

action which can then be noted in the report. This is one of the ways the Office seeks to influence improvements and changes in public administration by agencies as the recommendations and suggestions the Office makes to agencies are not binding. The obligation under section 8(5) sits alongside the obligation in section 35A(3) that the Ombudsman must not disclose information or make statements about a particular investigation where the opinions of the Ombudsman are expressly or implied critical of a person or the agency unless section 8(5) is complied with.

108. An agency will often provide their comments by way of track changes to a draft report. However, the Office casts a critical eye over all suggestions offered by an agency in this manner. Suggested changes are often rejected or re-worked.
109. The Ombudsman recognises the agency has technical expertise in the area of government administration under investigation. As such, it welcomes comments from agencies that clarify or correct or provide further context. The Office considers whether the comments correct factual inaccuracies, and whether the evidence better supports the original wording or the suggested changes. The Office prefers to use language that is neutral, factual and impartial in the final report as described in the Work Practices Manual.⁷¹
110. The other main way in which comments are given is in a meeting to discuss the draft report. This may involve discussing specific wording, specific draft findings or recommendations, or broader themes. The Office will test and negotiate the proposed recommendations with agencies to ensure they are practical and can be fully implemented by the agency.

Outline of 2017 report

111. On 30 January 2017, a proposed outline of the investigation report was provided to DHS for comment.⁷² The outline covered the key differences between debt recovery and data matching prior to the OCI and under the OCI, including scale, automation of fundamental parts of the decision-making process and shifting the onus to customers to provide evidence of employment and income. The outline also noted there was no specific legal advice on the process being fully automated.
112. The outline was provided to DHS as part of an overall process to afford procedural fairness to them as required by section 8(5) of the Act. At the initial meeting with DHS on 18 January 2017, Mr Glenn stated that he would provide DHS with a high-level report for comment. This was that report.
113. The outline comprised a very early draft of all the issues the Office was seeing, what the Office knew at that stage about the OCI and some early analysis and concerns. Providing it to DHS gave it an early opportunity to identify any factual errors, and points of difference, and to provide further information to address the issues the investigation team was identifying. I recall my expectation was that we would receive comments and further material from sharing this outline.
114. The outline included reference to averaging and that it had been used by DHS in limited circumstances where DHS was unable to contact the employer or customer. The outline queried whether use of averaging reflected best practice decision making when used on a wide scale for

⁷¹ A1590691, pp 33, 36 and 84.

⁷² A447451

historical debts and noted that the legal advice we had seen from DHS assumed that a person was making the decision and the advice did not cover the process being fully automated.

115. On 3 February 2017, DHS provided comments on the outline including that income averaging was a long-standing process in use by DHS since the early 1980s, it was authorised under the *Guide to Social Security Law*, the OCI process was not fully automated, although automation of decision making was allowed under section 6A of the Social Security (Administration) Act 1999 (Cth).⁷³

April 2017 report

116. On 10 March 2017, the Acting Ombudsman approved, and the Office provided to DHS and DSS a draft of the final report. The draft was provided for comments as part of the procedural fairness steps required by sections 8(5) and 35A(3) of the Act.⁷⁴
117. The draft report detailed at paragraph 3.7, 3.8 and in Appendix B from paragraph 2.36 onwards that, in our view, the automatic application of the 10% recovery fee in the OCI fettered the discretion and judgement needed by the decision maker when assessing whether a customer has 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 has the power to automate decision making under section 6A of the Social Security (Administration) Act 1999 (Cth), it cannot do so where it would fetter a discretion.
118. I recall that numerous meetings were held between the Office and DHS concerning the draft report, including with the Acting Ombudsman.⁷⁵ I cannot recall exactly how many meetings were held and the documents I reviewed in preparing this statement do not assist my recollection as there were no minutes taken at these meetings. I recall Annette Musolino, Alison McCann, Jason McNamara and Michael Robinson attended these meetings. I recall keeping the Acting Ombudsman updated on the meetings about the draft report that he did not attend.
119. In these meetings, the DHS representatives in attendance had strong views and expressed them forcefully. The issues canvassed included administrative decision making and evidence gathering, and application of the 10% recovery fee. The doubts the team had about the lawfulness of averaging were not raised. This is because Mr Glenn had decided not to include any mention of this in the report, as discussed above at paragraph 94.
120. DHS provided the Office with track changes and comments to the draft report on 20 March 2017.⁷⁶ The DHS mark-ups changed the analysis and findings about fettering discretion in relation to the application of the 10% recovery fee at paragraph 3.7 and 3.8 but not in Appendix B.
121. The track changes by DHS were considered by the investigation team and either accepted in full, rejected in full or stylistically modified to use plain English.⁷⁷ We rejected in full the DHS track changes to paragraph 3.7 and 3.8.

⁷³ A450519

⁷⁴ A480912, A480911, A481072, A481071

⁷⁵ A481052, A529912

⁷⁶ A484084

⁷⁷ A484089

122. On 23 March 2017, I sent the next version of the draft report back to DHS following our consideration of their comments and track changes.⁷⁸ In this version of the draft report, the investigation team added a footnote to paragraph 3.8 that referenced a decision of the Federal Court - *Australian Postal Corporation v Forgie* [2003] FCAFC 223 (8 October 2003), paras 40 and 59 following research into relevant case law.⁷⁹ In that case, Black CJ, Merkel and Stone JJ found that consideration ‘...of the words ‘without reasonable excuse’ introduces a distinctive requirement for some deliberative human action. An assessment needs to be made at some point – by a person...’. And at paragraph 50, that ‘in whatever way the process of arriving at a reasonable excuse is to be characterised, ordinary administrative law principles are not excluded. Thus, the process – whatever it should be called – is one that would have to be undertaken in good faith, taking into account only relevant considerations and in accordance with procedural fairness obligations, etc.’
123. On 28 March 2017, the Acting Ombudsman let me and one of the other members of the investigation team know by email that Jonathan Hutson from DHS wanted to speak with him the following day about ‘...a couple of outstanding issues where we have a “misunderstanding” before the report...’ was finalised.⁸⁰ In that email Mr Glenn referred to our views on the 10% recovery fee and that he wanted to move away from the language of fettering discretion and adopt more of the DHS position and its interpretation of how section 1228B operates and that better communication with customers would address our concerns. Based on this direction from Mr Glenn, the published version of the 2017 report stated at paragraph 2.40 that any question of fettering discretion could only be answered by the courts.
124. DSS was also consulted on the draft report⁸¹ and provided its comments.⁸² I cannot recall if there was a meeting with DSS representatives to discuss the draft report. I do recall the Office’s engagement with DSS was less involved than with DHS. DHS was the lead ‘responder’ to the draft report given its lead role in administering the debt recovery program and implementing the OCI.
125. On 29 and 30 March 2017, the final draft of the report was provided to DHS and DSS for formal response by the Secretaries so these could be included in the published report.⁸³ ⁸⁴The formal responses to the report were received from DHS on 5 April 2017⁸⁵ and DSS on 6 April 2017.⁸⁶ There were no further redrafts after this final consultation. The agency responses formed Appendix C to the report.

⁷⁸ zA13752

⁷⁹ A1909698

⁸⁰ A1881444

⁸¹ A484937, A485753

⁸² A491106

⁸³ A486252

⁸⁴ A491371

⁸⁵ A491780

⁸⁶ A491990

Finalisation of the 2017 report

126. On 7 April 2017, the Acting Ombudsman approved the 2017 report and its publication⁸⁷ with letters sent to the relevant Secretaries and Ministers as required by section 15 of the Act.⁸⁸

Questions 11, 12 and 13

(11) Set out your knowledge of, and involvement in, the provision of the 2017 AIAL Conference Paper to the Agency prior to that paper being delivered.

With respect to your answer:

(a) provide an explanation of the reasons why the 2017 AIAL Conference Paper was provided to the Agency prior to the paper being delivered;

(b) produce copies of any documents recording comments received from the Agency and/or the Department in relation to the 2017 AIAL Conference Paper, including file notes of meetings; and

(c) explain what changes were made to the 2017 AIAL Conference Paper and presentation following any feedback or comments received from the Agency.

(12) Set out your knowledge of, and involvement in, any contact from the Agency as proposed in the email bearing document ID number CTH.3001.0048.6854

(13) Provide a detailed description of your knowledge and view of the AIAL Hanks Paper, and any steps you took with respect to the Investigation after receiving that paper.

127. On 3 March 2017, I sent an email to the Acting Ombudsman seeking approval to pitch a paper to the AIAL Conference organisers for its 2017 conference about the lessons to be learnt when automating administrative decision making using the OCI platform as a case study.⁸⁹ The conference theme covered the impact of technology on public administration and privacy and managing data and information holdings. The investigation team and I considered this was a good opportunity to promote best practice public administration around the Government's digital transformation agenda.

128. On 8 June 2017, the conference organisers advised that our pitch had been chosen and we were requested to submit a paper and presentation.⁹⁰ A paper⁹¹ and a presentation⁹² were prepared by a member of the investigation team and these were given to the new Ombudsman, Michael Manthorpe for review and approval before submitting to the conference organisers. Michael Manthorpe had joined the Office as Ombudsman in May 2017.

⁸⁷ A492365, A485676

⁸⁸ A492404, A2292064, A492400, A2292061

⁸⁹ A477883, A477764

⁹⁰ A529348

⁹¹ A501267

⁹² A530681

129. On 14 July 2017, Mr Manthorpe sent me and members of the investigation team an email with his comments on the paper for the conference.⁹³ He checked that we did not include any new criticism of DHS beyond what we said in the 2017 report and said we should give DHS an opportunity to comment if we did. A member of the investigation team confirmed there were no new criticisms in the paper about DHS, to which the Ombudsman said he was then happy to approve the paper.
130. I was provided 2 documents - ID number CTH:3001.0048.6854 and CTH:1000.0008.3726. The document ending in 3726 shows I provided a copy of the paper that I would present at the AIAL conference to Michael Robinson from DHS on 17 July 2017, stating it was provided for information only and had been approved by the Ombudsman. I also stated in the email that we had been careful to keep the paper consistent with the own motion report and if DHS had any concerns to let me know. I do not recall any further contact with DHS about this paper.
131. I attended the AIAL Conference along with other members of the investigation team. I recall the Ombudsman attended the Conference as well as he told me afterwards that I presented the paper 'calmly and clearly'. I recall, when hearing Peter Hanks keynote speech, we felt very disappointed about the decision not to include anything in the 2017 report about our concerns with the legality of the OCI.
132. However, we (the investigation team) did note that Mr Hanks' paper and speech appeared to focus only on sections 1222A and 1223(1) of the Social Security Act 1991 (Cth), without mention of other relevant legislative provisions under the Social Security law such as sections 6A and 79 of the Social Security (Administration) Act 1999 (Cth).
133. At the time of the conference, I had moved into a different role at the Office and was no longer directly involved in the strategic engagement and own motion work, and the 2017 investigation had concluded in April.
134. I am aware that a member of the investigation team prepared a minute and a draft letter after the conference in August 2017 requesting the Ombudsman consider writing to DHS under section 12(4) of the Act raising our concerns about the legality of averaging. However, I am not aware and the records I reviewed do not show if it was given to the Ombudsman.⁹⁴ The analysis in the proposed letter was based on the draft section examining the legality of averaging that was not included in the 2017 report.

Question 14

Summarise your knowledge of the responses to the Reports and the steps taken to ensure that the recommendations were implemented.

135. I provide the following information in accordance with paragraph 14 of NTG-006. A more fulsome explanation of my involvement in relation to the implementation of the recommendations made in the 2017 report is addressed in my Statement in response to NTG-0216.

⁹³ A530814

⁹⁴ A540338, A483062

136. The 2017 report contained several recommendations which the Departments considered. I received notice of the formal response of DHS on 5 April 2017, and DSS on 6 April 2017.⁹⁵ The formal responses to the 2017 report from the Secretary of DHS and Secretary of DSS are at appendix C to the report.
137. DHS agreed to implement recommendations 1, 2, 3, 5, 6, 7, and 8 in full. DHS also agreed to implement recommendation 4a, 4b and 4c in full.
138. DSS agreed to implement recommendation 4d.
139. As I changed roles within the Office on 9 June 2017, I did not have direct responsibility for monitoring the implementation of the recommendations made in the 2017 Report. This responsibility remained with the new head of the Strategy Branch (formerly the Social Services Branch), Ms Fiona Sawyers. My involvement concerning the implementation of these recommendations was therefore limited to being copied into email correspondence with Ms Sawyers. I provide further detail on my involvement in relevant email exchanges below from paragraph 161.
140. I am aware that, on 10 August 2017, the Office created a new IOI to monitor the implementation of the recommendations from the 2017 report. The process for monitoring the implementation of the Ombudsman's recommendations is set out in the Work Practices Manual.⁹⁶

Question 15

Provide details of your knowledge and circumstances of the Deputy Ombudsman providing a media release for the Agency to provide to the Minister, as set out in document ID number CTH.1000.0011.1190.

141. In October 2018, I was working in the role of Senior Assistant Ombudsman Operations Branch. The Operations Branch was responsible for investigating individual complaints received from the public on a case-by-case basis as described at paragraph 14 above. The Office would also receive complaints from members of Parliament, NGOs, businesses and other stakeholders, including anyone who had dealings with government agencies and contracted services providers.
142. On 30 May 2018, the Hon Andrew Wilkie MP wrote to the Ombudsman asking him to investigate debt notices being sent by Centrelink as part of the Social Welfare Debt Recovery Program. Attached to the letter was a redacted debt notice received by one of Mr Wilkie's constituents, Mr Dut.⁹⁷
143. When Michael Manthorpe became Ombudsman in May 2017, he directed that he be notified of all correspondence, including complaints from members of parliament, other office bearers of importance and contacts from the media. The letter from Mr Wilke was received by the Intake team in my branch.

⁹⁵ A491780, A491990

⁹⁶ A1590691, pp 110, 117, and 121.

⁹⁷ A1630805

144. On 12 June 2018, the Ombudsman sent a response back to Mr Wilkie advising he would investigate the issues raised and requested further information about the debt notice Mr Wilkie had attached to his letter.⁹⁸ The Ombudsman directed that I work closely with the Investigation Officer from the Strategy Branch on the investigation into the debt notice Mr Dut had received. The investigation into the broader issues raised by Mr Wilkie were handled by the Strategy Branch.⁹⁹
145. Consistent with that direction, Ms Sawyers and I corresponded with Mr Wilkie and his office during the investigation. We provided regular updates, including notifying Mr Wilkie of the outcome of investigation into Mr Dut's debt notice on 19 October 2018.¹⁰⁰
146. The finalised investigation into Mr Dut's debt notice was approved by the Ombudsman after he was briefed by me and Ms Sawyers on 4 September, and only after we had dealt with further issues to the satisfaction of the Ombudsman.¹⁰¹
147. Consistent with the media direction of the Ombudsman discussed below, the briefing minute considered that the letters to Mr Wilkie and Mr Dut may be published in the media. As a courtesy, it was appropriate to provide DHS with a copy of the letters to Mr Wilkie and Mr Dut, so that DHS would be forewarned if that did occur. We were aware that Mr Wilkie had been regularly commenting in the media about DHS and the Robodebt Scheme.¹⁰² A copy of the letters was sent to DHS by the Investigation Officer on 19 October 2018,¹⁰³ followed by an email advising closure of the complaint on 28 November 2018.¹⁰⁴
148. On 24 October 2018, I received the email and a phone call from Michael Robinson at DHS.¹⁰⁵ I cannot remember what was discussed in the phone call and no longer have records of this conversation. I sent the email onto the Ombudsman and Deputy Ombudsman Jaala Hinchcliffe with a suggested response.¹⁰⁶ The Ombudsman wanted a more fulsome response which I drafted, and which was amended by the Deputy Ombudsman, before being approved by the Ombudsman to send to DHS.
149. On 25 October 2018 I received an email from Michael Robinson at DHS (and the Deputy Ombudsman was also copied in) forwarding an internal DHS email from Craig Storen advising that the Ombudsman approved words I had sent the day prior were included in the DHS question time brief for that day.¹⁰⁷

Question 16

⁹⁸ A2310834

⁹⁹ A1909810

¹⁰⁰ A1662752, A1665814, A1667725, A1673257, A1684654, A1688567

¹⁰¹ A1669051

¹⁰² A1909797

¹⁰³ A2296857

¹⁰⁴ A1909759

¹⁰⁵ CTH.1000.0011.1190

¹⁰⁶ A1686623

¹⁰⁷ A2312045

Provide your view as to whether the provision of a media release to the Agency differed from the usual process adopted by the Commonwealth Ombudsman with respect to providing media releases to agencies, departments or Ministers.

150. The Office Work Practice Manual detailed what staff were to do if they received a media enquiry.¹⁰⁸ The Manual stated that the Ombudsman or Deputy Ombudsman would decide whether to respond to media enquiries. Consistent with this, on 9 January 2017 I sent an email to DHS advising that the Deputy Ombudsman Richard Glenn was giving an interview to the Guardian about the own motion investigation.¹⁰⁹ Other media enquiries received during the investigation were also dealt with this way.¹¹⁰
151. When Michael Manthorpe joined the Office as Ombudsman in May 2017, he also directed that he wanted to be notified of all media enquiries received by the Office, and he or the Deputy Ombudsman would approve all responses to the media. He also made it clear that he wanted to engage with the media to educate them about the role of the Office and the work we did, while noting the requirements on confidentiality in section 8(2) and section 35 of the Act.
152. This extended to correcting the record and clarifying when there were media articles about the Office and its work that were inaccurate, along with notifying agencies and departments the office was investigating about media enquiries we received and had responded to, so they were forewarned. This was on a case-by-case basis subject to the approval from him or the Deputy Ombudsman.

Question 17

Describe your views as to:

a) whether there were any deficiencies in the process followed in the Investigations or in the April 2017 Report. If so, what was the cause of those deficiencies, and what changes could be made to avoid those deficiencies arising in future investigations;

b) the extent to which the Commonwealth Ombudsman provided an accountability mechanism for government conduct in relation to the Robodebt scheme, and the effectiveness of that accountability mechanism following each of the Reports.

153. While the Office's Work Practices Manual provides broad guidance for conducting an own motion investigation, each Ombudsman investigation is different depending upon the issues to be investigated, where information comes from, the agency being investigated and the views of the Ombudsman of the day. There is no standard way or process for conducting an own motion investigation, including no standard timeframe.
154. In this case we balanced increasing concerns about the OCI with influencing timely and positive improvements to its operating. The Ombudsman's recommendations that arise from its

¹⁰⁸ A1590691, p 60.

¹⁰⁹ A1909669

¹¹⁰ A1909770

- investigations are not binding on agencies. The Office seeks to make practical and achievable recommendations to inform improvement in the way agencies administer government policy.
155. Our investigation concentrated on improving the OCI system's usability, its transparency, accessibility, fairness and the adequacy of support for users of the system, including the quality of service delivery by DHS and procedural fairness for customers.
156. DHS agreed to and implemented changes that we suggested to the OCI during the investigation. This included the following:
- a) No longer applying the 10% recovery fee automatically for customers who responded to the initial letters.
 - b) Enhancing the OCI system to make it easier for customers who had a reasonable excuse to notify DHS so they would not be charged the fee.
 - c) Providing clearer information and a further invitation to provide a reasonable excuse in debt notification letters.
 - d) Taking additional steps to ensure customers were aware of the income discrepancy by sending them the initial contact letter and the first reminder letter by registered mail and sending a further reminder letter and attempting phone contact with the customer.
 - e) Working with the Digital Transformation Agency to conduct comprehensive user testing of enhancements to the OCI system to make it more user-friendly.
157. We detailed the further improvements DHS made to the OCI in February 2017 based on feedback we gave them during our investigation in Appendix A of the 2017 report, at paragraphs 1.30 to 1.50.
158. The investigation flagged the issue of the legality, despite it not being included in the 2017 report.
159. Within the timeframe required and given the scope and nature of the investigation I believe the investigation was undertaken thoroughly and effectively.

Question 18

Describe whether, and if so how, the Commonwealth Ombudsman monitors either references made to its reports, or reliance placed on its reports, by agencies which have been the subject of an investigation, and any action taken in response to that monitoring.

160. While Michael Manthorpe was Ombudsman, the Communications team would conduct media monitoring and provide daily briefings to the Executive, specifically the Ombudsman, Deputy Ombudsman and Senior Assistant Ombudsman. This media monitoring would capture references to the Office, the Ombudsman, other key staff and certain topics in which the Office was interested across government.
161. On 9 April 2018, I was included in an internal email exchange between Fiona Sawyers and relevant team members investigating the implementation of the recommendations made in the

2017 report.¹¹¹ Ms Sawyers discussed a meeting that she and I had with the Ombudsman concerning DHS' response to a media enquiry from Paul Karp from the Guardian, which construed the 2017 report as confirming that the online compliance system meets all legislative requirements. As a result of this meeting, Ms Sawyers' email suggests that the Ombudsman sought follow up work to gain clarity on this broader issue of legality, including with respect to our work on the 2017 report. Ms Sawyers also queried with her team whether she should suggest to the Ombudsman that he write to DHS to correct the record concerning DHS' response to Mr Karp's enquiry. I am unable to comment on whether this further correspondence took place as I have no recollection beyond my involvement described in this paragraph.

162. On 24 May 2018, I was copied into correspondence between the Deputy Ombudsman, Jaala Hinchcliffe, and Annette Musolino.¹¹² The email canvassed several issues, among which Ms Hinchcliffe sought correct an inaccurate media statement on 5 April 2018. Ms Hinchcliffe took issue with a DHS employee quoting that "[t]he independent review by the Commonwealth Ombudsman found the online compliance system met all legislative requirements".
163. The records show Annette Musolino responded to the Deputy Ombudsman on 8 June 2018 advising that DHS had updated the media lines to ensure they met the wording used in the 2017 report.

Signature of witness:

L Macleod

Name of witness:

Louise Macleod

Date

22 February 2023

¹¹¹ A1909736

¹¹² A1909602

Royal Commission into the RoboDebt Scheme
Supplementary Statement of Ms Louise Macleod

No NTG-0216

SUPPLEMENTARY STATEMENT OF MS LOUISE MACLEOD

Name	Louise Macleod
Address	One Canberra Avenue, Canberra ACT
Occupation	Public Servant
Date	23 February 2023

Introduction

1. This statement made by me accurately sets out the evidence that I am prepared to give to the Royal Commission into the Robodebt Scheme (**Royal Commission**).
2. This supplementary statement is true and correct to the best of my knowledge and belief.
3. I provide this supplementary statement in response to the Notice to Give a Statement and Produce Documents dated 20 February 2023 and numbered NTG-0216 (**Supplementary Notice**). It is a supplementary statement in that it is additional to the written statement I give in response to the Notice to Give a Statement and Produce Documents dated 15 February 2023 and numbered NTG-0006 (**First Notice**).
4. The current Commonwealth Ombudsman, Mr Iain Anderson, delegated authority to me under section 34 of the *Ombudsman Act 1976* (Cth) (**Act**) to disclose information to the Royal Commission to assist its inquiries. I make this statement based on matters within my own knowledge and the records made available to me under instrument of delegation by the Commonwealth Ombudsman.
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 Supplementary Notice and on the basis the information will be treated as evidence which is subject to section 6DD of the *Royal Commissions Act 1902* (Cth).

Question 1

Outline the extent of your involvement in the 2019 and 2021 Reports

2021 Report

6. I was not involved in the preparation of the report published by the Commonwealth Ombudsman in April 2021, entitled *'Services Australia's Income Compliance Program: A Report About*

Services Australia's Implementation of Changes to the Program in 2019 and 2020'. I cannot comment on the details of the 2021 Report.

7. On 9 June 2017, I commenced as the Senior Assistant Ombudsman, Complaints Management and Education Branch. This position was not involved in the investigation or preparation of the 2021 Report.
8. I have previously provided a written statement in response to the First Notice in relation to my positions held at the Office of the Commonwealth Ombudsman (**Office**).

2019 Report

9. I provide the following information to demonstrate my involvement in the preparation of the report published by the Commonwealth Ombudsman in April 2019, entitled '*Centrelink's Automated Debt Raising and Recovery System: Implementation Report*'.
10. The purpose of the 2019 Report was to monitor the implementation of the recommendations made in the report published by the Commonwealth Ombudsman in April 2017, entitled '*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*' (**2017 Report**).
11. As noted above at paragraph [7], I commenced a new position with the Office on 9 June 2017. My primary responsibilities were overseeing the complaint handling and complaints education functions for the Office. The Complaints Management and Education Branch (**Branch**) assessed and investigated complaints (generally made by the public) on a case-by-case basis. The Branch also delivered education on best practice in complaint handling to government agencies. This role differed to the role I had previously held, which was as acting Senior Assistant Ombudsman, Social Services, Indigenous and Disability Branch. That branch became known as the Strategy Branch following an Office restructure by the Ombudsman, Mr Michael Manthorpe.
12. Ms Fiona Sawyers, Senior Assistant Ombudsman, joined the Office and assumed responsibility for the new Strategy Branch. The Strategy Branch was responsible for 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**). My Branch and Ms Sawyers' branch worked closely together as the individual complaints that were investigated by my Branch would then be analysed by Ms Sawyers' branch to identify systemic issues that needed strategic engagement by her branch with the agencies involved. There was no overlap in responsibilities between Ms Sawyers' role and my own.
13. I was not responsible for monitoring the recommendations made in the 2017 Report. Nor was I actively involved in the investigation and preparation of subsequent reports on the Robodebt scheme published by the Commonwealth Ombudsman. These own motion investigations were undertaken by the Strategy Branch.
14. The Strategy Branch and Ms Sawyers were responsible for monitoring the implementation of the recommendations made in the 2017 Report.

15. On 9 April 2018, I was copied into internal email correspondence between Ms Sawyers and the relevant team members tasked with investigating and preparing the 2019 Report.¹ In that email, Ms Sawyers advised the investigations team that I had met with Mr Manthorpe to discuss the response from DHS to a media inquiry conducted by the Guardian Australia. This media inquiry related to the outcome of the 2017 Report. I have no recollection of this meeting and no longer have file notes of this meeting.

16. The DHS's response to the Guardian stated that

The [DHS] fully cooperated with the Commonwealth Ombudsman's investigation which found the online compliance system meets all legislative requirements ...

As previously stated, the [DHS] strongly refutes any claims that it has conducted its compliance activities in a manner which is inconsistent with the legislation.

17. The records show I was copied into this correspondence because it related to the 2017 Report and the Ombudsman, Deputy Ombudsman and Ms Sawyers were aware I had been involved in the own motion investigation that led to the 2017 Report.

18. In the email on 9 April 2018, Ms Sawyers noted that Mr Manthorpe requested further investigation into a research article prepared by Professor Emeritus Terry Carney AO and the legal advices from DHS. It was further suggested that Mr Manthorpe wanted to discuss the legality of the online compliance system (OCI) in the near future. Ms Sawyers drew attention to a draft chapter of the 2017 Report addressing the legality of the OCI, which was not included in that report. A copy of this draft chapter is attached to this statement.² Lastly, Ms Sawyers queried with the team whether Mr Manthorpe should write to DHS to correct the record concerning its response above at paragraph [16]. I cannot recall if further discussion occurred between Mr Manthorpe and the investigations team and if I was part of that discussion. I no longer have file notes to indicate that I was involved.

19. On 13 April 2018, I was copied into an internal email from Ms Sawyers to the Deputy Ombudsman, Jaala Hinchcliffe, providing information about the legality of the OCI. This information included the legal advices provided by DHS and DSS to the Ombudsman in preparation of the 2017 Report. This email also included an internal analysis of the issues raised by Professor Carney in the article entitled '*The New Digital Future for Welfare: Debts Without Legal Proofs or Moral Authority?*' (2018) (**Carney article**).³

20. On 19 April 2018, I was copied into internal email correspondence between Mr Manthorpe, Ms Hinchcliffe and Ms Sawyers about the OCI.⁴ In that email, Mr Manthorpe noted that he had received and reviewed the various legal advices and deliberations of the OCI by the DHS and the DSS. He expressed preliminary views about the legality of the OCI, noting that it would be useful to accept the DHS' offer to provide a briefing on the DHS' views on the lawfulness of the OCI (as it was then), including how the issue had developed in the Administrative Appeals Tribunal and the courts.

¹ A2312044.

² A461854.

³ A1909596.

⁴ A1909769.

21. In response to this email, Ms Hinchcliffe organised the briefing proposed by DHS, which occurred on 17 May 2018. The lawfulness of income averaging was discussed at this meeting. Ms Hinchcliffe records that the attendees at this briefing agreed that the use of averaging could lead to debts being raised that were more than the debts owed.⁵
22. On 18 May 2018, Ms Annette Musolino, Chief Counsel of the Legal Services Division, DHS, sent an email to Ms Hinchcliffe, providing a summary of the key points from the briefing on 17 May 2018 and the DHS' position on the Carney article.⁶ Ms Hinchcliffe forwarded this email correspondence to the Ombudsman, other staff members and me. In this email, Ms Musolino disagreed with Professor Carney's analysis on the lawfulness of income averaging. She noted that the Carney article:
 - a) misunderstood many aspects of the OCI process and the safeguards in place to afford procedural fairness to social welfare beneficiaries;
 - b) confused and conflated evidential burdens of proof which apply to the making of administrative decisions; and
 - c) falsely asserted that DHS had specific legal obligations and evidence burdens for raising debts.
23. On 24 May 2018, Ms Hinchcliffe responded to Ms Musolino's position in respect of the lawfulness of income averaging and the Carney article.⁷ I was copied into this correspondence. I note the following information to outline the issues raised by Ms Hinchcliffe to Ms Musolino.
 - a) whether in DHS' view it would be ultra vires the powers under section 1223 of the *Social Security Act 1991* (Cth) to use income averaging to raise debts that exceed the amount of debt owed by the customer. Ms Hinchcliffe further inquired whether the DHS had sought external legal advice on this issue.
 - b) whether there could be situations in which DHS considered it had a duty to inquire when raising debts.
 - c) whether the DHS has acted on the recommendations in paragraph 3.6 of the 2017 Report.⁸
24. Ms Hinchcliffe also drew Ms Musolino's attention to the following matters:
 - a) The statement by Mr Hank Jongen from DHS to Fairfax Media on 5 April 2018, which proclaimed "the independent review by the Commonwealth Ombudsman found the OCI system met all legislative requirements and accurately calculated debts when the required information was entered", did not reflect the findings at paragraph 3.3 of the 2017 report.
 - b) While the 2017 Report did not address the legality of income averaging, it still expressed concerns about averaging at paragraphs 3.2 and 3.3. The Office was satisfied that if the

⁵ A1909602

⁶ A1909593.

⁷ A1909602.

⁸ A1909602.

customer was able to collect the income information required and enter it properly into the system, the OCI was capable of accurately calculating the debt.

- c) At paragraph 3.6, the 2017 Report suggested DHS test a sizable sample of debts raised by the OCI and re-evaluate where the risk for debts calculated on incomplete information should properly lie and investigate ways to mitigate the risk of over-recovering debts.
25. On 8 June 2018, Ms Musolino responded to Ms Hinchcliffe's email.⁹ I was copied into this email. Ms Musolino expressed the view that:

... the procedural fairness available throughout the OCI process, including merits review, provide ample opportunity for the correct decision to be made. The practice of averaging is reasonable, noting that it is generally used in circumstances where recipients refuse to engage with the department or fail to adequately explain discrepancies which have been identified. Further any decision based on averaging can always be changed if new information comes to light.

Ms Musolino confirmed that DHS would ensure that the media response was consistent with the wording used in the 2017 Report.

26. On 3 October 2018, a staff member of the investigations team sent an email to the Director of the Legal team in the Office, Kate Wandmaker.¹⁰ This email contains an early draft of the proposed legal section for the 2019 Report, requesting legal advice from Ms Wandmaker on the draft. I was copied into this email.
27. On 3 October 2018, I was then consulted by a staff member of the Strategy Branch on a minute seeking approval from Mr Manthorpe to draft the 2019 Report.¹¹ I made minor editorial amendments to the covering minute to correct typographical errors. I also indicated that I supported the recommendation made in the minute.
28. I provide the following information contained in the minute:
- a) The Office had been investigating the implementation actions of DHS and DSS since September 2017. The investigations team was satisfied that most of the recommendations had been implemented, attaching analysis against each recommendation.
- b) It was recommended that a section on legality of income averaging be included in the 2019 Report, noting the public criticism of the 2017 Report. It was noted that the question of legality could not be decided with certainty by the Office. Rather, the Office would be guided by legislative amendment to clarify the lawfulness of income averaging or a decision of the Federal Court in a fully argued case.
- c) The 2019 Report would focus on the administration of the program and recommendations to improve its fairness, transparency, and effectiveness.

⁹ A2312058.

¹⁰ A1909788.

¹¹ A1909573, A1679774, zA24867, zA24960, zA247715, zA24879.

29. The Ombudsman approved the minute on 8 October 2018.¹²
30. On 8 October 2018, I sent an email to the investigation officer and the Director of the Legal team. I advised that I had a discussion with Mr Manthorpe and the Acting Senior Assistant Ombudsman, Strategy Branch, Lee Katauskas about drafting the 2019 Report, which Mr Manthorpe had approved.¹³ I also conveyed Mr Manthorpe's request for changes to the legality section of the 2019 Report, which were:

to avoid the legal argument and have the report do as follows - acknowledge and summarise the concerns raised by various stakeholders about legality (for example Carney, Hanks, the National Welfare Rights network etc); summarise the legal position of DHS/DSS; conclude the issue of legality cannot be resolved by the Office; and suggest/recommend the department obtain external legal advice and run a test case or obtain legislative amendment.

31. On 5 February 2019, I was sent an email from Ms Sawyers, attaching a draft of the 2019 Report.¹⁴ I was informed that the draft report had been considered by the new Strategic Policy Board, comprising the Ombudsman, Deputy Ombudsman and Senior Assistant Ombudsmen while I was on personal leave. I was further informed that the report needed to be cleared by the Ombudsman and the Deputy Ombudsman, before being sent to the Secretary of DHS, Renee Leon for comment under section 8(5) of the Act.
32. On 4 and 6 February 2019, I was included in an internal email exchange between the Ombudsman and Ms Sawyers about the nature of the complaints received by the Office about the Employment Income Confirmation system – the new name DHS gave to the OCI. This email correspondence discussed how the Office was handling the complaints and whether any new issues were being raised. This email further considered the possibility of including the draft chapter on legality in the 2019 Report, with edits from the Ombudsman.¹⁵
33. I am not aware of the reasons why the draft text about legality was not ultimately included in the 2019 Report.

Signature of witness:

L Macleod

Name of witness:

Louise Macleod

Date

23 February 2023

¹² A1679774.

¹³ A1909583.

¹⁴ A1909676.

¹⁵ A1909723, A1909709.

DOCUMENT 2

In the matter of the Royal Commission into the Robodebt Scheme

No NTG-0202

STATEMENT

Name	Michael Manthorpe PSM
Address	Address known to the Commission
Occupation	Consultant
Date	27 February 2023

1. I refer to the Notice to Give Information in Writing and Produce Documents (NTG-0202) dated 15 February 2023 directed to me by the Royal Commission into the Robodebt Scheme (**Notice**).
2. I am retired from the Australian Public Service (**APS**) but continue to be involved with the APS through my work in my consulting business.
3. This statement is true and correct to the best of my knowledge and belief, having made inquiries in the time available to me since the Notice was received on 15 February 2023.
4. This statement has been prepared with the assistance of lawyers from the Australian Government Solicitor (**AGS**).
5. On 19 February 2023 lawyers from AGS made a request to the Solicitor Assisting the Royal Commission to narrow the scope of the Notice. On 24 February 2023 the Solicitor Assisting the Royal Commission indicated they consented to the proposed narrowed scope of the Notice.
6. In the time that has been available to me I have not had the opportunity to review all of the documents in relation to the below matters held by the Office of the Commonwealth Ombudsman (**Office**).
7. Should further documents or matters be brought to my attention in the course of the Royal Commission, I will seek to assist the Commission by providing a supplementary response.
8. The current Commonwealth Ombudsman, Iain Anderson, delegated authority to me under section 33 of the *Ombudsman Act 1976* (Cth) (the Act) to disclose information to the Royal Commission to assist its inquiries.

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.

9. I was the Commonwealth Ombudsman from May 2017 until July 2021. The role encompasses oversight of matters of administration and the handling of complaints about most of the Australian Public Service. It also fulfils a range of additional distinct roles including that of ACT Ombudsman, Immigration Ombudsman, Law Enforcement Ombudsman, Private Health Insurance Ombudsman, among others.
10. Prior to my appointment as the Commonwealth Ombudsman I was a career public servant from 1984 until May 2017, when I resigned to take up the statutory office of Ombudsman. I worked in the employment, workplace relations, education, immigration and border protection portfolios, the last 8 years of which were at Deputy Secretary level.
11. I retired in July 2021, but have since established my own consulting business. I have an Arts Degree from Queensland University.

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 2019 and 2021 Reports.

12. I commissioned, oversaw the preparation of, signed off on and published both the 2019 and 2021 Reports. The circumstances leading up to each report were very different. I explain them below.
13. Both the 2019 and 2021 reports were 'own motion investigations'. The Act provides that the Commonwealth Ombudsman can undertake investigations of administrative action on an 'own motion' basis¹ and can choose how an investigation should be conducted. Staff from the Office assist the Commonwealth Ombudsman to conduct these investigations.
14. The preparation of an own motion investigation report can be an iterative process. Typically several drafts are prepared as evidence is gathered and analysed. My recollection is that this was true of both the 2019 and 2021 reports, not least because the subject of our investigation was not, itself, static. During the preparation of the 2019 report, DHS was making iterative amendments to how Robodebt operated, many of which related to implementing our earlier recommendations. During the preparation of the 2021 report, the scheme was being dismantled and refunds made.

The 2019 Report

2017 Report

15. As noted above, I was appointed as the Commonwealth Ombudsman in May 2017. The report that had been produced by my immediate predecessor (Mr Richard Glenn) had been published in April 2017.²

¹ Factsheet 'Ombudsman Investigations'

https://www.ombudsman.gov.au/__data/assets/pdf_file/0030/35598/Ombudsman-Investigations.pdf

² CTH.3004.0010.5247

16. As set out in the Executive Summary, this report, was prompted by the many complaints that the Office had received from people who had incurred debts under the online compliance intervention (OCI) and the Office was intensively working to assist individual complainants. I was also aware that there had been extensive media and political commentary about the Robodebt Scheme.
17. I read Mr Glenn's 2017 report very early in my term. Mr Glenn's report was:
- ...concentrated on the accessibility, usability, and transparency of the system, including quality of service delivery and procedural fairness...³*
18. I was impressed by the way in which it had identified a range of administrative shortcomings in the Robodebt scheme and the recommendations that he had made including that:
- a) DHS should reassess whether the application of the recovery fee was appropriate, taking into account the customer's personal circumstances, including the existence of a reasonable excuse;
 - b) The additional information and explanations that should be provided in initial contact letters;
 - c) DHS should inform customers that if they do not enter their income information then ATO income will be averaged evenly across the relevant period which may result in a debt and that this debt may be less accurate than debts based on actual income;
 - d) DHS should use its powers to request evidence directly from a financial institution when it would cause financial hardship to a person to obtain the bank statements;
 - e) DHS should use its coercive powers to obtain income information from third parties (like banks and former employers) where despite reasonable attempts they have been unable to obtain this information;
 - f) DHS should ensure that its phone lines were adequately resourced;
 - g) DHS produce publicly available information for customers on how to use the OCI system;
 - h) DHS should systemically capture and record information obtained from complaints and internal reviews and use this information to continuously improve the OIC system from the customer's perspective;
 - i) DHS should extend the current vulnerable (staff assisted) cohort to include current and former customers with a payment nominee who is court appointed or an organisation or customers with a current homelessness flag on their record;
 - j) DHS should consider making outbound calls to vulnerable people where they have not responded to letters and that DHS should consult with relevant stakeholders about the difficulties vulnerable groups may face when engaging with the OCI; and

³ CTH.3004.0010.5247 at .5250

- k) Before undertaking an expansion of the OCI it should be reviewed in its current form and further consideration should be given as to how to mitigate the risk of possible over-recovery of debts.
19. I was of the view that Mr Glenn's recommendations were sensible and practical and, if implemented, would help overcome many of the problems in the scheme, including with respect to accessibility and transparency.

Commencing Own Motion Investigation

20. In September 2017, I decided to conduct a further Own Motion investigation into whether the recommendations of the 2017 report had or were being satisfactorily actioned by both DSS and DHS. This seemed to me, at the time, to be an effective way in which I could hold the DSS and DHS to account for their administration of the scheme, which by then was both well established and plainly a high priority for the Government of the day, despite the surrounding controversy. I took a similar approach to several other matters, where I would also go back after some time to check that agencies had actually done what we recommended they should do.
21. To my mind, there was nothing unusual about the process of establishing the investigation, and the decision to do so was mine alone. Having decided to proceed, with a further own motion investigation, I took the following steps with respect to commencing the investigation:
- a) advised Secretary Leon of DHS and Secretary Campbell of DSS of my intent to undertake the investigation; and
 - b) forming a small team of staff, guided by their Senior Assistant Ombudsman, Deputy Ombudsman and ultimately myself, to commence work. Although there was some turnover of senior staff in the Office, the Deputy Ombudsman who oversaw most of the investigation was Jaala Hinchcliffe.
22. In April 2019, the 2019 Report was published. It found that the DSS had implemented the recommendation for which it was responsible from the 2017 report; and that DHS had made progress in implementing the remaining recommendations, albeit that there was more to be done.

The 2021 Report

23. The environment within which Robodebt was operating had changed fundamentally by the time I commissioned the 2021 Report in March 2020.
24. In November 2019, after a lengthy period of public debate about the scheme and, in particular, whether or not the scheme was created on a sound legal basis, I was advised in a telephone call from the then Secretary of DHS, Renee Leon, that DHS had received advice from the Solicitor General to the effect that those legal foundations were fundamentally flawed. This set in motion a lengthy process whereby the Government, through DHS, was required to identify which debts that had been raised under the scheme lacked a legal basis and then to go about refunding or waiving those debts. I was mindful that, at the same time, a major class action lead by Gordon Legal was progressing through the courts against the Government in relation to Robodebt. Nevertheless, following discussions with my staff at the end of 2019 and the beginning of 2020, it struck me that it could be a useful complementary activity for my Office to scrutinise and

report on the administrative processes whereby DHS was seeking to right the catastrophic wrong that the raising of hundreds of thousands of legally flawed debts created, to the extent that was possible.

25. As was the case with regard to the 2019 report, the decision to undertake the investigation was mine; I notified the relevant senior officials and commissioned a small team to undertake the work.

Question 3

Set out your involvement in the Investigation and how, to your knowledge, they were conducted.

26. I took a close personal interest in both of the investigations, just as I would with respect to every Own Motion investigation that the Office conducts. Although I cannot specifically recall all the tasks I undertook, generally these would have included:
- a) settling on the initial scope of the exercise;
 - b) settling on the broad project plan for its execution, including issues such as how and when the team would engage with the relevant agencies;
 - c) ensuring we deployed adequate resources to the task;
 - d) regular meetings with the team about progress;
 - e) review of draft high level findings, and
 - f) finalisation of the draft and final reports.
27. With respect to Robodebt, I was always very keen to ensure that we were paying close attention to what complaints to the Office were telling us, what issues they were highlighting, so that our investigations could be grounded in real human experience.
28. The usual practice for procuring reports included the following:
- a) draft and final reports would be provided by me in writing to the Secretaries of DHS and DSS. I recall this occurred for both the 2019 and 2021 Reports.
 - b) From this, the DHS and DSS would be afforded a reasonable opportunity to comment on our emergent findings, partly as a matter of due process and partly to ensure that our analysis was soundly based.
 - c) Sometimes the Office would accept suggestions of a Department/Agency to amend our report; sometimes we would not, depending on the merits of the argument.
 - d) I would also make myself available to my team, or to senior officials in the relevant Department / Agency, if there were particular sensitivities to discuss.

29. Set out on pages 5 and 6 of the 2019 Report and page 5 of the 2021 Report is the Office's investigation methodology. Either or both of the Investigations included tasks such as:
- a) analysis of complaint data;
 - b) multiple data and information requests;
 - c) provision of draft policy updates, customer facing materials and systems for Ombudsman comment;
 - d) user testing of Commonwealth Ombudsman suggestions;
 - e) dedicated monthly Employment Income Confirmation (EIC) meetings with DHS;
 - f) further discussion at regular liaison meetings, including Senior Executive Service (SES) level liaison meetings with both departments, and quarterly director level debt meetings and internal review meetings with DHS;
 - g) ad hoc officer level and SES level meetings on discrete issues;
 - h) review of a number of parallel individual complaint investigations.

Question 4

Set out your involvement in the meeting held on or around 17 May 2018 between the Agency and the Ombudsman's office, about legal issues relating to debt recovery action arising from the Robodebt scheme.

30. As noted above, the scope of the 2019 report was to assess and report on the extent to which DHS had, or had not, adequately implemented the recommendations that had been contained in the 2017 report.
31. Shortly after becoming the Commonwealth Ombudsman in 2017, a separate but critical issue came to my attention. Some legal experts, which included Professor Terry Carney, and other commentators were of the view that there were flaws in the fundamental legality of the Robodebt scheme.
32. I am not legally qualified and did not study law. In order to understand the legal issues that had been raised, I therefore relied on staff who worked at the Office and were legally qualified and who advised me. At that time, I sought to understand whether the Office had formed a view on the question of legality and how, or in what way, the Office might respond. To do this, I had discussions with my staff, and in particular, Louise MacLeod who was legally qualified and who had been heavily involved in the 2017 report. I recall that I was informed that the Office had been provided with legal advices, in the context of the preparation of the Office's 2017 report, which had been generated in the DSS and DHS that indicated the Robodebt scheme was consistent with the relevant legislation. While I recall there was some doubt raised about the use of "averaging" to determine debts in an earlier advice, the Department's more recent advice, and

the position put to us, was that “averaging” was consistent with the legislative framework. The Office’s 2017 report also contains advice from the DSS Secretary Pratt to the effect that the legal requirements were met.

33. It was evident, therefore, that there were competing points of view. Throughout the latter half of 2017 I had a number of discussions with my staff, including Louise Macleod and other staff working on our investigations, which focused on the following considerations:
 - a) That the position had been taken at the time that the 2017 Report was finalised that the issue of legality could only be determined definitively in a court of law;
 - b) That the Office’s expectation would be that, given the large numbers of affected DHS customers, the legality of the scheme would be tested in the AAT and the courts; and
 - c) That we had not formed a definitive view on the point; and
 - d) That in any event, the Ombudsman is not empowered to make a binding decision on a contested legal point.
34. With respect to point (c) above, there were comments made from time to time by DHS officers, including to the media, that the Ombudsman had found, in the 2017 report, that the Robodebt scheme, including the use of “averaging” was lawful. However, when I was briefed by Ms MacLeod and other staff on this issue upon arriving in the Office, it became clear to me that the Office’s view was that we had not made such a definitive finding. Rather, I was briefed to the effect that the 2017 report said, and was intended to convey, that if all of the appropriate income data was loaded into the online compliance system, the system was capable of calculating an accurate debt. While it did not make a finding that “averaging” was unlawful, the Office did not expressly find that Robodebt met all of the legislative requirements.
35. For additional context, I should add here that there were occasions during my term as Commonwealth Ombudsman where the Office actively questioned or raised doubts about the legality of various aspects of administration. This typically occurred where relatively straightforward provisions in the statute were demonstratively being breached (for example, there are very specific provisions in various laws pertaining to covert or intrusive law enforcement activity where the Office would often highlight that such specific provisions were not being met). Sometimes, if there was doubt, we would encourage the relevant law enforcement agency to seek legal advice on its approach as a way of seeking assurance on their approach and, as necessary, make adjustments. Robodebt was different to this: here was a scenario where the relevant agencies were putting to us that their program was legally sound, based on their most contemporary legal advice, despite external critiques to the contrary. In my experience, not least in what is now the Department of Home Affairs, it is not unusual for lawyers in various fields to hold a view that the Commonwealth’s legal position is flawed. Sometimes they are right; and sometimes they are wrong, and thus there are many contested visa, citizenship and refugee matters being considered in the courts.
36. All this being so, I took the position in 2017 that our better course was to continue to focus on the “bread and butter” issues of seeking to improve the administration of the Robodebt scheme, whilst taking a close interest in how the tribunals or courts might approach the issue.