



Income Maintenance Periods and Special Benefit

A REPORT CONCERNING THE
DEPARTMENT OF SOCIAL SERVICES' POLICY
INSTRUCTIONS TO THE
DEPARTMENT OF HUMAN SERVICES - CENTRELINK

March 2016

Report by the Commonwealth Ombudsman,
Colin Neave, under the *Ombudsman Act 1976*

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EXECUTIVE SUMMARY

Many people who receive employment termination payments following dismissal or redundancy are unaware that these payments may prevent them from receiving income support from the Department of Human Services - Centrelink (DHS) for a period of time. Some people may not easily find a new job, particularly if they have an illness or disability that makes it difficult to obtain suitable work. It is not uncommon for people to find out about this non-payment period, called an Income Maintenance Period (IMP), after they have spent their termination payment and are in difficult financial circumstances. By that time they may be at risk of, or experiencing, homelessness and have accrued significant debts.

As many charities use the receipt of income support payments as one of their tests for service eligibility, people serving IMPs are often unable to access assistance or support from charities.

People in this situation have two options for obtaining income support: the first is to ask DHS to reduce the length of the IMP on the ground that the person is in severe financial hardship because of unavoidable or reasonable expenditure; the second is to lodge a claim for Special Benefit.

The social security legislation provides DHS with discretionary decision making powers to reduce IMPs and to grant Special Benefit. But these discretions are not exercised in isolation – DHS is required to follow the Department of Social Services' (DSS) policy instructions. This report focusses on those policy instructions.

In the case of the discretion to reduce IMPs, we suggest that the instruction is too strict and narrow in its assessment of why a person is in severe financial hardship, particularly if they have spent only a small portion of the termination payment on expenses that are not considered to be unavoidable or reasonable.

At the time of the investigation, DSS's policy instruction to DHS was that Special Benefit was not to be granted to a person who is serving an IMP for another payment. However, this instruction was not supported by the current legislation and was contrary to the way in which the discretion to grant Special Benefit has been exercised by an external tribunal.

The report makes three recommendations. The first recommends that DSS amend the policy instruction for IMP reduction so that it takes account of each person's circumstances including the portion of the termination payment that was spent on non-permitted items in relation to the actual size of the payment and the length of the IMP. The second recommends that DSS amend its instruction about the grant of Special Benefit during an IMP so that DHS is permitted to properly consider, and, where appropriate, grant claims in that situation. The third recommends that DSS do what it can to raise community awareness of the impact of employment termination upon income support non-payment and waiting periods.

All three of these recommendations were accepted by DSS and changes were made to the *Guide to Social Security Law* on 8 February 2016. However, those changes were not satisfactory and Part 5 of this report concludes that more should be done to properly implement the recommendations.

PART 1—INTRODUCTION

1.1 People who lose their jobs following dismissal or redundancy (referred to below as termination) often receive lump sum payments.¹ While many people go on to obtain new positions, some do not: their skills may not be compatible with current vacancies, there may be high unemployment in their local area, or they may have a health condition that makes it difficult to find suitable work or a willing employer. Some people who have injuries or illnesses may find themselves without work after protracted periods of unpaid leave or unsuccessful workers' compensation claims. These people may be in financial hardship or carrying significant debt by the time they receive their termination payment.

1.2 What many people do not know is that the social security law requires DHS to take termination payments into account when assessing whether a person can be paid certain income support payments.² The intention underlying the legislation is that a person who receives a termination payment is expected to use that money prudently to cover their reasonable living expenses before they receive assistance from the social security system.

1.3 If the termination payment is very small, a person may be entitled to an income support payment at a reduced rate. But for many people, the size of the termination payment will mean they must serve a non-payment period called an Income Maintenance Period (IMP), before a benefit such as Newstart Allowance can be paid to them. The IMP can last for days to over a year – an IMP applies for the equivalent number of weeks that the employment-related termination payment represents.

1.4 For example, a person receives a termination payment of around \$75,000 comprised of payment in lieu of notice equivalent to 5 weeks salary, redundancy equivalent to 29 weeks salary, and 1 day each of salary for annual leave and long service leave. The period covered by the termination payment is 34 weeks and two days. The IMP will apply for 34 weeks during which time income support is not payable.

1.5 In the 2013-14 financial year 57,382 IMPs were applied. In the 2014-15 financial year 54,160 IMPs were applied³.

1.6 There is no obligation for employers to let employees know about IMPs and other waiting periods, and they are only required to notify DHS if 15 or more employees are being made redundant.⁴ If people were aware of IMPs at the time of their termination, they would know to check with DHS when they get their lump sum payment. It is reasonable to assume that most people would then be more likely to make choices

¹ These typically include annual leave, sick leave, maternity leave or long service leave.

² Newstart Allowance, Partner Allowance, Parenting Payment, Sickness Allowance, Youth Allowance, Austudy, Widow Allowance and Disability Support Pension (except if the Disability Support Pension recipient is permanently blind).

<http://www.humanservices.gov.au/customer/enablers/centrelink/waiting-periods/income-maintenance-period>

³ Data provided by DSS on 19 November 2015.

⁴ Section 530 of the *Fair Work Act 2009*; following suggestions from the National Welfare Rights Network, the Fair Work Ombudsman's template termination and redundancy letters now suggests that employers include advice that '*some termination payments may give rise to waiting periods for any applicable Centrelink payments. If you need to lodge a claim for payment you should contact Centrelink immediately to find out if there is a waiting period.*'

Available at <http://www.fairwork.gov.au/ending-employment/notice-and-final-pay> and <http://www.fairwork.gov.au/ending-employment/redundancy>

that would ensure they have enough money to support themselves for the duration of the IMP.

1.7 However, it is not uncommon for people to spend all of their termination payment before they contact DHS. Much of this expenditure can appear quite sensible at the time – paying off mortgages or repaying credit cards and other debt, especially if they expect to get another job quickly – while other expenditure may not be necessary or prudent. By the time they learn about IMPs, people can be in severe financial hardship, carrying significant debt and facing or experiencing homelessness. Many are responsible for supporting their dependents, including children.

1.8 Further compounding the difficulties, many charities use the receipt of an income support payment as a threshold requirement for their services. If a person is in significant financial hardship or is homeless, but unable to obtain an income support payment due to an IMP, they often cannot turn to these charities for assistance.

1.9 People affected by IMPs who cannot obtain employment do have two options they can pursue with DHS: the first is to seek a review of the IMP decision so that it might be reduced; the second is to lodge a claim for Special Benefit. Both of these options require DHS to exercise discretions under the *Social Security Act 1991* (the Act).

1.10 This report examines the current policy instructions that the Department of Social Services (DSS) has issued to the Department of Human Services - Centrelink (DHS) about the exercise of those discretions. DSS is the agency responsible for the social security legislation and associated policies. DHS is the service delivery agency that administers income support payments to the community, via its Centrelink program. DHS is bound by the instructions it receives from DSS. For ease of understanding, the term 'DHS' is mainly used in this report as it is the department which manages the Centrelink program. However, where it is necessary to refer to the Centrelink program itself, then the term 'Centrelink' is used.

1.11 This report arose from investigations into two complaints from the National Welfare Rights Network.⁵ It also draws upon material from other complaints that have been made to this office since mid-June 2014. The report is issued under s 15 of the *Ombudsman Act 1976*.

Seeking to have an IMP reduced

1.12 The first option for someone who is in financial hardship but serving an IMP is to ask DHS to reduce the length of the IMP. The Act gives DHS the discretion to do that if the person is in severe financial hardship because they have incurred unavoidable or reasonable expenditure during the IMP. While the Act sets out some rules around assessing whether a person is in severe financial hardship and what kinds of expenditure can be taken into account, it does not specify how an IMP should be reduced. It does not address what to do if a person has a combination of unavoidable or reasonable expenditure and expenditure that does not meet this test.

1.13 At the time of investigation, DSS had provided DHS with a step-by-step policy instruction to assist it when considering the discretion to reduce IMPs. This instruction put a very strict and low limit on the amount of money a person could

⁵ The National Welfare Rights Network is a peak community organisation that provides systemic and individual advocacy for people affected by social security law, policy and administration. Details available at <http://www.welfarerights.org.au/>

spend on items that are not considered unavoidable or reasonable, irrespective of the length of the IMP or amount of the termination payment involved. Part 2 of this report discusses our concerns about the very narrow test that DSS required DHS to apply, given that it is not set out in the Act and case law suggests a more flexible approach may be appropriate.⁶

Claiming Special Benefit

1.14 Another option is to make a claim for a payment type known as Special Benefit. Special Benefit is designed to provide income support to people who are in financial hardship and are unable to earn a sufficient livelihood for themselves and their dependents for reasons beyond their control. The Act gives DHS discretion to decide whether to grant Special Benefit.

1.15 The Act does not currently apply IMPs to Special Benefit and there is nothing in the Act that says Special Benefit cannot be paid while a person is serving an IMP for another payment.⁷ Contrary to this, DSS had issued a policy instruction that Special Benefit should not be paid to a person who is serving an IMP in relation to another income support payment. Due to this instruction, DHS could not grant Special Benefit to someone serving an IMP. However, if the person sought review of that decision before an external tribunal, it was and remains possible that Special Benefit would be granted.⁸ In our experience, DHS will not bring the Special Benefit payment to people's attention even after they have repeatedly sought assistance during financial hardship.

Case study 1 – in hardship with dependents

Mr A lives in a remote Indigenous community in Queensland with his wife and four children. Mr A and his wife also provide foster and respite care for other children. In April 2015 he was made redundant and received a \$36,000 lump sum payment. He used most of that money to pay off debts and to purchase a car. He has a back injury and heart condition and is no longer able to work.

In late April 2015 he applied for Newstart Allowance. DHS informed him that he had to serve an IMP until December 2015. Prior to that advice, Mr A had been unaware of income support waiting periods. His wife was also refused Parenting Payment due to his IMP. Mr and Mrs A were trying to support themselves and their dependents using Family Tax Benefit payments, payments made for the foster/respite children in their care and support from their extended family. Mr A owed his council over \$3000 in rates and land lease payments.

After numerous discussions with DHS during which Mr A says he was told that nothing could be done, he contacted the Ombudsman in July 2015. We discussed his right to seek review of the length of the IMP and informed him about Special Benefit.

⁶ See *Secretary, Department of Education, Employment and Workplace Relations v Ergin* [2010] FCA 1438

⁷ A Bill was introduced to Parliament on 2 December 2015 that would amend the Act so that a person cannot be paid Special Benefit while they are serving an IMP. See Schedule 1 of the *Social Services Legislation Amendment (Miscellaneous Measures) Bill 2015*.

⁸ Tribunals are bound by the law but are not required to follow policy instruction if that instruction is considered to be inconsistent with the legislation. Most Centrelink decisions can be reviewed internally and externally. The internal review is conducted by an Authorised Review Officer. If a person is unhappy with that decision, they can seek review at the Administrative Appeals Tribunal (AAT) First Review. An AAT First Review decision can be reviewed by the AAT Second Review.

We explained that Special Benefit was unlikely to be granted by DHS but might be granted by a tribunal. We did not investigate, but referred Mr A to a National Welfare Rights Network member for assistance. After several conversations with us, Mr A said that, due to his deteriorating heart condition, he did not want to undergo the stress of further engagement with DHS or the review process, particularly if it required him to apply to a tribunal.

1.16 Part 3 of this report discusses our concerns about the way in which DSS has limited DHS's discretion to grant Special Benefit. Part 5 explains that, despite DSS accepting our recommendation to remove this instruction, we remain concerned that it persists in a modified form in the amended instruction to DHS. However, there is presently no basis for it in the legislation and there have been several tribunal decisions in which people have been granted Special Benefit while they were serving an IMP for another payment.

PART 2—INCOME MAINTENANCE PERIODS

2.1 A key problem with the administration of IMPs is that there is no requirement for a person who is about to be given a termination payment to be referred to DHS or warned about possible payment waiting periods.

2.2 This contrasts unfavourably with people who receive lump sum compensation payments that include a component for lost earnings or lost capacity to earn. Payments of this type attract their own non-payment period called a compensation preclusion period. However, there is a better system for ensuring that people who receive these payments are aware of these preclusion periods at the point of financial settlement. These include the requirement for insurers to notify DHS before the compensation is paid; mechanisms for people to find out the likely length of their preclusion period before they receive the funds; and professional obligations for lawyers to discuss preclusion periods with their clients.

2.3 Compensation preclusion periods, which often run to years due to the size of the compensation payments involved, are also subject to a discretion to reduce their length. They can be reduced or waived on the grounds of ‘special circumstances’.⁹ It is not apparent, as a matter of policy, why there is such a comparatively narrow assessment of requests to reduce the length of IMPs.

The legal framework for decision-making

The legislation

2.4 The Act defines termination payments to include payments for unused leave, redundancy payments and other payments connected with the termination of the person’s employment.¹⁰ If a person is in ‘severe financial hardship’ because they had ‘unavoidable or reasonable expenditure’ while an IMP has was in place, then there is a legislated discretion to decide that the whole or a part of the IMP does not apply to that person.¹¹

2.5 ‘Severe financial hardship’ is defined in the Act in the following way:¹²

- for a person who is not a member of a couple – they are in severe financial hardship if the value of their liquid assets¹³ is less than the fortnightly amount of the maximum rate of income support benefits that would have been payable to the person if they were not serving an IMP.
- for a person who is a member of a couple – they are in severe financial hardship if the couple’s liquid assets is less than twice the fortnightly amount of the maximum rate of income support benefits that would have been payable to the person if they were not serving an IMP.

⁹ Per s 1184K of the Act. More information is at <http://guides.dss.gov.au/guide-social-security-law/4/13/4/10>

¹⁰ See, for example, s 1068-G7AQ concerning the calculation of Newstart Allowance and Sickness Allowance. There are several payment calculators in the Act for different types of payments but those concerning Newstart Allowance will be used for the purposes of this explanation.

¹¹ Subsection 1068-G7AM.

¹² Subsections 19C(2) and (3).

¹³ Liquid assets are defined in s14A as the person’s cash and readily realisable assets including, amongst other things, amounts due and payable to the person from a third party.

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2.6 As of September 2015, for a single person without children who is claiming Newstart Allowance, they would be in severe financial hardship if their liquid assets were less than \$656.40.¹⁴

2.7 The term ‘unavoidable and reasonable expenditure’ is defined to include:

- The reasonable costs of living that the person is taken to have incurred (these are listed in the Act)¹⁵ – for a single person, these costs are capped at the amount of the income support payment that would have been payable during the period of the IMP. For a person who is a member of a couple, these costs are capped at twice that amount.¹⁶
- Other necessary expenses such as the costs of repairs to, or replacement of, essential whitegoods in the person’s home, school and funeral expenses.¹⁷

The case law

2.8 The Act does not set out a formula for determining the amount to reduce an IMP by if a decision maker is satisfied that the person is in severe financial hardship due to unavoidable or reasonable expenditure. However, there is some guidance in the publicly available decisions of the Administrative Appeals Tribunal (AAT) and the Federal Court.

2.9 In the decision in *Secretary, Department of Education, Employment and Workplace Relations v Ergin [2010] FCA 1438* (Ergin), the Federal Court considered an appeal from an AAT decision in which Mr Ergin had received a significant termination payment but used part of the payment on discretionary spending which was not required to meet his day to day living expenses.

2.10 The department argued that there is no discretion to waive the IMP in whole, or in part, where the severe financial hardship has been caused by a combination of unavoidable or reasonable expenditure and other expenditure. In effect, the department argued unavoidable or reasonable expenditure must be the sole cause of the severe financial hardship. This argument was not accepted.

2.11 The court pointed out that even when all the conditions for reducing an IMP have been met, it is possible for the Secretary to decide, in appropriate cases, not to exercise the discretion to reduce the IMP at all.¹⁸ It also found (at paragraph 34) that:

Depending on the circumstances, the Secretary may be satisfied that the cause of the applicant’s impecunious state was unavoidable or reasonable expenditure even though some of the termination payment may have been spent on items which do not fall into this category. Such a conclusion may be possible, for example, in a case in which an application for the exercise of discretion is made towards the end of an income maintenance period and it is

¹⁴ This figure is based on Newstart Allowance, Rent Assistance and the Energy Supplement rates as at 2 September 2015.

¹⁵ s 19C(5) limits these to food costs; rent or mortgage payments; regular medical expenses; rates, water and sewerage payments; gas, electricity and telephone bills; petrol for the person’s vehicle; public transport; any other costs that the Secretary determines.

¹⁶ Subsections 19C(6) and (7).

¹⁷ The non-exhaustive list also includes essential expenses arising from the birth or adoption of a child, buying replacement essential household goods following theft or natural disaster where not covered by insurance, essential repair to the car or home, vehicle or home insurance, vehicle registration, essential medical expenses, and any other costs that the Secretary determines are unavoidable or reasonable in the circumstances of the person.

¹⁸ *Ergin*, Paragraph 31.

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found that the bulk of the termination payment has been expended on unavoidable and reasonable purchases, notwithstanding that a very small sum has been used for other purposes. (original emphasis)

2.12 The court ultimately concluded that the AAT had made an error in its reasoning when it decided to exercise the discretion to reduce Mr Ergin’s IMP. Nonetheless, at paragraph 40 the court noted that:

...the discretion conferred on decision-makers...is broad and unfettered. It may be that there will be cases in which it might be appropriate for the decision-maker to adopt the “apportionment” method in determining what part of an income maintenance period should not be applied to an applicant. The further consideration of this issue should await a case in which it is squarely raised and fully argued.

2.13 These extracts point to the possibility of an approach where consideration is given to the relative portions spent on permitted and non-permitted items, as against the size of the termination payment. This was not accommodated in the policy that applied at the time of the investigation.

The policy

2.14 In the absence of a statutory formula explaining how to assess causation where there is permissible and non-permissible expenditure, DSS provided policy instruction in the form of part 4.3.4.40 of the *Guide to Social Security Law*.¹⁹ At the time of the investigation, that part set out the following formula:

Step	Procedure
1	Establish whether the person is in severe financial hardship [as prescribed in the Act]
2	Assess the value of the person’s total liquid assets at the date of the commencement of their IMP
3	Assess the unavoidable or reasonable expenditure of the recipient by adding together: a) The level of reasonable costs of living (being mindful of the upper limit capped by the Act) applicable to the person’s circumstances, incurred since the start of the IMP, and b) Any unavoidable or reasonable expenditure in addition to the reasonable costs of living that has occurred since the commencement of the IMP.
4	Deduct the total amount at step 3 (unavoidable and reasonable expenditure) from the amount at step 2 (total liquid assets)
5	It then explains that if the amount remaining after step four is less than or equal to the amount permitted under the severe financial hardship test at step one, then they are ‘in severe financial hardship due to reasonable or unavoidable expenditure and they are entitled to have the remainder of their IMP waived’.

¹⁹ Available at <http://guides.dss.gov.au/guide-social-security-law/4/3/4/40>

2.15 The policy also said ‘...*, if the amount at step 4 does not meet the severe financial hardship test, NO allowances or deductions can be made for any unavoidable or reasonable expenditure, including the reasonable costs of living, that the recipient has incurred, and the recipient must serve their full IMP.*

2.16 Using the example provided in paragraph 2.6 above, this instruction meant that if a person had less than \$656.40 (the severe financial hardship test) available but they spent more than this amount on non-permitted items during the IMP, it was not possible for DHS to reduce the IMP. This would be the case even if the person was unaware of IMPs, was homeless, suffering from medical conditions and without any support or assistance.

The administrative issue

2.17 This strict limit does not take account of the size of the IMP or the length of time that the IMP applies for. It also narrowed the discretion of the decision-maker.

2.18 This was illustrated by a complaint we received in 2014, where a woman who was the sole parent of a teenager received a termination payment of \$75,000 and spent it all before she learned she was subject to an IMP of eight months. Under the policy, and payment rates at the time, she could spend no more than \$709 of the termination payment on matters not considered unavoidable or reasonable before the policy would prohibit IMP waiver. That is less than 1% of the termination payment that could be spent on discretionary matters. The SSAT decided to reduce the IMP. As DHS’s systems were structured around the strict monetary limitation, there were some challenges implementing this particular tribunal decision.²⁰

2.19 When we investigated this issue, we asked both DHS and DSS to comment on whether there was a conflict between the decision in *Ergin* and the policy instruction 4.3.4.40 of the Guide as it existed at the time. Both expressed the view that the court in *Ergin* did not make a binding decision about the method for assessing an IMP when there is both permitted and non-permitted expenditure. DSS also said it did not perceive any inconsistency between *Ergin* and the current policy instruction.

2.20 In our view, what is clear from the decision in *Ergin*, is that the court took the view that the discretion to waive part or all of an IMP is ‘broad and unfettered’. *Ergin* does indicate that it is possible to exercise the discretion favourably when the ‘bulk’ of a termination payment has been used on necessary and reasonable expenses and a ‘very small’ part has not. This suggests that there should be scope for the decision-maker to take account of the circumstances of each case so that a sensible view can be reached about the way in which that termination payment has been used. We also suggest that the decision-maker should be able to have regard to the size of the IMP so that relative assessments of the ‘bulk’ and a ‘very small’ part can be made.

2.21 Contrary to this, the policy set a finite figure for assessing appropriate expenditure: it sought to demonstrate the causative link between the financial hardship and the unavoidable or reasonable expenditure through a fixed amount set at the severe financial hardship test. In our view, the Guide was not reasonable in its assumption as its use of a monetary cap to determine causation was too restrictive

²⁰ Tribunals are not strictly bound by policy in the same way as Centrelink decision-makers. While policy will usually be applied, if the tribunal member decides the policy is not consistent with the strict requirements of the Act, they can decide not to follow it.

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and did not enable decision-makers to properly exercise their discretion to waive part or all of an IMP. We suggested that the Guide should be amended to allow a more flexible assessment that takes account of the relative portion of the termination payment that has been spent on unavoidable or reasonable expenditure.

2.22 In its initial response to our office on 20 October 2014, DSS said that the policy:

...reasonably assumes that if a person has incurred unavoidable or reasonable expenditure, but not to the extent that it would bring their liquid assets below the severe financial hardship threshold, that the unavoidable or reasonable expenditure was unlikely to be the cause of the person being in severe financial hardship'. It did acknowledge the legislative intention is to 'give the decision maker considerable discretion in determining whether a person's severe financial hardship is caused by unavoidable or reasonable expenditure, with regard to the individual circumstances of the case, and how much, if any, of the IMP should be waived.

It did not amend the policy at that time.

2.23 We made formal recommendations that DSS change the policy at recommendation one of this report. In response, DSS did amend the instruction, effective from 8 February 2016. Part 5 of this report details those amendments and our commentary about them.

PART 3—SPECIAL BENEFIT

3.1 The Act provides for a discretionary payment that can be paid to an Australian resident, known as Special Benefit. There are certain grounds, contained in s 729(2), which must be met before payment can be made. These include:

- no other income support payment type is payable to that person
- the reason why benefits are not payable is not because of industrial action, a move to a reduced employment area, a seasonal work preclusion, a failure to comply with a notification requirement or a compliance failure, and
- the person has an inability to earn a sufficient livelihood because of age, physical or mental disability or domestic circumstances, or for any other reason.

3.2 In August 2012, DSS issued an instruction to DHS that said:

...the Department remains of the view that [Special Benefit] should not be available to people who are precluded from other social security payments as a result of the imposition of an IMP.²¹

3.3 There are some good policy intentions behind the instruction not to grant Special Benefit during an IMP. Amongst these are the idea that people should use their own resources before drawing on tax payer funded support, and that there should not be an incentive to spend termination payments and then claim Special Benefit. However, while the decision-maker is entitled to take these matters into account when exercising the Special Benefit discretion, DSS's instruction did not permit DHS to weigh up the circumstances of each case. Rather, DHS was under a blanket instruction not to grant Special Benefit if a person was serving an IMP.

3.4 There is also a legal principle that says discretionary decision-makers should not have their discretion fettered or the outcome dictated by another party. Arguably, DSS's current instruction does not comply with this principle.

3.5 This blanket instruction has produced some inequitable results on appeal, as external tribunals are not bound by DSS's instruction and have, in several cases, decided to pay Special Benefit contrary to the policy. In our view, the outcome of a claim for a particular payment should not turn on the level of review a person is willing and able to pursue, or whether they have the assistance and advice of an advocate.

Case study 2 – a Social Security Appeals Tribunal (SSAT) decision²²

In March 2015 Mr B was dismissed and paid \$11,972.80 gross in entitlements. By April 2015, Mr B had run out of money. He applied for Newstart Allowance (NSA), but DHS applied an IMP until mid-June 2015. Mr B had not previously known about income support waiting periods. In May 2015 he was assisted by an advocate to seek a review of the IMP decision and lodge a claim for Special Benefit. He was refused Special Benefit. Both this decision, and the length of the IMP were affirmed during an internal Centrelink review.

²¹ We viewed this email during the course of our investigation.

²² Social Security Appeal Tribunal decisions are not published. This decision was provided to this office in the course of our investigation.

The SSAT²³ reviewed these decisions. The SSAT noted that Mr B's work performance had deteriorated shortly after a personal crisis. He became depressed, lost motivation and was unable to sleep. His depression was exacerbated by the loss of his job. Mr B was isolated and avoided people. He turned to gambling and drinking and the bulk of his termination payments were spent on these activities. After he was served with an eviction notice he made several suicide attempts. He commenced treatment for his depression in May 2015. Mr B had unsuccessfully attempted to find work but was unable to use employment service providers because he was without an income support payment.

While noting that Mr B's judgement was impaired by depression, the SSAT decided that his gambling and drinking expenses were not reasonable or unavoidable. Consequently, the SSAT did not reduce the length of his IMP.

However, the SSAT decided Mr B should be paid Special Benefit from the date he claimed it in May 2015. The SSAT made this decision as Mr B had several illnesses in addition to his depression, such as severe vision impairment and diabetes. He had no formal qualifications, was unable to drive and had limited work skills. He was also homeless at the time of the tribunal hearing and had sold his possessions. The SSAT expressly noted that *'the Act does not state that special benefit cannot be paid to a person who is serving an income maintenance period for Newstart Allowance'*.

The decision-making framework

3.6 The legislative provisions giving rise to the discretion to grant Special Benefit are largely set out above. The sections governing Special Benefit do not currently make any reference to IMPs, although a Bill before Parliament may make that change.²⁴ There is also a separate discretion as to the rate of Special Benefit that should be paid, but the rate cannot exceed the rate of payment that would have been paid under the IMP-affected payment.²⁵

3.7 There is legal authority that says the legislative discretion to grant Special Benefit is not confined by strict adherence to departmental policy; it is a discretion that is recognised as being a very broad one.²⁶ However, there is also accepted precedent that says that decisions should be made consistent with government guidelines or policy unless there are cogent reasons not to.²⁷

3.8 The publicly available policy about Special Benefit is contained in the *Guide to Social Security Law* (the Guide). Section 1.2.6.10 of the Guide says:²⁸

[Special Benefit] aims to provide income support for people who, due to reasons beyond their control are:

²³ From 1 July 2015 the SSAT merged with the Administrative Appeals Tribunal (AAT) and is now known as AAT First Review.

²⁴ See footnote 7 above.

²⁵ Section 746

²⁶ For example *Re Secretary, Department of Social Security and David* (1990) 20 ALD 262, *Secretary, Department of Social Services v Schofield* (1992) 27 ALD 619, *Re Secretary, Department of Social Services v Kowalski* [1993] AATA 249 and *Vu; Department of Family and Community Services* [2001] AATA 706 (10 August 2001).

²⁷ *Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634.

²⁸ <http://guides.dss.gov.au/guide-social-security-law/1/2/6/10>

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- in financial hardship, AND
- unable to earn a sufficient livelihood for themselves and their dependants.

To receive [Special Benefit] it must be established that the person is not eligible for any other pension or allowance. [It] is a discretionary payment. The circumstances under which it is granted and the amount paid are determined by a delegate of the Secretary of the Department.

3.9 In addition, Section 3.7.1.30 of the *Guide to Social Security Law* sets out how to assess Special Benefit claims.²⁹ It lists a range of factors that decision-makers must consider including the intention of the Act, a person's ability to earn a sufficient livelihood, the circumstances that led to their hardship, other support available, social worker involvement, the available funds test and the income test.

3.10 These factors are broken down into further detail in the instruction. At the time of the investigation, under 'Circumstances leading to hardship' it said:

The person's circumstances must be carefully considered to determine whether their inability to earn a sufficient livelihood was unavoidable or whether they have placed themselves in financial hardship by:

- persevering with an unprofitable business venture,
- spending their money on unnecessary items, or
- disposing of money, by gifting or other means without adequate return.

[Special Benefit] should NOT be paid if the delegate believes the person:

- knew at the time, that by spending their funds they would be placing themselves in financial hardship, AND
- could have avoided the situation of financial hardship...

3.11 The instruction from DSS not to pay Special Benefit when a person is subject to an IMP for another payment came into effect around August 2012. Around the same time, both DSS and DHS noted the desirability of legislative change to support that instruction. A Bill to amend the Act was introduced into Parliament on 2 December 2015.³⁰ If it is passed in its current form it will prohibit DHS from paying Special Benefit to a person during an IMP.

3.12 In the meantime, there have been a number of appeals, in addition to the case studies in this report, in which the Social Security Appeals Tribunal (SSAT) has found cogent reasons not to follow the policy instruction. In one decision in June 2012, the SSAT granted Special Benefit to a 54 year old man who had been unable to obtain a new job after being made redundant. At the time of the hearing he was homeless and required to serve an IMP from November 2011 until 23 September 2012. The SSAT decided this IMP could not be reduced due to a very large portion of the termination payment having been loaned to a friend who had refused to pay it back (this expenditure was not considered unavoidable or reasonable). However, it

²⁹ <http://guides.dss.gov.au/guide-social-security-law/3/7/1/30> There are several other relevant instructions under parts 3.7.1.10 to 3.7.1.110 available at <http://guides.dss.gov.au/guide-social-security-law/3/7/1>

³⁰ See footnote 7.

concluded that the discretion to grant Special Benefit should be exercised in his favour.³¹

3.13 Similarly, in March 2013, the SSAT decided to grant Special Benefit to a 50 year old man who was serving an IMP from September 2012 to July 2013. He had also been unable to find work and was represented by an advocate. The SSAT backdated the start date of the Special Benefit claim of January 2013 to the date he claimed Newstart Allowance in November 2012.³² In doing so, the SSAT decided not to follow the policy instruction in section 3.7.1.30 of the Guide that said unnecessarily expended funds should be deemed to be available to the claimant.³³

3.14 These decisions were not appealed by DSS as they were open to the tribunal as a matter of law. These tribunal decisions show that, while DHS was instructed to refuse Special Benefit, it was and remains possible for a person to be granted Special Benefit if they seek review with an external merits review tribunal. However, Special Benefit is not commonly promoted to people who seek financial assistance from DHS during an IMP and very few people are aware that success, in appropriate cases, will turn on that person seeking external review.

The administrative issues

3.15 We are aware that since at least mid-2014 the National Welfare Rights Network has suggested to DSS that the policy instruction be amended to reflect the broad discretion available under the legislation; or the legislation should be amended so that Special Benefit is clearly not payable during an IMP as a matter of law. Until recently, neither of these suggestions has been acted on.

Disruption to the integrity of the merits review system

3.16 The SSAT decisions pose something of a dilemma for DSS: they do not accord with DSS's view of the policy intention behind Special Benefit but the tribunal's reasoning is arguable, and likely to be followed by other tribunal members in suitable cases. It may also be affirmed if it is challenged in the next level of merits review, particularly where the applicant is represented by a member of the National Welfare Rights Network.

3.17 We acknowledge that an agency can decide not to appeal a tribunal decision and that the lack of an appeal, whether to another tribunal or a court, does not amount to acceptance of the reasoning in the decision.

3.18 However, the variation in interpretation of, and approach to, the legislation, between the agencies and an external tribunal has brought about a systemic inconsistency in the social security merits review process that persists today. The grant and payment of an income support benefit should not be determined by the level of review a person has the means and opportunity to access, particularly when it concerns a payment for people in very difficult and stressful circumstances.

³¹ This decision was provided to this office in the course of our investigation.

³² Section 15 of the *Social Security (Administration) Act 1999* provides that a claim can be deemed to be a claim for another payment type in certain circumstances, including if an earlier claim was made in error when a person was actually eligible to another payment type that they later claimed.

³³ This decision was provided to this office in the course of our investigation.

Whether the policy can validly instruct decision makers not to pay Special Benefit during an IMP

3.19 In our view, in its current form the legislation does not support the instruction to refuse all Special Benefit claims when a person is serving an IMP. In fact, the instruction meant there is no point in DHS having regard to the various factors set out at paragraph 3.9 above, as, irrespective of the claimant's personal circumstances, if they were serving an IMP, Special Benefit was not to be granted.

3.20 We also point to legal authority which notes *'there is a distinction between an unlawful policy which creates a fetter purporting to limit the range of discretion conferred by a statute, and a lawful policy which leaves the range of discretion intact while guiding the exercise of the power'*.³⁴ In many ways, this situation is similar to a seminal High Court decision that found a comparable policy instruction was invalid. That policy instructed decision-makers not to pay people an unemployment allowance during the end of year school holidays even though they met the eligibility criteria in the Act.³⁵ The Court concluded that the policy was inconsistent with the legislation and it had been applied inflexibly without any regard to the personal circumstances of the applicant.

3.21 While it would be a matter for a court of competent jurisdiction to decide, it would appear that the effect of DSS's instruction about the grant of Special Benefit during an IMP was to take the decision out of the hands of the DHS decision-maker. Discretionary decisions that are made under dictation or are affected by a fettering of the discretion are susceptible to legal challenge.³⁶

Lack of public knowledge about Special Benefit

3.22 As noted above, the complaints to this office indicate that people are not routinely informed by DHS that they may be eligible for Special Benefit while serving an IMP. While DSS's instruction not to pay during an IMP applied, a claim needed to be taken to an external tribunal before it would be granted, it is important that claims are made as early as possible to maximise arrears payments under the legislation. DSS's advice to DHS is that there is no statutory or common law obligation to 'advise people of the ability to claim a particular income support payment or advise existing customers of alternative payment types'.³⁷

3.23 As DSS is represented at the second tier of Administrative Appeals Tribunal (AAT) hearings about IMPs, often by DHS advocates, we are aware that DHS has sought advice from DSS³⁸ as to whether the Model Litigant Obligations³⁹ or any other obligations in the AAT require DHS to alert the tribunal or the applicant to the

³⁴ *Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634

³⁵ *Green v Daniels* (1977) 13 ALR 1

³⁶ For example, the *Administrative Decisions (Judicial Review) Act 1977* enables a person who is affected by certain decisions to seek review of those decisions if they are, amongst other things, affected by 'an exercise of a discretionary power at the direction or behest of another person' (s 5(2)(e)) or 'an exercise of discretionary power in accordance with a rule or policy without regard to the merits of the particular case' (s 5(2)(f)).

³⁷ Correspondence viewed by us in the course of our investigation.

³⁸ Correspondence was viewed by this office in the course of our investigation.

³⁹ The Legal Services Directions 2005 contains model litigant obligations which include the instruction that 'an agency should use its best endeavours to assist the tribunal to make its decision'. Appendix B, merits review proceedings. Available at <https://www.comlaw.gov.au/Details/F2012C00691>

possible availability of Special Benefit.⁴⁰ In its response to this investigation, DSS said that the AAT is confined to reviewing the operative decision and where that decision concerns an IMP, reference to a possible entitlement to another payment, namely Special Benefit, is not relevant.

3.24 We have some observations about these responses. First, DHS operates on a 'life events' model where a customer is encouraged to explain the event that has triggered their contact with Centrelink, with the expectation that officers will then offer a suitable service to that customer, including inviting claims for appropriate payments. From time to time this does not occur and, where the evidence indicates there was sufficient material before DHS to show that a particular claim should have been invited, customers have sought and obtained recompense through the scheme for Compensation for Detriment caused by Defective Administration (CDDA). It seems inconsistent with this practice to suggest that a customer who presents with an inability to earn sufficient income during an IMP should not be informed about the potential availability of Special Benefit.

3.25 Second, in the SSAT decision referred to in paragraph 3.13 above, the tribunal exercised the power under s 15 of the *Social Security (Administration) Act 1999* to decide that the Newstart Allowance claim that triggered the IMP assessment could be deemed to be the date of a Special Benefit claim. This enabled the claimant to receive Special Benefit arrears worth several months' payment. There may be other cases concerning IMPs in which the claim for payment should be deemed to be a Special Benefit claim under s 15 of the Administration Act. However, this will only be considered if it is properly canvassed before the AAT. If a claimant is unrepresented, the tribunal must rely upon the agency and its representative to present all relevant information so that it may make the correct or preferable decision.

⁴⁰ Agencies do not usually appear before AAT First Review, but are represented by an advocate at AAT Second Review.

PART 4—OPTIONS FOR RESOLUTION

4.1 We wrote to DSS in detail in December 2014 about the policy governing the reduction of IMPs and the policy instruction not to pay Special Benefit during an IMP.

4.2 In its response in late January 2015 it advised that the Guide represents the department's interpretation of the legislation and policy intention of the IMP. It explained this policy instruction has been in place with minimal amendment since 1999. DSS said that *'given the longstanding nature of the policy and the potential impacts of a significant variation to the existing policy, the Department is undertaking an internal review of IMPs, in particular Section 4.3.4.40 of the Guide, and will consider the Ombudsman's views as part of the review'*.

4.3 With respect to Special Benefit, DSS said its position is *'longstanding policy aligned with the intent of the payment as a safety net for those in hardship through no fault of their own'*. It said that *'changing Special Benefit policy as it relates to its availability to IMP-affected claimants, due to the nature of the available funds tests, will not just affect leave, termination and redundancy payments but any form of available funds'*. The department noted that it is constrained in amending longstanding policy within the current social security context and in light of broader government policy. It was, however, reviewing Special Benefit as a payment option for IMP-affected claimants experiencing extenuating circumstances.

4.4 Initially, it was thought that the review would take around a month. In March 2015, DSS advised that the review was in progress and likely to take a number of months, but there was no set timeframe for completion. We met with DSS in July 2015 at which time it confirmed the review was underway and advised it did not propose to change the Special Benefit instruction in the meantime.

IMPs waiver instruction

4.5 We have suggested to DSS that its instruction to DHS about how to assess whether to reduce an IMP should be amended, having regard to the guidance in *Ergin* and removing the inflexible monetary figure that is currently used to assess if someone has spent too much money on impermissible items.

4.6 We would also observe that in light of the current Bill to change the Act so that there is no question that Special Benefit cannot be paid while a person is serving an IMP, it would seem appropriate to also consider whether the grounds on which an IMP can be reduced should be aligned with those that apply to a compensation preclusion period. This would remove any question about the availability of Special Benefit but also simplify the test for considering whether an IMP should be reduced. Ultimately, that is a matter for Parliament.

4.7 Nonetheless, it is evident that more needs to be done to promote awareness of IMPs and many people would benefit from mechanisms that alert them to the impact that their termination payment will have on their income support entitlements before they receive that money. This may be informed by research the National Welfare Rights Network commissioned last year.⁴¹

⁴¹ www.welfarerights.org.au/sites/default/files/news/NWRN%20Research%20Briefing%20-%20IMPs%20and%20CPPs.pdf

Special Benefit

4.8 We remain of the view that DSS's instruction not to pay Special Benefit instruction was not permissible. That policy was not consistent with the Act and it did not enable delegated decision makers to exercise their discretion properly. The difference in interpretation between the agencies and tribunals disrupts the integrity of the review system itself. There is a possibility of achieving a decision not bound by the policy restriction but only if a person seeks external review, which is inequitable and at odds with the principles of good public administration.

4.9 The most immediate solution to this situation would be for DSS to retract its instruction not to pay Special Benefit to a person who is also serving an IMP. After considering recommendation two in the draft of this report, DSS did amend the Guide. However, as explained in Part 5 below, in our view that change is inadequate.

Recommendations

4.10 The Ombudsman recommends that DSS takes the following actions:

Recommendation 1 – Income Maintenance Period reduction

DSS should amend the policy instruction in section 4.3.4.40 of the Guide to enable decision-makers to take account of each person's circumstances including the portion of the termination payment spent on non-permitted items in relation to the actual size of the payment and the length of the Income Maintenance Period.

Recommendation 2 – Special Benefit

DSS should amend its instruction to DHS so that it is permitted to properly consider, and where appropriate, grant claims for Special Benefit during an Income Maintenance Period.

Recommendation 3 – Awareness of the impact of termination payments

DSS should act on opportunities to promote awareness of the interaction between employment termination and income support waiting periods.

PART 5—AGENCY RESPONSE

4.11 We provided DSS and DHS with a draft of this report on 2 November 2015. We met with both agencies on 12 November and received a response from DSS on 27 November, and one from DHS on 1 December 2015.

DSS's response

4.12 DSS's response to each of the recommendations is detailed below.

Recommendation 1 – Income Maintenance Period reduction

DSS should amend the policy instruction in section 4.3.4.40 of the Guide to enable decision-makers to take account of each person's circumstances including the portion of the termination payment spent on non-permitted items in relation to the actual size of the payment and the length of the Income Maintenance Period.

4.13 DSS responded that:

The Department will amend Section 4.3.4.40 of the Guide to Social Security Law (the Guide) to make it clear to decision makers that when making a determination to waive an Income Maintenance Period in full or in part they should consider the individual circumstances of the person when determining 'unavoidable and reasonable' expenditure.

4.14 In late January 2016, DSS provided this office with the amendments it had made to the Guide in response to the recommendation. Pleasingly, these changes included some welcome additions such as an instruction to take account of 'expenditure that usually would not be considered unavoidable or reasonable to be unavoidable or reasonable in the person's circumstances, because the person's financial judgment and decision-making capacity was severely impaired due to a diagnosed medical condition or because of coercion'. Overall, the revisions enable decision makers to consider a person's expenditure from more individualised perspective.

4.15 While the step-by-step process for assessing whether an IMP can be waived has been largely untouched⁴², and it still says that the test cannot be met if the amount at step 4 is more than the person's fortnightly maximum payment, an exception has been added at the end. It says:

If the delegate is satisfied, based on the evidence provided, that the person is in severe financial hardship due to the portion of the person's expenditure that was unavoidable or reasonable, the delegate may waive the remainder of the IMP.

4.16 While this opens up the process of assessment considerably, the purpose and effect of this instruction may not be immediately clear to decision makers, particular if the decision maker is unfamiliar with the issues canvassed in this report or is an Authorised Review Officer who works across a range of decision types.⁴³ We are concerned that decision makers will not fully appreciate that this exception allows

⁴² See paragraph 2.14 above.

⁴³ Authorised Review Officers (ARO) are Centrelink officers who perform an internal review of a decision, usually at a customer's request. AROs have not had prior involvement in the matter and their review includes consideration of new information and evidence. They perform this role across a range of payment and decision types.

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for a departure from the outcome of the detailed step-by-step procedure that sits above it. Consequently, we suggest that this new exception be supported by an example of a situation in which it is permissible for the decision maker to depart from the outcome achieved via the step-by-step procedure.

4.17 We are also concerned that a later section of 4.3.4.40 of the Guide may confuse decision makers, or at least detract from the full effect of the new exception. The later section says:

If the person is in severe financial hardship due to expenditure that is not considered unavoidable or reasonable, NO part of their IMP can be waived. This means that NO allowances or deductions can be made for any unavoidable or reasonable expenditure, including the reasonable costs of living, that the recipient incurred, and the recipient must serve the full IMP.

4.18 While we acknowledge that an IMP cannot be reduced if the termination payment is mainly or solely due to an impermissible expenditure, the above section does not reflect the new exception which allows decision makers to have regard to the portion of money spent on permissible and impermissible items. In its current form, it may lead decision makers to discount the new exception on the grounds that impermissible expenditure has contributed to the person's financial hardship. We suggest that this paragraph be refined so as to reflect the newly introduced portion exception detailed at 4.15 above.

4.19 We will continue to engage with DSS about these suggested amendments.

Recommendation 2 – Special Benefit

DSS should amend its instruction to DHS so that it is permitted to properly consider, and where appropriate, grant claims for Special Benefit during an Income Maintenance Period.

4.20 DSS responded that:

The Department supports the policy that Special Benefit should not be paid to people who have disposed of a large sum of money on unnecessary expenditure, placing themselves in hardship and unable to earn a sufficient livelihood. This includes people serving an Income Maintenance Period for another payment. However, the Department will amend the Guide so that this policy is expressed in a manner that supports a decision maker to use their discretion and depart from this general rule if there are compelling reasons to do so, taking into account the individual circumstances of the case.

4.21 In late January we were provided with DSS's revisions to part 3.7.1.30 of the Guide, which supersede its blanket instruction not to pay Special Benefit during an IMP. The amendments include a new example that says:

A person serving an IMP for another income support payment should generally NOT be paid SpB as the person's financial hardship was neither unavoidable nor reasonable.

Explanation:

The IMP hardship waiver provisions reflect the factors that are applicable to whether the discretion to pay SpB can be exercised. In assessing whether an IMP can be waived, the

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delegate, exercising their discretion, disregards any costs that they determine are unavoidable or reasonable expenditure in relation to the person's circumstances. Consequently, if the delegate is not satisfied that the person has incurred unavoidable or reasonable expenditure leading to financial hardship for the purposes of waiving the IMP, then the delegate should also conclude that the person should not be granted SpB.

4.22 The revised instruction begins well by introducing the concept of a general rule. It is common to find general rules to guide the exercise of discretions. But to avoid fettering the discretion, the general rule must permit the decision maker to depart from that rule in the particular circumstances of an individual case. DSS's revised Guide fails to explain the circumstances in which it may be permissible to depart from the general rule. Ultimately, it delivers a message that has the same effects as the blanket instruction not to pay Special Benefit during any IMPs.

4.23 This amendment does not achieve the outcome indicated by DSS's response to the draft report, in which it said it would support 'a decision maker to use their discretion to depart from this general rule if there are compelling reasons to do so, taking into account the individual circumstances of the case'. The amended instruction ties the discretion to grant Special Benefit to the reasoning that underpins whether an IMP can be reduced. While we note a Bill has been introduced into Parliament that would prohibit the grant of Special Benefit during an IMP, in its current form, the legislation does not limit the Special Benefit discretion in this way.

4.24 We suggest that the Guide be further revised so that it explains that decision makers can depart from the general rule when there are compelling reasons to do so. It would also assist if it was accompanied by an example.

4.25 The changes to the Special Benefit instruction may be short-lived if the Bill before Parliament passes in its current form. Nonetheless, until that occurs, it is important that the policy is amended so that it provides DHS decision-makers with the opportunity to properly exercise their full discretion in accordance with the current law. As it stands, DSS's implementation of a response to this recommendation is not satisfactory and we will continue to engage with it about this matter.

Recommendation 3 – Awareness of the impact of termination payments

DSS should act on opportunities to promote awareness of the interaction between employment termination and income support waiting periods.

4.26 DSS said:

The Department agrees with this recommendation and will work with the Department of Human Services and the Department of Employment to ensure people who leave employment and receive a termination payment are aware of the impact the termination payment may have on their eligibility for income support.

4.27 DSS's advice that it will work with other agencies to act on opportunities to increase community awareness about the impact of termination payments is encouraging.

DHS's response

4.28 DHS provided brief comments on the content of the report itself, noting that the recommendations were directed to DSS and that it works closely with DSS to ensure that its administration is consistent with the legislative and policy framework outlined by DSS.

4.29 Referring to paragraph 1.8 above, DHS observed that it does not have control over charities and the basis on which they offer assistance to individuals or families.

4.30 With regard to the parts of the report that note that people who may be eligible for Special Benefit are not routinely informed of this option, DHS said:

...the department acknowledges its role in informing people when they approach the department of potential income support payment options relevant to their personal circumstances. However, given that the [then] policy instructions issued by the DSS explicitly preclude the payment of Special Benefit to a person who is subject to an Income Maintenance Period, the department takes the view that it would not be appropriate to recommend that a person apply for Special Benefit in these circumstances.

4.31 Referring to the paragraph which concerns the role and obligations of agencies in hearings before the Administrative Appeals Tribunal (AAT), DHS submitted that the obligation to assist the tribunal does not extend to providing information about all possible benefits available to the applicant.

4.32 We note DHS's response with concern. DHS's standard approach under the 'life events' model is to invite a person to test their eligibility for payments that are likely to fit their circumstances. While DSS's former and current instruction does not permit DHS to grant Special Benefit to a person serving an IMP, the discretion remains open to the tribunals. A claimant can only apply to a tribunal if they have first been through DHS's internal review process. In this situation, DHS is the gatekeeper and often the only means by which a person can learn about Special Benefit or begin the process of obtaining it.

4.33 While each case would turn on its own facts, we remain of the view that DHS's approach is not appropriate, particularly where the decision depends on the exercise of a discretion. Further, we consider that it would be open to a person who misses out on Special Benefit because DHS did not inform them about to make a claim for lost entitlements under the CDDA scheme.

4.34 In conjunction with our suggested changes to section 3.7.1.30 of the Guide, we suggest that DHS should revise its internal instructions to explain to its staff that they should invite a person who is serving an IMP to lodge a claim for Special Benefit, particularly where there is something compelling in the individual case that warrants consideration of a claim. Examples would assist DHS's staff. We will engage with DHS about this further.