significant threshold - for example that a matter appears to have been contrary to law, unreasonable, unjust, oppressive or improperly discriminatory, was based on a mistake of law or fact, or was otherwise wrong in all of the circumstances, and that action should be taken as a result. The action the Ombudsman recommends be taken may be to vary, cancel or mitigate the effects of a decision, but the Ombudsman can also recommend changing a rule of law, provision of an enactment or practice. The Ombudsman can also request that the agency involved advise, within a specified time, the action it proposes to take on the matters raised in the report.

27. One precondition for the issue by the Ombudsman of any report in respect of an investigation where the report sets out opinions expressly or impliedly critical of an agency or person (including a section 15 report) is that, before completing the investigation, the agency or person must be affi;>rded the opportunity to make such submissions, orally or in writing, concerning the matter as they think fit (section 8(5)).

28. A second precondition for issuing a section 15 report is that the agency involved is given the opp01tunity to provide such comments concerning the repott as it wishes to make (section 15(5)). These responses are typically published as attachments to the rep01t.

29. The full process of an Own Motion Investigation may take an extended period to complete, for example 12 months f'om the start of the investigation to the publication of a report. An Ombudsman may also decide to complete an Own Motion Investigation in a much shorter tirneframe, for example due to the circumstances of the issue. There will typically be a range of finely balanced decisions to be made by the Office at the outset and in the course of the investigation, in order to be able to bring it to finalisation within the desired timeframe.

30. The power to issue a section 15 report is a non-delegable power of the Ombudsman, who must weigh up the issues, the evidence, proposed findings and the best way to take those matters forward. While an Own Motion Investigation team carries out the investigation and drafts the report, it is a report of the Ombudsman and the.recommendations, the content and the decision to publish are all ultimately decisions of the Ombudsman.

Section 15 reports are usually published

31. A formal report under section 15 of the Ombudsman Act is generally also published. If it is believed that there are grounds to invoke section 15, it is usual to also decide that publishing the report is in the pubtic interest, under section 35A of the Ombudsman Act.

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32. A section 15 report must in any case be provided to the Minister responsible for the agency involved. The Ombudsman may also choose to discuss any matter relevant to the investigation with the responsible Minister, whether before or after the completion of the investigation (section 8(8)):

33. Alternatively, the Ombudsman could choose to pLiblicise the issue through an issues paper or other generalised publication, or could choose to deal with the matter confidentially in a formal or informal manner.

34. Dealing with a matter confidentially could include issuing a formal section 15 report but not publishing it, although this would be unusual.

35. A section 15 report carries with it the power to make recommendations and to follow up the implementation of those recommendations. If a section 15 repo1t has been made and an agency does not take adequate and appropriate action on the Ombudsman's recommendations within a reasonable time after provision of the section 15 rep01t, the Ombudsman Act provides options of advising the Prime Minister (section 16) and the Presiding Officers of Parliament (section 17) of the matter. In the case of the Presiding Officers, the Ombudsman Act provides that they should present to both Houses of Parliament copies of the section 15 rep01t in question.

36. If an Ombudsman chooses to address an issue infonnally, for example by engaging with an agency or agency head, making suggestions to them and seeking assurances from them that appropriate action will be taken on an issue, the Ombudsman can still subsequently choose to take formal action - such as at that point issuing and publishing a section 15 repo1t, with formal recommendations - if for example the agency does not in fact take the action it had committed to take.

Q3, Having reviewed the evidence presented at the Royal Commission to date in relation to investigations undertaken by the Commonwealth Ombudsman, please provide your views on:

(a) the processes which the Office of the Ombudsman currently follows to undertake an Own Motion Investigation, and whether those processes are similar or different to the processes which appear f 'om the evidence to have occurred in relation to the Investigations; and

(b) the manner in which an Own Motion Investigation report is prepared and finalised, including the manner in which agencies are provided with an opportunity to comment on a draft report, and whether these are similar or different to the techniques which appear f 'om the evidence to have occurred in relation to the Investigations

37. The processes currently followed by the Office of the Ombudsman in conducting an Own Motion Investigation appear to be similar to the processes followed in relation to Robodebt, or the Online Compliance Intervention **(OCI)** scheme.

38. At the same time, my understanding is that the Robodebt investigations may have been significantly more challenging than most investigations the Office conducts, paiticularly in tenns of how the agencies responded to requests for information and engaged with the Office during

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the process. I say that based on what I have observed of the evidence that the Commission has heard and upon discussions with staff who have conducted other Own Motion Tnvestigations.

39. It appears, for example, that requests for documents were not always met, or were answered with cut and pastes or summaries of documents (such as legal advice) rather than the underlying documents actually requested. The departments seem also to have pursued a somewhat strained interpretation of the clear and straightforward requests for information in deciding what was in scope. Neither of those is usual in my experience. In addition, the impression I formed of the evidence that the Commission bas heard is that the agencies were very firmly advocating a paliicular position in their engagement with the Ombudsman, rather than simply responding to the requests and questions they received f'om the Ombudsman. In my experience, while it is not uncommon for an agency to put its point of view to the Office in the course of an investigation, it is unusual to do so with the apparent level of vigour and persistence that the agencies did in this case, including in how the agencies seem to have sought to shape every engagement they had with the Office as a way to push their particular view.

40. In addition, while as I have said earlier the timef'ame set for an Own Motion Investigation will depend in part upon the circumstances of the issue, it seems to me that the 2017 investigation and report were completed in a very sholt timef'ame for a report on such a major issue. It is possible that a factor which influenced the decision on timeframe, in terms of perceived mgency of the issue, was the volume of complaints that the Office was receiving about Robodebt, but I do not know why this timef'ame was set for the investigation and report.

41. I note that the evidence before the Royal Commission has touched on the following processes for engaging with agencies:

    a) requesting copies of documents

    b) meeting with agencies to discuss the issues relevant to the repolt

    c) providing the agency with preliminary drafts of a report, and the agencies providing feedback on the draft including by way of track changes

    d) providing the agency a formal opportunity to comment on a proposed report, and annexing their formal comments to the report.

42. Each of these are techniques which the Office continues to use. Each of these is either a useful or mandatory step in the process of conducting a complex investigation and preparing a section I5 report. At the same time, the Office needs to be ready and able to quickly change its approach if necessary in the course of a paliicular investigation, for example if an agency is not responding appropriately to requests for documents. In such situations it may be a question of taking informal or fonnal steps to seek agency compliance, if it appears that the agency has omitted to provide documents that had been specifically requested.

43. It may also be a matter of ensuring that the agency understands what the Office is seeking f'om them and why. For example, in relation to paragraph 41(c) above, providing an agency with a draft of a report can be an efficient and effective way for an agency to assist the Office to better understand or more accurately express matters of fact which are better known by the agency, palticularly if the draft report is lengthy and the issues are detailed or involve technical language

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and concepts. It needs to be understood by the agency, however, that the Office is just seeking to identify errors of fact in the draft and that the final wording of the report is a matter solely for the Ombudsman. I say more about this in paragraphs 54-55 below.

Q4. Please provide copies of any process guidance documents which would have been available to Commonwealth Ombudsman staff between December 2016 and the present date that provided guidance in conducting an Own Motion Investigation.

44. Although an investigation is to be undertaken in such manner as the Ombudsman thinks fit (section 8(2)), there was and is procedural guidance available to staff conducting investigations, including Own Motion Investigations, preparing section 15 reports and monitoring the implementation of recommendations.

45. I have caused staff in the office to undertake a search for documents that would match the terms of question 4 above. I have supplied these to AGS to make available to the Commission. They are:

a) Work Practices Manual (2011-2019)[1]

b) Guidelines for preparing own motion and major investigation reports for publication (2013-2019)[2]

c) Formal Report Checklist (2013-2019)[3]

d) Formal Report Template (2016, regularly updated for branding purposes)[4]

e) Parliamentary Complaint Handling Procedure 13 – Formal Reports (2019-current)[5]

f) Systemic Issues Assessment Framework (2020-current)[6]

g) Fact Sheet for Agencies on Ombudsman Recommendations (2020-current)[7]

h) Monitoring Recommendations Policy (2021-current)[8]

i) Monitoring Recommendations Procedure (2021-current)[9]

j) Crafting Recommendations Guidelines (2021-current)[10]

k) Fact Sheet for Agencies on Own Motion Investigations (2021-current)[11]

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[1] IAN.001.001.0082
[2] IAN.001.001.0020
[3] IAN.001.001.0232
[4] IAN.001.001.0252
[5] IAN.001.001.0002
[6] IAN.001.001.0057
[7] IAN.001.001.0080
[8] IAN.001.001.0050
[9] IAN.001.001.0058
[10] TBA
[11] IAN.001.001.0233

Released under the Freedom of Information Act 1982 (Cth)

l) Ombudsman Act 1976 Own Motion Investigations Introduction Training (2022-current)[12]

m) Assessment Frameworks and Information Gathering – Strategy Investigations Team Training (2022-current)[13]

n) Poster for Agencies on Double Smart Recommendations (2021-current)[14]

o) Crafting Recommendations Training (2022-current)[15]

Q5. Outline any changes that you suggest should be made, with respect to the current approach, processes or procedures that the Commonwealth Ombudsman follows, in light of your review of the evidence before the Royal Commission.

Work is underway on procedural guidance

46. My Office is currently updating the guidance material specifically in relation to Own Motion Investigations.

47. The key aspects of the guidance that I believe need to be updated cover matters like:

a) the manner in which we scope the investigation at the outset;

b) the manner in which we request information from agencies, including legal advice, and our options if we think the agency is not providing the information that has been requested;

c) how we provide procedural fairness before finalising an investigation;

d) how to address and resolve issues;

e) how to address issues that we cannot resolve.

48. I believe that it is desirable to provide guidance on the manner in which we scope out an investigation at the outset because I believe that ensuring there is clarity on the purpose for and potential key issues in an investigation will assist in making tactical decisions in the course of an investigation. It will also assist in planning the time and processes required to conduct the investigation, and in ensuring that a section 15 report addresses the key reasons why the investigation was embarked upon.

49. I believe that addressing the manner in which we request information from agencies and our options if we do not think an agency is responding appropriately is also important in guiding tactical decision-making during the investigation, should an issue arise. For example, while we typically commence an investigation by notifying the relevant agency and seeking the provision of information and documents under section 8 of the Ombudsman Act, we also have the option

[12] IAN.001.001.0028
[13] IAN.001.001.0235
[14] IAN.001.001.0001
[15] IAN.001.001.0256

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of formally requiring the provision of information and documents by issuing a notice under section 9 of the Ombudsman Act. If a person does not comply with a section 9 notice, we can apply to the Federal Court for an order directing the person to comply.

50. This latter step would not be taken lightly, given it will involve delay to an investigation. However, it is important that the investigation team know that it is an option and that they – and the Ombudsman – are able to draw this to the attention of an agency, or their Minister, as an option that we are willing to pursue if necessary. (Section 8(7A)(b) provides that a pre-condition for the issue of a section 9 notice is notification to the Minister that the matter is being investigated, unless the Minister has already been advised.)

51. Another option is to make and publish formal recommendations about the conduct of the agency in a section 15 report, which could be done as a separate stand-alone exercise during the investigation, specifically about the agency's apparent failure to comply with legal obligations under sections 8 or 9 of the Ombudsman Act. Before embarking upon this option, it would first be drawn to the attention of the head of the agency as an action being seriously contemplated.

52. Alternately, if an agency has not fully complied with section 8 but the Office has been able to obtain sufficient information to form a view upon the key issues involved in the investigation, the agency's response to requests for information could be the subject of comment in the final section 15 report at the conclusion of the investigation. While the Ombudsman may not be able to compel an agency to take a particular action, a potentially significant tool at the Ombudsman's disposal is the ability to comment publicly on a matter and on an agency's conduct, should the Ombudsman believe that it is necessary to do so.

53. With respect to seeking legal advice from agencies, the procedural guidance will make clear that we should be seeking copies of requests for legal advice, documents referring to requesting legal advice, drafts of legal advice, legal advice, and all documents discussing or analysing legal advice. When we are seeking information and documents, we also need to make clear that we require copies of the actual documents.

54. In terms of guidance on procedural fairness process, I believe that we should ensure that we do not through this process impair our own ultimate effectiveness. Given that the Ombudsman cannot compel an agency to act on recommendations, as noted above, we seek to persuade agencies of the merits of our views and, where possible, to work together constructively to seek an appropriate outcome on an issue. This may include accepting textual suggestions if in the view of the Ombudsman they do not have an inappropriate detrimental effect upon the intent of the report, in particular the way in which it sets out evidence, findings and recommendations.

55. It is also important that agencies are properly provided with the opportunity to identify what they believe to be errors of fact or law. At the same time, it can be challenging for an investigation team if an agency is strongly urging changes to text on the grounds that it is incorrect or fails to include relevant detail, but in the team's view it is actually just a subjective difference of opinion about language. The guidance should therefore make clear that the process of procedural fairness is limited to enabling agencies to make submissions on the matters being investigated, that ultimately the report is a statement of the opinion of the Ombudsman, and also note that agencies will get an opportunity to respond formally when a section 15 report has been finalised.

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Future options for addressing and resolving issues

56. In terms of how to address and resolve issues and how to address issues that we cannot resolve, I make some further comments in the following paragraphs.

57. Overall, in my view guidance is useful in assisting staff, but it only goes so far: for example, it cannot anticipate all issues that may arise in the course of a particular investigation.

58. While I am keen that the Office provides some more detail in our guidance on matters such as those mentioned in paragraph 45 above, that does not mean that in my view the guidance available in 2016 was defective. I also do not intend to be critical of the investigators or of my predecessors as Ombudsman: they were required to make the best decisions they could in the challenging circumstances prevailing at the time.

59. The team conducting the 2016-17 investigation were able to identify a range of significant issues, to persist in seeking information when it was not provided, and to propose ways of addressing issues, notwithstanding a range of significant challenges experienced during the conduct of the investigation.

60. Legality was identified as a critical issue in the investigation. My understanding is that ultimately the view was reached that the Office was not able to determine the question of legality and that it should not be raised in the report as an issue if it was not something the Office was able to conclusively determine. I believe that it was also understood that the question of legality would soon be considered by the Administrative Appeals Tribunal in applications seeking review of decisions made under the OCI scheme.

Option: seeking external legal advice

61. My understanding is that consideration was given within the Ombudsman's Office to seeking external legal advice. I am not sure who made the decision not to proceed with this. Consideration was also given to seeking an advisory opinion from the Administrative Appeals Tribunal, under section 10A of the Ombudsman Act. Inquiries were made with the AAT, which indicated it would require a full contested hearing. I understand that this was seen as taking too long and being too resource-intensive.

62. I am keen that the Office's revised guidance material makes clear to staff some of the formal and informal options and powers we have, and also that I am willing, if necessary, to consider pursuing them when conducting particularly challenging investigations. Beyond updating the guidance material, however, this is something I need to ensure is and continues to be clearly understood by all staff of the Office, as part of ensuring that our role is clearly understood and advanced in everything we do.

63. For example, in my view, should a question of legality that we are unable to determine arise in a future investigation, one option would be for us to seek external legal advice. The Office would need to comply with the *Legal Services Directions 2017* in doing so. The Legal Services Directions are binding rules issued by the Attorney-General about Commonwealth legal work. The Directions would require the Office to consult with the agency that administers the relevant legislation we were seeking advice upon before we seek the advice, unless the matter is urgent, and to provide a copy of the advice to the agency. It would also be open to me to seek an

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exemption from the Directions from the Attorney-General, but I do not see the requirements of the Directions as a problem.

64. In my view, a preferable alternative would be to tell the agency that it should seek external legal advice and then provide a copy to my Office. Advice could be sought from the Australian Government Solicitor, who have considerable expertise in the interpretation of Commonwealth statutes, or in the most significant cases from the Solicitor-General, noting that under the Legal Services Directions the Attorney-General needs to approve the provision of advice by the Solicitor-General. If the agency declined to seek external legal advice, options would then be to ourselves seek external legal advice, or to issue a section 15 report formally recommending that the agency seek external legal advice within a specified timeframe on a specified question or questions and then share that advice with the Office. The option of seeking to have the agency procure external legal advice may take longer than seeking external legal advice ourselves, but in my view is preferable in terms of seeking to improve government administration because it involves the relevant agency agreeing to take the desired action to clarify the issue.

Option: AAT advisory opinion or Federal Court test case

65. Another option would be to seek an advisory opinion from the AAT. In my experience, a fully contested hearing on a narrow question of law can be prepared for and conducted in a very focused manner, and it would primarily be a question of when the AAT could make available an appropriate member – ideally a Deputy President who is also a Federal Court judge – to conduct a hearing and then when a decision could be rendered.

66. It would be unusual for the Ombudsman to be a party to a matter before the AAT, with the other party being the relevant agency (which is how I understand the AAT had envisaged the process would occur when the suggestion was made in 2017), given that the Ombudsman is required to be impartial. At the same time, I do not believe that impartiality would prevent the Ombudsman from advancing a view to the AAT as to the correct interpretation of the law, in order to have the AAT then advise on the question.

67. In my view, however, a preferable option would be to seek to persuade the agency, including by formal recommendation in a section 15 report, that the relevant agency fund an applicant to bring a test case in the Federal Court. Under section 45 of the *Administrative Appeals Tribunal Act 1975* the President of the AAT, on his or her own motion or on the application of a party, may refer a question of law arising in a proceeding before the Tribunal to the Federal Court for determination.

68. While the government has announced that it intends to abolish and replace the AAT, my Office is recommending to the Attorney-General's Department that the successor body to the AAT should similarly be able to provide an advisory opinion on a matter referred by the Ombudsman and also to refer a question of law to the Federal Court for determination. These are examples of how different elements of the Commonwealth administrative law scheme can work together to resolve issues of significance to the community.

Option: report on a doubt without resolving it

69. Another option available to the Office, if there is a significant contested issue that the Office is unable to determine, is to nonetheless clearly articulate the issue in a section 15 report. Agencies

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may suggest that it would be unhelpful to create public doubt about issues such as the legality of a program, if the Ombudsman is unable to determine categorically that the program is or is not legal. In my view, however, we are not providing assurance about government administration if we are silent on issues that we believe to be significant and have chosen to investigate, even if we are not able to determine them.

70. The benefit of reporting on a significant matter that the Ombudsman has investigated but not been able to determine is that it can encourage the agency to prioritise resolution of the doubt and to transparently report the outcome of their analysis. In my view, that would be in the interests of public administration.

71. I also do not believe that the Ombudsman expressing an opinion in a report would necessarily create any prejudice to the subsequent consideration of that matter in a civil tribunal or court, noting that tribunals and courts will determine matters before them in accordance with their own professional and statutory obligations.

72. I do recognise there would be a range of considerations to weigh up, for example:

    a) expressing the report in a way that did not prejudice the Commonwealth's legal professional privilege in any advice that had been shared with the Ombudsman

    b) the risk that the Ombudsman would be drawn into litigation in a way that undermined the independence of the Office, for example a party seeking to rely on an expression of a view by the Ombudsman as supporting their case, to apply pressure to a Commonwealth party to concede a point. I note that the Ombudsman and the staff of the Office can not be compelled to appear in court and disclose information obtained under the Ombudsman Act (section 35(8)), so the risk of the Office being drawn more directly into the litigation is remote

    c) the risk of an allegation of contempt of legal proceedings if the Ombudsman were to publish a view on a legal issue before a court or tribunal and thereby interfere with the conduct of the proceeding. That risk also strikes me as remote, although in a criminal or jury trial particular care might need to be exercised.

73. However, I do not consider these to be insurmountable obstacles. If I was considering publishing a report expressing a doubt about legality at a time when I knew proceedings were pending, I would seek legal advice on whether the report could prejudice proceedings, and seek a way to include something in my report that was not likely to cause prejudice.

74. Where the issue unable to be resolved is a matter of legality, in my view the most desirable option is either a test case or a legislative amendment to publicly put the matter beyond doubt, or at least the seeking of external legal advice.

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Q6. Outline any changes you would recommend in respect of the current processes of engagement by the Commonwealth Ombudsman with any departments or agencies that are the subject of an investigation, in light of your review of the evidence before the Royal Commission.

75. I have outlined in response to question 5 a range of suggestions which would impact on the current process of engagement. As I have noted above, in my view it is a question of seeking to persuade an agency if possible, and if not to consider what formal options are available to the Ombudsman to ensure that one's view is clearly articulated and considered, publicly if necessary, in order to advance improvement in government administration. We have adopted a model of risk-based oversight with respect to law enforcement agency use of coercive and intrusive powers, and I will consider whether assessments of agency capability and culture should form part of the scoping of and preparation for complex investigations and other work of the office. I have no further changes to recommend. However I welcome the Royal Commission's consideration of these issues. I will carefully consider any recommendations the Royal Commission may make in relation to the functions which the Ombudsman performs.

Signature of witness: 

Name of witness: IAIN HUGH CAIRNS ANDERSON

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In the matter of the Royal Commission into the Robodebt Scheme

No NTG-006

STATEMENT

Name	Louise Macleod
Address	One Canberra Avenue, Canberra ACT
Occupation	Public Servant
Date	22 February 2023

Introduction

1. This statement made by me accurately sets out the evidence that I am prepared to give to the Royal Commission in the RoboDebt Scheme (**Royal Commission**).

2. This statement is true and correct to the best of my knowledge and belief.

3. I provide this statement in response to the Notice to Give a Statement and Produce Documents dated 15 February 2023 and number NTG-006 (**Notice**).

4. The current Commonwealth Ombudsman, Iain Anderson, delegated authority to me under section 34 of the *Ombudsman Act 1976* (Cth) to disclose information to the Royal Commission to assist its inquiries. This statement is based on information contained in documents made available to me by the Commonwealth Ombudsman, and my own recollection of events relevant to the Notice.

5. This information is produced to the Royal Commission on the basis that it will be received into evidence by the Royal Commission pursuant to the Notice and on the basis that the information will be treated as evidence which is subject to section 6DD of the *Royal Commission Act 1902* (Cth).

Direct involvement limited to 2017 Report

6. I am not aware of the details of the April 2021 report that was published by the Commonwealth Ombudsman, titled *Services Australia's Income Compliance Program: A report about Services Australia's implementation of changes to the program in 2019 and 2020.* I was no longer occupying positions that were involved in the investigation which gave rise to this report, so I am unable to comment.

7. Where I am asked questions about 'Reports' my answers are confined to the report dated April 2017 by the Commonwealth Ombudsman titled '*Centrelink's Automated Debt Raising and Recovery system – A report about the Department of Human Services' Online Compliance Intervention System for Debt Raising and Recovery*'.

8. I was provided access to documents relevant to the April 2019 report and investigation by the Ombudsman's Office to review on 14 February 2023.

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Question 1

Set out your relevant qualifications and professional experience, including your employment history at the Office of the Commonwealth Ombudsman, and the positions held before and after your role at the Commonwealth Ombudsman.

Employment history and qualifications

9. I currently hold the position of Assistant Secretary, Policy Regulation and Legal Branch at the Office of the National Data Commissioner.

10. I worked at the Office of the Commonwealth Ombudsman (the **Office**) from 11 July 2016 to 31 July 2022. During this period, I worked in the following positions:

    a. Director, Social Services & Indigenous Team within the Social Services Branch from 11 July 2016 to 22 January 2017

    b. Acting Senior Assistant Ombudsman, Social Services, Indigenous & Disability Branch from 23 January 2017 to 8 June 2017

    c. Senior Assistant Ombudsman, Complaints Management & Education Branch from 9 June 2017 to 3 March 2019

    d. Senior Assistant Ombudsman, Program Delivery Branch from 4 March 2019 to 29 January 2021, and

    e. Acting Deputy Ombudsman from 1 August 2021 to 31 July 2022.

11. Prior to joining the Office in July 2016, I worked at the following agencies in the following roles:

    a. Civil Aviation Safety Authority – Section Head Aviation Medicine

    b. Administrative Appeals Tribunal – District Registrar ACT

    c. Australian Competition and Consumer Commission – Director Emerging Issues and Compliance Monitoring

    d. Office of the Commonwealth Ombudsman – Senior Investigation Officer

    e. Energy & Water Ombudsman Victoria – Conciliator

    f. Department of Justice and Attorney General QLD – Mediator

    g. Australian Army – Logistics Officer

12. In the 5-month period from 30 January 2021 to 31 July 2021, I was at the Department of the Prime Minister and Cabinet, as Assistant Secretary, Review of the Parliamentary Workplace.

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13. I hold a Graduate Diploma in Legal Practice from the Australian National University.

Role at the Office of the Commonwealth Ombudsman

14. The structure of the Office when I joined in 2016 meant that different teams engaged on issues in different ways. Individual complaints (usually from members of the public) were received and actioned by the Operations Branch on a case-by-case basis. Investigation Officers within the Operations Branch were delegated by the Ombudsman the power to use section 8 of the *Ombudsman Act 1976* (Cth) (**Act**) to request information from departments and agencies when investigating individual complaints.

15. The effect of a section 8 notice is that the Ombudsman may obtain information from such persons, and make such inquiries, as they think fit. Departments and agencies can volunteer information to the Ombudsman in accordance with a section 8 notice. The Ombudsman also has a power under section 9 to compel the provision of information. Only the Ombudsman, Deputy Ombudsman, Senior Assistant Ombudsman and Executive Level 2 staff can use section 9 of the Act. Investigation Officers were Executive Level 1 and APS 4 – 6 level staff.

16. The Social Services, Indigenous & Disability Branch (the **Branch**), where I worked from 11 July 2016 to 8 June 2017, focused on conducting own motion investigations under section 5(1)(b) of the Act into systemic issues arising from administrative actions, and strategic engagement with Commonwealth agencies across the social services portfolio, including the Department of Human Services (**DHS**) and the Department of Social Services (**DSS**). This included the own motion investigation that culminated in the 2017 report, as I describe below from paragraph 35.

17. Investigation Officers in the Social Services Branch were also delegated the power to use section 8 of the Act to request information from departments and agencies when assessing systemic issues that arose from the insights gained from individual complaints, and our strategic engagement and research.

18. As Director, Social Services & Indigenous team, I led a team of about eight staff focused on strategic engagement with DHS and DSS. As Acting Senior Assistant Ombudsman, Social Services, Indigenous & Disability Branch, I led a team of about eighteen staff undertaking own motion investigations and engagement across the whole social services portfolio. This work included engaging in and investigating issues about delays in planning interviews by the National Disability Insurance Agency and concerns with the accessibility and use of Indigenous language interpreters by government agencies providing services in remote and regional communities.

Question 2

Provide details of your knowledge of the circumstances and processes that led to the Commonwealth Ombudsman Investigations which were the subject of the Reports.

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April 2017 report

My early engagement

19. When I joined the Office in July 2016, the Branch had an established relationship with DHS and DSS. Engagement with DHS and DSS would occur formally via quarterly meetings, and informally as issues arose, including via topic specific briefings.

20. It was at the 26 May 2016 quarterly meeting, that DHS advised the Office of its planned roll out of a new Online Compliance Intervention (**OCI**) Platform from July 2016.[1] [2] I did not attend this meeting as it pre-dated my time at the Office.

21. The Minutes from the meeting show the Office queried the ability for customers to clarify old debts, and asked questions about current appeal rates by customers and the success of these, how the debt recovery fee was being applied, and the information and assistance that would be available to customers using the OCI platform. The Office also requested further information about debt variation versus debt write off or waiver and asked for more information to be provided as it was uncertain whether the OCI platform enabled the customer to develop awareness that it is possible the data on which a debt was based could be wrong.

22. On 8 June 2016, the Office requested further information from DHS under section 8 following that meeting, which included requesting information about the automatic application of the 10% recovery fee and internal or external legal advice about the change to the automatic application of the fee.[3]

23. On 8 August 2016, DHS provided the Office with its response including legal advice from DSS about the application of the 10% recovery fee in the OCI.[4] The Legal advice from DSS stated the automatic application of the recovery fee in the OCI would still satisfy section 1228B of the *Social Security Act 1991*. Further information about this legal advice is provided at paragraphs 69–70.

24. On 26 October 2016, I attended a quarterly meeting with DHS staff along with colleagues from the Office. This meeting was my first strategic engagement with DHS.

25. To the best of my recollection, there was no briefing provided to me in preparation for this meeting, (and none was shown to me when preparing this statement). Based on my usual workplace practice at the Office, I expect that I reviewed the agenda, and possibly the meeting notes from the previous meeting,[5] and spoke with my team to prepare in advance of the meeting. However, I have no specific recollection of doing so.

26. I have no independent recollection of this meeting. According to minutes of that meeting, DHS gave an update on its rollout of the OCI platform, including how the application of the 10% recovery fee was assessed in the OCI. The Office asked for information about 'special circumstances' for the application of the recovery fee, and that not all letters issued by the OCI drew the customers attention to the automatic application of the recovery fee if the customer did

[1] A422238
[2] A382761
[3] A2310774
[4] A2312253, A2312252
[5] CTH.3023.002.0229

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not respond by the due date. The Office also asked questions about the identification of vulnerable customers by the OCI, treatment of customers from non-English speaking backgrounds and the reasons customers could select when requesting a review of a decision online.[6]

27. At the same time my team was engaging with DHS about the rollout of the OCI, complaints to the Office were increasing as described under Question 3 below.

Initial section 8 notices

28. On 20 December 2016, an Investigation Officer in my team issued a section 8 notice to DHS (by email) asking for information about the use of income averaging, including whether DHS had sought legal advice about the legality of averaging income for social security overpayment calculations.[7] I was copied into the email as the Director of the team which was usual practice.

29. As set out in the email to DHS, the section 8 notice was issued because of the media reporting and the large number of individual complaints the Office was receiving about the OCI as described above, from people who were concerned their debts may have been calculated using ATO income data averaged over the full financial year rather than using the actual amounts earned each fortnight.

30. On 22 December 2016 a further notice was issued to DHS under section 8 by an Investigation Officer in my team,[8] asking if the OCI platform would be expanded to include non-PAYG ATO data from January 2017, consistent with previous information DHS gave the Office.

31. The Investigation Officer also asked in the section 8 notice whether the DHS debt notices were issued under section 11 of the *Data Matching Program (Assistance and Tax) Act 1990* and if there was legal advice on their use, any ministerial briefings on the OCI, consideration of the accuracy of debts generated by the program, project management, project governance and risk assessment frameworks used during implementation of the program. The notice also requested an urgent briefing from DHS in early January 2017.

32. I sent an email to my supervisor, Senior Assistant Ombudsman George Masri on 3 January 2017 updating him on the questions we had put to DHS under section 8 and flagging that we were also speaking with our contact at the Office of the Australian Information Commission about what we were doing.[9] I recall Mr Masri was keeping the Ombudsman Colin Neave and Deputy Ombudsman Richard Glenn updated with what we were seeing – the increasing complaints and the media about the OCI and discussions with DHS.[10] I recall being told the Ombudsman agreed an own motion investigation was necessary.

33. As a follow-on to the section 8 notice issued on 22 December 2016 and under instruction from my supervisor, on 4 January 2017 I sent an email to my equivalent at DHS setting out the issues the Office requested DHS cover at the briefing – the governance, design and functionality of the OCI platform, how DHS was ensuring the income data was accurate and the decision to raise a debt was legally valid and complied with administrative law, how DHS was assessing and

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[6] A522090
[7] A442174
[8] A442173, A442175
[9] A1909740
[10] A1909692, A1909674

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managing the risk of incorrect decisions to raise a debt and commence collection action, especially where the customer was vulnerable, accessibility aspects of the platform, and how complaints, feedback and review requests were being dealt with by DHS.[11]

34. On 6 January 2017, DHS provided the requested briefing which included a walk-through of the OCI platform.[12] At the briefing DHS told the Office that the methodology for raising debts had not changed, DHS was not making assumptions about the existence of an overpayment, the process was to identify an overpayment via data matching, averaging income data was not new and DHS used averaged income data where they were unable to ascertain fortnightly information from the employer or customer.

2017 own motion investigation proposal

35. In parallel to these inquiries with DHS, on 5 January 2017 I was tasked by my supervisor with preparing a minute[13] and project initiation plan[14] for the Ombudsman, Colin Neave, to consider. I sought his formal approval to conduct an own motion investigation into the OCI. This was consistent with the Office Work Practices Manual and Project Management Framework Policy.[15] The decision to commence an own motion investigation under section 5(1)(b) of the Act can only be made by the Ombudsman. The decision to prepare a report under section 15 of the Act can also only be made by the Ombudsman.

36. The minute recommended an own motion investigation be commenced and identified that the key concerns of the Office were as follows:

    a) whether the OCI program met relevant legislative requirements

    b) the accuracy of the debts raised using the OCI platform

    c) the adequacy of the risks assessments and decision making during the planning and implementation stages of the OCI platform

    d) the safeguards for vulnerable customers

    e) the level of automated decision-making in the OCI platform

    f) the impacts on decision-making quality and best practice principles, and

    g) service delivery issues.

37. The minute recommended that a report be prepared under section 15 of the Act.

38. Mr Neave approved the conduct of an own motion on 10 January 2017, writing to the Secretary of DHS, Kathryn Campbell, the Secretary DSS, Finn Pratt, and the relevant Ministers, the Hon

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[11] A440740
[12] A440920
[13] A440773
[14] A440547
[15] A1590691, A1591801

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Alan Tudge and the Hon Christian Porter under section 8 of the Act, advising he had decided to conduct an own motion investigation into the OCI program.[16]

39. To give context to the decision to conduct the investigation, the threshold that warrants an own-motion investigation is when a systemic issue of public administration is identified (such as being the subject of numerous complaints affecting many people that has or could cause appreciable damage to citizens, is complex, there is broader public interest in publicising the problem) and the Office perceives there is no, or insufficient, appetite or engagement by the relevant agency/s to address the systemic issue, which could warrant comment being made under section 12(4) of the Act or a report under section 15 that is published under section 35A of the Act. Further, a deficiency in an individual case that is likely to be repeated in other cases may meet the threshold for an own-motion investigation.[17]

Question 3

Set out your knowledge in general terms of any complaints received by the Commonwealth Ombudsman during the Relevant Period in relation to the Robodebt scheme. In your response, provide details of your knowledge on whether there was any material change in the number of complaints received by the Commonwealth Ombudsman, and whether that had any impact on the decision to commence the Investigations.

Complaints received by the Office about the Robodebt scheme

40. From October 2016 the Office saw an increase in complaints about DHS' Centrelink program, specifically about Centrelink debts and the OCI.[18]

41. The complaints covered a range of issues, including:

    a) the failure to provide the initial discrepancy letter

    b) becoming aware of an outstanding debt only after receiving a demand from a debt collection agency

    c) differences in income being recorded in the system

    d) inconsistent information about the amount of the debt

    e) problems uploading payslips and documents onto the OCI, and

    f) inconsistent advice from Centrelink staff to customers outlining the evidence it was necessary to provide to get the debt reassessed.

42. There were also complaints about customers being referred online to use the OCI by Centrelink staff and refusing face to face or phone assistance.[19]

[16] A441950, A442011
[17] A1590691
[18] A452976
[19] A452083

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43. The Office tracked the complaints in its case management system, Resolve, by recording them under an 'issue of interest'(**IOI**). Resolve was used by the Operations Branch staff and my Branch staff as the case management system for all complaint handling and investigations in the Office. Operations Branch staff would attach the individual complaints they were investigating to the IOIs for staff in my Branch to analyse further and engage with DHS on the systemic issues the complaints were revealing.

44. The initial IOI about Centrelink debts was called *IOI-2012-500003 Debt Recovery including the use of mercantile agents*. In December 2016, this IOI was closed, and my team created two new IOIs (*IOI-2016-400007 Online Compliance Platform*, and *IOI-600004 Application of 10% recovery fee*). We did this because in December 2016 the number of complaints received about Centrelink debt and data matching almost tripled.[20] [21] For example in June 2016, the Office received 27 complaints about Centrelink debts and in December 2016 this increased to 112 complaints about Centrelink debts. The Office was also seeing media reports about people receiving automated debt letters from Centrelink.[22]

Question 4 and 5

(4) Set out your involvement in the Investigations and how, to your knowledge, they were conducted. Include any requests made for information, and the process by which material provided by the Agency and/or the Department was reviewed, considered or assessed, in the course of the Investigations.

(5) In your answer to paragraph 4, please describe the extent to which (if at all) the process followed in the Investigations:

(a) differed from the usual process adopted by the Commonwealth Ombudsman in an investigation in respect of the level or frequency of communication with agencies or departments the subject of the Investigations

(b) differed from the usual process in the extent to which the agency or department under investigation engaged with the process, provided information, and put forward material for reference or inclusion in the report.

Standing up the 2017 investigation team and approach to the 2017 own motion investigation

45. The own-motion investigation by the Office commenced in early 2017, I led a small investigation team that was stood up on a temporary basis for the duration of the investigation, consistent with usual practice in the Office at the time to bring together subject matter specialists from across the Office to do own motion investigations.[23] The team consisted of myself, two staff members from the Social Services, Indigenous & Disability Branch and one staff member from the Operations Branch, drawing on skills, knowledge and experience relevant to the investigation.

[20] A452976
[21] A452083
[22] A56247
[23] A1590691

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46. The team reported directly to the Acting Commonwealth Ombudsman, Richard Glenn for the duration of the investigation. This was because Mr Neave left the Office in January 2017 shortly after approving the investigation. George Masri also left the Office by the end of January 2017. Richard Glenn became the Acting Ombudsman, and I began acting in the role vacated by George Masri. I had daily meetings with Mr Glenn to update him on progress and receive direction on the approach to the investigation.

47. The conduct of the own motion investigation and the process followed was decided by the Acting Ombudsman consistent with section 8(2) of the Act – in private and in such manner as the Ombudsman (at the time) thinks fit and broadly followed the process described in the Office's Work Practice Manual.[24]

48. Mr Glenn varied the approach from that set out in the project initiation plan approved by Mr Neave. Mr Glenn wanted to clear the draft report outline (discussed from paragraph 111), and the draft report for comment under section 8(5) of the Act (discussed from paragraph 116) before these were given to DHS and DSS, rather than clearance by me as Acting Senior Assistant Ombudsman. I understood this was because I was new to the Office, and I was still learning Office processes and procedures.

49. I had frequent meetings with Mr Glenn during this investigation, as this was my first own-motion investigation, and I wanted to ensure I was undertaking it in the manner the Acting Ombudsman wanted. Also, Mr Glenn adopted a hands-on approach to the investigation and preparation of this report for the reasons set out above. Mr Glenn gave me two documents. One of the documents outlined how to structure the report and the other included his handwritten notes on the content he wished to see included in the report.[25]

50. On 10 January 2017, the Office issued a media release announcing the own-motion investigation.[26] Beyond this, however, the investigation was undertaken in private in accordance with section 8(2) of the Act. The investigation was conducted in accordance with the following process:

    a) Firstly, the Office sought to obtain all relevant information to the investigation through examination of documents and consultation with officers of DHS and DSS.

    b) Secondly, the Office formed preliminary views about the outcome of the investigation.

    c) Thirdly, the Office conducted further consultation on a draft report with DHS and DSS to ensure procedural fairness; and

    d) Finally, the Office completed and published the report.[27]

51. As will be explained in the following paragraphs, this process was broadly consistent with the Office's Work Practice Manual.[28] The Office was required to complete its investigation into the OCI program by early April 2017. To complete the investigation and report in the timeframe, it

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[24] A1590691, p113.
[25] A443868, A443867
[26] A2311830 (web URL)
[27] A1909817, A1909652
[28] A1590691

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was necessary for the Office to request information, consult and prepare the report contemporaneously.

52. The own motion investigation drew on the analysis of individual complaints the Office investigated which were relevant to the scope of the own motion investigation as described below at paragraph 58. As I describe above at paragraph 40, this was informed by the complaints recorded under the IOI in Resolve, desktop research by the investigation team of the legislation and case law, articles about 'digital readiness'[29] and what was being described as happening in media articles and by other stakeholders.

53. The Investigation Team of the Office analysed all documents provided by DHS and DSS against the following:

a) *Social Security Act 1991* (Cth)

b) *Social Security (Administration) Act 1999* (Cth)

c) *Data Matching Program (Tax and Assistance) Act 1990* (Cth)

d) the Guide to Social Security Law - Using the Social Security Guide | Social Security Guide (dss.gov.au)

e) the Centrelink Operational Blueprint

f) the Better Practice Guide to Automated Assistance in Administrative Decision Making,[30] and

g) the 27 best practice principles in the ARC report on Automated Assistance in Administrative Decision Making.[31]

54. The Investigation Team's analysis was included in the working drafts, the draft report and the final 2017 report.

55. The investigation also drew on discussions the Office held with other oversight bodies, including the Australian National Audit Office, the Inspector General of Taxation, and the Office of the Australian Information Commissioner.[32] These discussions occurred to avoid duplication between the other oversight bodies and to gather information from them that may have been relevant to the investigation.

56. The investigation also drew on a roundtable with peak community stakeholders on 18 January 2017, which included representatives from the National Welfare Rights Network, Australian Council of Social Services, ADACAS, National Aboriginal & Torres Strait Islander Legal Services, Australian Privacy Foundation, Autism Australia, Carers Australia, Canberra Community Law, Financial and Consumer Rights Council, Legal Aid NSW, Mission Australia, Legal Aid Victoria, Financial Counsellors Association NSW, People with Disability Australia and

[29] A1909622
[30] A442136, A442135, A442549, A1646069, A2263696
[31] A1693401
[32] A442155, A440398, A1909633

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Youth Action.[33] Attendees at the roundtable were chosen because they were assisting their client base with debt notices they had received and helping them to navigate Centrelink and use the OCI. Several of the complaints we investigated that were used as case studies in the 2017 report were referred to the Office from the attendees at this roundtable.

57. The Office sought and received further information from DHS and DSS during January and February 2017 in accordance with the section 8 notice letters.[34] The investigation also involved meetings between the Office and DHS and DSS staff on site, to discuss and clarify issues identified by the investigation team and to access documents.[35] Discussion included, for example, how the OCI worked, what were the business rules for the design of the OCI, what was the project management and governance arrangements for the OCI platform, how customers were made aware of a possible debt, what happened if they didn't respond to the debt notice, how much information was included in the notice about the debt, what customers needed to do and what income information they needed to provide when using the OCI, how customers who were vulnerable could get assistance, did the OCI explain how the debt was calculated and that it used averaging.

58. During the investigation, the DHS did not produce all the information and documents requested by the Office under the section 8 notices, even after repeated requests.[36] Ultimately, Mr Glenn and the investigation team decided it was necessary to complete the investigation based on the information the Office was provided. They formed the view that there was sufficient evidence to make reasonable conclusions that could be supported by evidence. This was based on considering the information we had received, including from the individual complaint investigations, and the analysis by the investigation team. This approach was consistent with how administrative investigations were completed by the Office under the Work Practices Manual – not every issue could be explored within the timeframe.

Consultation with DHS and DSS

59. The level and frequency of communication with DHS and DSS during this own motion was necessitated by the complexity of the issues being investigated as described above, the volume of information that was provided by DHS and DSS, and the need to clarify and check the information by the investigation team.

60. At the outset of the investigation, on 18 January 2017 the Acting Ombudsman met with senior staff at DHS (Jonathan Hutson, Malisa Golighty, Karen Harfield, Mark Withnell, Marcus Markovic and Scot Britton). I prepared a briefing to support the Mr Glenn in that meeting. [37] The brief outlined the approach the own motion investigation would follow and the scope of the investigation which included focusing on how the government's policy was being implemented, whether the OCI complied with the relevant legislative requirements and administrative law, the accuracy of debts being raised by the OCI, the adequacy of risk assessment and decision making, the adequacy of safeguards and the impact on vulnerable customers, and the impact of automated decision making on the quality of decisions, service delivery and accessibility. The brief also noted the investigation would result in a high-level report for comment in February and a more detailed report later.

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[33] A442536
[34] A1909786, A1909690
[35] fA54115, fA54967
[36] fA54115, A448499, A444074
[37] A443117

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61. I was aware the Acting Ombudsman had other meetings with senior staff at DHS which I identify at paragraph 87 that I was not involved in. I am not able to comment on what was discussed at the meetings.

62. On 19 and 20 January 2017, the investigation team attended DHS and met with key staff and were shown the operation of the OCI.[38] The investigation team was given some of the information that was requested in the section 8 notices described between paragraphs 28–34, which we scanned and uploaded into the Office records management system.

63. This was one of several meetings the investigation team had with key staff from DHS during the investigation. There were also frequent email exchanges between the investigation team and DHS and DSS[39] due to the concurrent activities described above that were necessary to complete the investigation and produce a report by the beginning of April 2017.

Questions 6 and 7 and 8

(6) Provide details of:

(a) the reasons for any decisions made concerning the ambit of the Investigations, including the legal basis for those decisions. This includes the decision recorded at paragraph 1.3 of the April 2017 Report not to "comment on the policy rationale behind the OCI process"; and

(b) whether the ambit of the Investigations included consideration of whether any aspect of the Robodebt scheme was contrary to law, unreasonable, unjust, or otherwise wrong within the meaning of section 15(1)(a) of the *Ombudsman Act 1976* (Cth). If it did not, why not? If it did, what, if any, findings, including preliminary or unpublished findings, were made in respect of that aspect of the Investigations and what was the basis for those findings?

(7) In responding to paragraph 6, address any consideration of the legality of the following aspects of the Robodebt scheme:

(a) the raising of debts on the basis of Averaged income;

(b) the requirement for a response, by a recipient, to the correspondence sent by the Agency; and

(c) the imposition of penalties where a recipient did not respond to the correspondence from the Agency.

Include, in your response, any conclusions that were reached on each of these issues and upon what evidence those conclusions were based.

(8) Identify all requests made to the Agency and/or Department for any legal advices in relation to the Robodebt scheme and the responses received. Describe the process by which

[38] fA54084, A443869, A443870, A443871, A443872, A444575
[39] fA54115, A448499, A444074

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those legal advices were reviewed, considered or assessed in the course of the Investigations, and what conclusions were drawn with respect to those advices.

Jurisdiction of the Ombudsman Office and consideration of section 15 of the Act

64. Section 5(1) of the Act authorises the Office to investigate administrative actions taken by Commonwealth departments and prescribed authorities. Policy set by the government of the day is outside the jurisdiction of the Office and does not fall within administrative action for investigation by the Office. The policy rationale behind the OCI process was set by the government of the day and introduced as part of a 2015-16 budget measure 'Strengthening the Integrity of Welfare Payments' and a December 2015 Mid-Year Economic Fiscal Outlook announcement.

65. The scope of the 2017 own motion investigation was decided by the Ombudsman Colin Neave, after receiving advice from George Masri and I on the issues we were seeing in complaints to the Office and is reflected in the letters to the relevant Secretaries and Ministers referenced at paragraph 38. Subsequent decisions made during the investigation about findings, including unpublished findings, were made by the Acting Ombudsman Richard Glenn.

66. The decision about what was included in the final 2017 report was made by Mr Glenn, consistent with sections 15(1)(a) and 35A(3) of the Act. Section 15 is a power exercised by the Ombudsman and is not capable of being delegated. I recall the investigation team had regard to section 15(1)(a) of the Act as we analysed the information we received from DHS and DSS.

Consideration of legality

67. Prior to my employment at the Office and the commencement of the 2017 own motion investigation, the Office, on 8 June 2016, requested information from DHS under section 8 following a briefing about the rollout of the OCI at a quarterly liaison meeting on 26 May 2016. The section 8 notice requested information about automatic application of the 10% recovery fee and internal or external legal advice about automatically applying the fee under the OCI platform.[40]

68. This request for information was made because slide 5 of the PowerPoint presentation given by DHS at the meeting on 26 May 2016, indicated the recovery fee would be automatically applied if the potential debtor did not contact DHS. The records show the Office considered that this approach was the opposite of DHS' existing practice at the time, whereby the recovery fee could only be applied if DHS first contacted the person as explained in part 6.7.1.45 of the *Guide to Social Security Law* and as required by section 1228B of the Social Security (Administration) Act, including satisfying the reasonable excuse provision in section 1228B(4).[41]

69. The records show on 8 August 2016, DHS provided the Office with its response including legal advice dated 14 July 2016 from DSS about the application of the 10% recovery fee in the OCI.[42] In the response, DHS and DSS advised the *Guide to Social Security Law* would be updated so

[40] A2310774
[41] A421624
[42] A2312301

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the policy supported the OCI, once the OCI was implemented. DSS advised it would also update the Operational Blueprint.

70. The DSS legal advice included in the response acknowledged that 'while the approach was substantially different to the existing practice which required contact with the person and establishing whether a reasonable excuse applied before applying the recovery fee, the OCI would still satisfy section 1228B because: the absence of a reasonable excuse does not need to be established before the penalty can be imposed – if a person does not take any action after receiving the letter [from the OCI], a penalty amount can be applied; there is no issue with only providing an online contact method to a person as there is always the option for a person to contact a [Centrelink] call centre if difficulties arise; the letter should be explicit about the consequences of not responding to the letter and not providing a reasonable excuse, ie that a 10% penalty amount will be added to the debt'.

71. As described above from paragraph 40, the Office had started receiving an increasing number of complaints about the OCI and debts from October 2016. Mindful of what we were told by DHS and DSS on 8 August 2016 and 26 October 2016, on 20 December 2016 the Office requested information under section 8 from DHS about using averaged annual ATO income amounts to raise debts, and whether DHS had sought legal advice about the legality of averaging income for social security overpayment calculations.[43]

72. A further section 8 notice was sent to DHS on 22 December 2016 asking for information about the use of notices under section 11 of the Data Matching Program (Assistance and Tax) Act 1990 (Cth), including legal advice on their use, any ministerial briefings on the OCI program, consideration given to the accuracy of debts raised by the OCI, as well as project management, project governance, and risk assessment frameworks used during implementation of the OCI.[44] The notice also requested an urgent briefing from DHS in early January 2017.

73. On 4 January 2017, I sent a follow-up email to DHS to arrange the urgent briefing from DHS and flagged the Ombudsman was considering whether to commence an own motion investigation into the OCI and debt recovery.[45] In that email, I said the Office wanted to understand how DHS was ensuring the income data was accurate and that the decision to raise a debt was legally valid and complied with administrative law.

74. On 6 January 2017, we received the briefing from DHS which included a walk-through of the OCI platform. The walk through and briefing from DHS did not answer our questions about the legality of averaging. We noted that a follow-up action would be to ask DHS for the legislative provision which it was relying on to do this in the OCI.[46]

75. At the onsite meeting with DHS on 19 and 20 January 2017, the investigation team was given some of the information that was requested in the section 8 notices from December described above between paragraphs 28–34. Included in this information was internal legal advice from DHS.

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[43] A442174
[44] A442173, A442175
[45] A440740
[46] A440920

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76. When reviewing the project management material DHS provided on 19 and 20 January 2017, the investigation team were concerned there were no lawyers on the DHS project management team for the OCI which was contrary to the ARC report on *Automated Assistance in Administrative Decision Making*. It looked like legal advice was only obtained by DHS in January 2015, which was after the design of the OCI was conceived.[47] The investigation team also identified that the Risk Management Plan for the OCI build included a statement that "there is a risk of legal or policy challenges" and there was a risk if a challenged occurred "success means major realignment of measures".[48] Lastly, the investigation team noted that the Executive Minute that went to cabinet[49] showed that DSS advised legislative change would be needed, however the Risk Assessment Potential Tool that went to cabinet as part of the Executive Minute said there was no legislation required.

DHS legal advice

77. DHS provided three legal advices to the Office.

78. The first advice we were provided was dated 14 January 2015.[50] It responded to questions about whether DHS could give the customer a legal notice that required them to engage online, provide documents online, and if DHS could automatically apply the assessment outcome if a customer failed to act by going online, or went online but failed to provide documents.

79. The 14 January 2015 advice stated that the customer could be required to engage online consistent with the requirements under the Data Matching Program (Assistant and Tax) Act 1990, however it would also need an option to respond orally so as not to negatively impact on their rights. It further stated that as the request for further documentation from the customer was not a coercive notice under social security law, there were no legal requirements as to how the notice should be sent or what information was required. However, the notice did need to allow sufficient time to respond and provide an alternative to providing the information online. The advice also stated that if after giving a customer sufficient time to respond and the customer did not provide the information, then the accuracy of the decision and the process to raise a debt may be brought into question by any review authority, especially if it was shown that there was other information available.

80. The second legal advice we were provided was dated 17 April 2015.[51] It responded to a description of the proposed process – that the customer would be sent a letter outlining the information to review, which would include the matched data (such as the name of the employer, period of employment and amount of income earned), information declared by the customer, and the discrepancy. The letter would outline that if they failed to respond, DHS would update their record with the information from the matched data. By applying the matched data, the total gross income would be evenly distributed across all fortnights in the employment period. The request for advice noted that DHS already apply this approach as a last resort in current processes where it was unable to identify the employer, or unable to contact the employer/s, or where customer or employer had not complied with the request for information.

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[47] A1909707
[48] A444101
[49] A444103 (marked cabinet in confidence)
[50] A444637
[51] A447451

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81. The 17 April 2015 advice stated the decision-making process must accord with best practice administrative decision making that provides the customer the opportunity to comment on the decision made and prior to that, provide information or their comments on the matters under consideration. The advice also stated, the decision maker may be satisfised, based upon the weight and reliability of the ATO data and the absence of contradictory information, to proceed to apply it to the customers record and raise the debt. This was a case-by-case consideration for the decision maker.

82. The third legal advice we were provided was dated 14 May 2015.[52] The advice responded to questions of whether the following process was in accordance with best practice in administrative decision making and if it was required in any contact with the customer to detail the debt amount. The process described in the request was – information is obtained from a third party; that information is considered in the context of the customer's circumstances; as a result of the consideration of the information it is likely that the customer has been overpaid and owes a debt to the Commonwealth; the customer is contacted and advised of the information from the third party, the impact on their rate of payment, and the likelihood that a debt will be raised.

83. The 14 May 2015 advice said the process appeared to mirror the six steps of good decision making as it appeared to give the customer the opportunity to be heard. It said there was no need to specify the debt amount as the department would expose itself unnecessarily if a debt amount was provided.

Concerns with DHS legal advice

84. The investigation team considered that the 17 April 2015 legal advice provided by DHS which described the proposed process, and that income averaging may be authorised as a last resort was problematic. We developed the view that income averaging on the scale proposed under the OCI was not supported by the Social Security (Administration) Act.[53]

85. In our view, the description we had been given by DHS of the intended automation of decision making in the OCI was not properly explained to the DHS legal team with key facts left out including the likely scale of the averaging, the extent of automation and risks to accuracy. The legal advice was predicated on the automated decision making in the OCI meeting minimum administrative decision-making requirements to ensure accuracy in every case. Using averaging in the OCI to calculate the debt when the customer could not provide their income information or where the customer did not respond to debt notices would not meet the minimum requirements.[54]

86. On 30 January 2017, the investigation team provided a proposed outline of the investigation report to DHS for comment, consistent with the information the Acting Ombudsman, Richard Glenn provided to DHS at the meeting on 18 January 2017, described at paragraph 60.[55] The outline of the report was approved by Mr Glenn and covered the key differences between debt recovery and data matching prior to the OCI system and under the OCI system, including scale, automation of fundamental parts of the decision-making process and shifting the onus to

[52] A444636
[53] A1646067
[54] A448329
[55] A444638

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customers to provide evidence of employment and income. The outline also noted there was no specific legal advice on the process being fully automated.

87. On 20 February 2017 I provided the Acting Ombudsman with a briefing for a meeting with Jonathan Huston of DHS on 22 February 2017. The briefing set out our concerns with the legality of the OCI program based on our analysis of the DHS legal advice and attached an early draft of the report that included a section examining the legality of averaging.[56] I cannot recall whether this meeting was initiated by the Office or by Jonathan Hutson. I did not attend that meeting, and to the best of my knowledge Mr Glenn was the only attendee from the Office.[57] I have not seen any records of what was discussed at that meeting.

DSS legal advice

88. On 19 February 2017 the Office requested DSS provide copies of legal advice authorising the use of income averaging, referring to information DHS had provided to the Office to the effect that it has always used averaging as a last resort.[58] DSS responded to this request on 23 February 2017, with a copy of legal advice advising that averaging could be used as a last resort and referred to section 79 of the Social Security (Administration) Act and the positive obligation on the Secretary to determine the correctness of the rate of social payment being paid to a person.[59]

89. On 24 February 2017, the Office made a further request to DSS to provide a copy of legal advice about the legislative change that would be needed to use ATO data in the way proposed in the Executive Minute dated 12 February 2015, given to the Office by DHS on 19 and 20 January 2017.[60]

90. In response, on 1 March 2017, DSS provided the Office with the legal advice previously provided on 23 February 2017, combined with legal advice dated 2014.[61] The advice dated 2014 stated that the proposal to 'smooth' a debt amount over an annual or other defined period may not be consistent with the legislative framework, and to correctly determine a relevant debt it would be necessary to consider the amount received in each relevant fortnight. The covering email referred to this 2014 advice and stated that DSS had considered the need for legislative change to support implementation of the OCI, had obtained the advice in December 2014 and provided this to DHS, DHS had then adjusted the process and DSS no longer considered that legislative change was needed. DSS stated it was satisfied the OCI met legislative requirements.

Concerns with DSS legal advice

91. The investigation team also had concerns with the DSS legal advice that income averaging could be used in the manner proposed under the OCI, although we considered its assertion that the process was authorised under section 79 of the Social Security (Administration) Act (Cth), may be open and arguable.[62] Section 79 requires that a retrospective rate calculation must be made if DHS is satisfied that the rate paid was more than the rate provided by social security law.

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[56] A1881446, A461854
[57] A1646068
[58] A455171
[59] A458862
[60] A2309696
[61] A1615600
[62] A460089

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Advisory opinion idea not pursued

92. In the 20 February 2017 briefing to Mr Glenn to support his meeting with Jonathan Hutson from DHS, I noted that I was seeking advice from the Administrative Appeals Tribunal (**Tribunal**) to find out what the Tribunal would need from the Office to obtain an advisory opinion under section 10A of the Act.[63] I was unfamiliar with the process of seeking an advisory opinion from the Tribunal and the Work Practices Manual did not cover the process. At the time, I understood the Office may have sought an advisory opinion from the Tribunal once before, but it was not something the Office had any real experience or expertise in.

93. In response to my contact, I recall being told by Chris Matthies at the Tribunal that the President of the Tribunal would require a fully argued hearing supported by written submissions from both sides. I recall the Acting Ombudsman did not consider this feasible within the existing resources dedicated to the investigation and that it would considerably extend the length of the investigation. I expected that testing the legality issue in this way would (quite properly) involve a substantial response from DHS and DSS based on their legal advice and on the seriousness of the consequences of an opinion suggesting that the OCI program was unlawful in one or other respects.

Legality not a feature of the final 2017 report

94. Ultimately the Acting Ombudsman decided not to include findings on legality in the 2017 report. While a section examining legality was drafted,[64] it was not included in the draft report provided to DHS and DSS for comment on 10 March 2017.[65]

95. The decision on the content of a report is one that can only be taken by the Ombudsman under section 15. I cannot speak definitively to the reasons for that decision.

96. In early 2017, I and others in the investigation team had developed genuine doubts that the OCI was lawful. We had doubts that the legal advice we had seen from DHS and DSS allowed for the raising of debts based on averaging under the OCI, although we also thought the legal advice provided to the Office by DSS on 23 February 2017, stating that the OCI was authorised by section 79 of the Social Security (Administration) Act (Cth), may be open and arguable.[66] We also had concerns with the automatic application of the 10% recovery fee in the OCI, and considered this fettered the discretion and judgement needed by the decision maker when assessing whether a customer had a reasonable excuse to not apply the penalty as required by section 1228B of the Social Security Act 1991 (Cth). We noted that while DHS had the power to automate decision-making under section 6A of the Social Security (Administration) Act (Cth), it cannot do so where it would fetter a discretion.

97. My recollection is the Acting Ombudsman was reluctant to publish a report that relied on our views and that dismissed the advice and position of DHS and DSS. In an email to me on 28 March 2017, Mr Glenn told me he preferred DHS' interpretation of section 1228B of the Social Security Act (Cth).[67] There were also timing imperatives in publishing the report that

[63] A1881446
[64] A461854
[65] A481072, A481071
[66] A460089
[67] A1881444

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would suggest that Mr Glenn did not wish to invest more time in finally resolving this difference of views.

98. Mr Glenn wanted the report published by early April 2017. There were increasing numbers of complaints being received from December 2016 and increasing media coverage of the issue in early 2017. My recollection is Mr Glenn considered it important to both ensure that DHS was being held accountable for making improvements to the administration of the program, and that the Office was seen as responsive to the growing public concern. By the end of April 2017, the Acting Ombudsman had left the Office.

Question 9

Explain what evidence was received from the Agency that supported the conclusions that:

(a) the OCI system accurately calculated debts

(b) the business rules underpinning the system accurately captured the legislative requirements

(c) the business rules underpinning the system accurately captured the policy requirements

99. The Office requested the ICT project management, project governance and risk assessment documentation for the OCI on 22 December 2016.[68] DHS provided this documentation at the on-site meeting on 19 and 20 January 2017[69] and talked through these with the investigation team. The project documentation included the Detailed Requirements Document for the OCI platform which set out the business rules and requirements for the design and build (**business rules**).

100. The business rules required the system to issues notices and letters to customers, detailing:

a) their legislative obligations

b) what the customer needed to do (including the information the customer needed such as bank account details to complete the intervention)

c) the timeframe to complete the intervention with reminders and warnings

d) assist customers (including when using the system with help text and instructional advice), and

e) for those with vulnerability indicators (such as those aged over 80, no fixed address, residing in a disaster area) pushed them to the previous manual intervention process.

101. The business rules also required the system to display options to the customer that included confirming the data already in the system (by accepting or updating), disputing the data provided (because the match was incorrect in some way), or adding additional information and uploading documents about other income (such as compensation, leave payments, termination payments,

[68] A442173, A442175
[69] A444144, A444145, A444146, A444147

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fringe benefits etc), including inputting specific details such as start and end dates with employers, days of week worked and amounts paid to enable accurate debt calculations.

102. The business rules also required the system to explain the debt calculations and how it was made, including the employer/s data the debt had resulted from, the period and the actual income versus the declared income for the debt period, and the ability to request more detailed information about the decision. The business rules also allowed the customer to seek reassessment of the decision at any time and to provide (and upload) new information about their income.

103. The business rules also required detailed reports to be produced from the OCI for auditing and external review purposes.

104. As examined in Appendix B of the 2017 final report, the investigation team was satisfied the business rules for the design and build of the OCI would calculate accurate debts if the information fed into it was correct from the various data sources it relied upon. These sources included the ATO data, the existing data held by DHS and information provided by the customer.

105. The business rules showed that the system did not create a new way of calculating debts. Instead, the OCI created a new way of collecting information to put into the existing debt calculator that DHS used, and new information could be fed into the calculator at any time.

Question 10

Set out your knowledge of, and involvement in, the process of drafting the Reports. In your answer, please address the following:

(a) describe the usual process of providing draft reports to agencies or departments the subject of Investigations carried out by the Ombudsman, including the opportunity to comment on the draft text of the report and any draft recommendations

(b) explain the approach taken in the Investigations whereby draft outlines of the Reports, and drafts of the Reports, were provided to the Agency or Department. Provide the justification for that approach, and explain and produce copies of any legal advice that informed that approach

(c) describe any consultation with the Agency or Department in respect of drafting the Reports, including Correspondence, Communications, meetings and discussions

Consultation on the draft reports

106. The usual practice of the Office when conducting investigations is to always provide a draft report to the agency subject to investigation in accordance with section 8(5) of the Act and as described in the Work Practices Manual.[70] In providing the draft report, the agency is invited to provide their comments on the draft report which the Office would then consider.

107. Providing a draft report is a procedural fairness requirement so any adverse findings are put to the agency, ensuring there are no surprises and giving them an opportunity to take remedial

[70] A1590691, p 22