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2 SOCIAL SECURITY

Including Student Assistance Decisions

Opinion

To compensate or not to compensate

In September 1999 the Ombudsman released an 'Own Motion Investigation' under s.35A of the *Social Security Act 1991*, looking at 'Financial Redress for Maladministration', titled 'To Compensate or not to Compensate'.

The main comment, reiterated a number of times in the Report, is that the current system of paying compensation to those affected by maladministration is complex, difficult to understand even by those charged with its application, and (hence) inconsistently applied.

The Ombudsman looked at current arrangements for paying such compensation and listed them as:

- settlement of monetary claims where there is in fact legal liability;
- compensation for detriment caused by defective administration (CDDA);
- act of grace payments; and
- ex gratia payments.

Monetary claims are covered by the Attorney-General's directions on handling monetary claims, authorised by s.55ZF of the *Judiciary Act 1903*. CDDA was set up in 1995 as a non-statutory administrative mechanism. Act of Grace payments are authorised by s.33 of the *Financial Management and Accountability Act 1997*. Ex-gratia payments are also non-statutory administrative mechanisms, requiring government approval.

Problems that are seen by both the public and some of those administering the relevant Departments as similar — that is, how to compensate individuals who have suffered detriment as a result of the actions of government — are covered by a variety of legislative and non-legislative programs, whose inter-relationship is not clear even to those charged with administering them.

Waiver and write off are also, in effect, measures for providing financial redress where a debt arises as a result of defective administration or other agency error.

There have been changes in these arrangements over the years. Until January 1998 the settlement of monetary claims where there was legal liability was covered by the former Finance Direction 21/3, which was repealed. In effect, a claim can be settled if settlement would be in accordance with legal principle and practice. Payments under the *Judiciary Act* are affected by the Commonwealth's obligation as a model litigant — that is the Commonwealth's

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obligation, amongst other matters, not to take advantage of the claimant's impecuniousness or the difficulty the claimant may have in obtaining access to information available to the Commonwealth.

CDDA was introduced in 1995. The relevant detriment can be financial or non-financial loss. A CDDA payment requires an element of 'unreasonableness', which can include clear cases of wrong or ambiguous advice. It does not apply to simple errors made by public servants. Nor can a CDDA payment be made where the Commonwealth would be legally liable if the matter went to court. This requires a determination as to the existence of legal liability before a payment can be made, even though from the point of view of the claimant it is immaterial which program the payment comes from.

Act of Grace payments apply to 'special circumstances', which are not defined, so could be anything that could broadly be described as such. In fact, they are used for three broad categories:

- where legislation produces unintended, anomalous inequitable or unjust results in the particular circumstances;
- where the matter is not covered by legislation but it is intended to introduce legislation and in the particular case it is desirable for the benefits to be applied retrospectively;
- where the particular circumstances lead to a moral obligation.

Ex gratia payments require approval by government and are usually reflected in a specific appropriation — usually for a group which has suffered a particular class of losses. An example is where social security recipients required departure certificates for payments, and payments were suspended if a recipient stayed away for over six months. Some people who intended to stay away for only a short while, but were unable to return, had payments suspended, such as people caught in the fighting in Lebanon who were often unable to return for a number of years. This situation was clearly an 'unintended consequence'. The legislation had been intended to catch those who had intended to stay abroad for prolonged periods without notifying the Department. The legislation was modified to clarify this situation and ex gratia payments were made to those unable to take advantage of amendment.

The Ombudsman comments on how he has found it difficult to persuade agencies to pay compensation. It is, however, notable that Centrelink accepts a much higher proportion of recommendations than the Department of Social Security (DSS) did — although it is too soon to tell if this will be an ongoing and meaningful change. (Centrelink accepted 82% of recommendations, compared with the DSS 50%).

The Ombudsman also commented that the Ombudsman and the relevant agencies can and do have different ideas about what is 'unreasonable' in the context of the CDDA scheme. The CDDA can be as broad or as narrow as the CEO of the particular agency wishes.

A major problem is how the different mechanisms interact. First, the question of legal liability is looked at, which may often be controversial. Then the agency will consider a payment under the CDDA, and, finally, the possibility of an Act of Grace payment is considered. DSS (UK) look first at the availability of the non-statutory scheme, which speeds the process up.

Agencies agree that the current arrangements are complex and hard to understand, and would prefer clear agency guidelines.

Agencies and the Ombudsman agree that agency staff need training in investigation, and need to be less defensive and more service oriented. This would probably save money in the long term.

The Ombudsman noted that the backdating provisions of *Social Security Act* are restrictive and can operate unfairly in some circumstances.

Recommendation 1: the backdating provisions of the *Social Security Act* should be amended to allow Centrelink discretion to backdate income support payments for up to 12 months in some circumstances.

Recommendation 2: Act of Grace and waiver powers should devolve to agency heads (Centrelink already has waiver power).

The Ombudsman points out that devolving the power to agency heads to make such payments would increase the accountability of the agency to its clientele, may decrease the time taken to make payments, and may actually increase consistency, as there would be more feedback between the different levels of decision making.

In the context of compensation for errors made by government agencies, it is also worth looking at Centrelink's report '1998–1999 Social Security Compliance Activity in Centrelink'. This report notes that 'Centrelink is placing increasing emphasis on helping customers avoid debts in the first place (see *SSR* Opinion December 1998, Ombudsman's Discussion Paper 'Balancing the Risks').

The report states that there were identified debts of $279.7 million. It states that there were 2.7 million reviews, leading to 256,378 payment cancellations or reductions, and 3011 convictions for fraud. It thus appears from Centrelink's own figures that it is only a very tiny minority of welfare recipients who are in fact fraudulent, and indeed in only a very small minority of cases are overpayments due to fraud by the recipients. This is despite the rhetoric targeting welfare cheats.

The Report does not indicate what proportion of overpayments is caused by client error, departmental error, a combination of both, or other factors.

The Review is broken down by programs administered under the *Social Security Act.*

The 'average' debt, across all programs, for all 'debtors' is $772.95; the average for age pensioners who are overpaid is $1716.20, while for those on newstart allowance it is $697.54. This does not of course tell the reader anything about the causes of the overpayments, but it may put into context the frequent assertion that certain categories of welfare recipients are rorting the system.

It is also interesting to see which programs showed the highest rate of overpayments. Forty-one percent of the reviews were carried out in the newstart program, leading to debts being identified in 13.6% of cases reviewed; 5.6% of all reviews were carried out in the family payments program, leading to debts being identified in 35.2% of cases. This leads to the AAT's expressed concern with respect to family payment:

> What remains of concern to the Tribunal is that an applicant as intelligent and articulate as Mrs Clark has found herself in this situation as a result of not being able to comprehend the letters, and the misleading nature of their advice.

[*Clark*, summarised in this issue.]

[A.B.]