

FACT SHEET 3

Providing remedies

November 2008

The Australian community has the right to expect a high standard of administration by Australian Government agencies. People expect agencies to act legally, fairly, in a timely manner, with integrity, and to be accountable, ethical and transparent. In short, agencies are expected to show respect for and act professionally towards individuals.

Millions of transactions occur each day between the community and agencies: occasionally things go wrong. When that happens it is essential that the problem is resolved quickly and fairly so that individuals do not suffer further and the integrity of public administration is maintained.

This fact sheet explains the remedies that can be provided for poor administration by Australian Government agencies. It will assist agencies to identify and provide an appropriate remedy for a person who has suffered disadvantage as a consequence of poor administrative practice. It mirrors the principles used by the Commonwealth Ombudsman in complaint investigation and in selecting the most appropriate remedy to address poor administration.

Guiding principle

The guiding principle in choosing a remedy is to put a person in the position he or she would have been if no administrative problem had occurred. If this is not possible, other appropriate action should be taken to remedy the disadvantage a person has suffered. For example, an agency might agree to consider a fresh application for a particular benefit or concession and waive some or all of the application fee. In some instances, financial compensation may be the most appropriate remedy. In addition, as a matter of general courtesy and good public administration, an agency should apologise and provide an explanation to a person where an error occurred.

Expectations and obligations

Many agencies have a service charter that outlines the service standards people can expect from the agency, and what the agency will do if those standards are not met. Public servants employed under the *Public Service Act 1999* are legally bound to uphold the Australian Public Service values and to comply with the Australian Public Service code of conduct. Government staff employed under other arrangements often have similar organisational values and codes of conduct to follow. Together, these help set the framework for evaluating the actions of agencies and choosing an appropriate remedy.

Individual issues and systemic problems

When someone has been disadvantaged by poor administration, the agency's priority should be to consider if a remedy is required. The agency should also examine if there is a systemic problem that needs attention, especially to remove or reduce the probability of further error arising. Other individuals who were affected may also deserve a remedy.

This guide looks at both sets of remedies—those required to alleviate individual disadvantage, and those required for systemic change.

REMEDIES FOR THE INDIVIDUAL

There are many remedies to choose from in deciding how best to respond to a problem. The choice of remedy will depend on many factors, and legislation may influence or limit that choice. More than one remedy may be required. The aim should be to choose the remedy that deals fully and finally with a problem.

Improved communication

One set of remedies is about improved communication—explaining and giving reasons.

A decision that adversely affects a person should be properly explained. Either the person or someone acting on their behalf should understand the decision and why it was made. Agencies should never forget that legislation and government programs can be complex and not fully understood by the public.

An explanation of the finer detail of a decision or process can clarify why an agency acted or decided as it did. This may help a person to understand that the agency did not have a discretion to act differently, or why the decision could not be made more quickly or simply. Many complaints to the Ombudsman are resolved by this simple step of providing a comprehensive explanation of a decision.

A thorough explanation of a decision also enables a person to better consider their options. The person can decide if other relevant information could be provided to the decision maker, if a fresh application should be made, or if a review of the decision should be requested. If necessary, an explanation should also admit why an error occurred and what can be done to fix it.

Actions and decisions

Another set of remedies targets the decision or action that adversely affected a person. Should the decision be expedited? Or deferred? Or reconsidered or changed?

Reducing delay—Delay in decision making is a common cause of complaint to the Ombudsman. There may be a sound reason for a delay—such as complexity in a decision, or the need to obtain extra information. Just as often, delay can be shortened. The best remedy that will satisfy a person may be to expedite the issue that concerns them. That is not to say that the person should ‘jump the queue’. Rather, agencies should always look for practical and principled ways to reduce delay.

Suspending or postponing action—A person may complain that an agency acted hastily in withdrawing or suspending a benefit, recovering a debt or terminating an arrangement. It may not be too late for the agency to suspend or postpone the adverse action so as to allow a better opportunity to consider if an alternative and less drastic course of action would be preferable. At the least, the

agency should check that the person was given a reasonable opportunity to put their case before the adverse decision was made. This is particularly important if previous communication with the person was hampered by language, ill health, comprehension or geographic isolation.

Reconsidering or changing a decision—This is desirable if a decision was based on incomplete information, or a person was not properly advised as to the information required for a decision in their favour.

Legal error can also be remedied by a fresh decision. Examples of legal error include misinterpretation of legislation, failure to comply with essential steps prescribed by legislation, or a decision being made by a person who lacked legal authority to make that decision.

Another important legal requirement is the need to observe natural justice, that is, to provide a person with an informed opportunity to be heard or make a submission before an adverse decision is made. Further guidance on legal requirements can be found in the Best Practice Guides to Decision Making published by the Administrative Review Council, available at www.ag.gov.au/arc.

The legislation being applied may limit the opportunity for an agency to make a fresh decision or to change an existing decision. This is less likely to be a constraint if there was a legal error in the decision, the decision can be appealed to an administrative tribunal, or it is open to the agency to consider a fresh application from the person. Even if there is a legal constraint on changing a decision, it may be possible to work around that constraint by another means or remedy. For example, financial compensation for defective administrative action may effectively put a person in the position in which he or she would otherwise have been.

If someone has a legal right to have a decision reviewed either internally or by an administrative tribunal, it may be appropriate to direct the person to that option rather than undertake an informal review of a disputed decision. An agency should nevertheless keep an open mind as to the best way forward. It might be better to correct a defective decision at an agency level, rather than require a person to go through a formal review process that could be costly or cause additional distress.

Financial compensation

Financial compensation remedies are another option to be considered. The following description of financial remedies applies to agencies that operate under the *Financial Management and Accountability Act 1997* (FMA Act): a fuller description is given in Finance Circular No 2006/05, Discretionary Compensation Mechanisms, available at www.finance.gov.au. (The same or a similar remedy can often be granted by a non-FMA agency, though each agency can be different.)

- Compensation for ‘detriment’ caused directly to a person by ‘defective administration’ can be made under the Scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme). ‘Detriment’ includes personal injury, property damage and economic detriment. Examples of ‘defective administration’ are an unreasonable agency failure to follow procedures or to give proper advice, or giving advice that was incorrect or ambiguous. A payment under the CDDA Scheme can be authorised by the agency against which the claim is made. Legal liability to pay compensation does not have to be proved.
- An act of grace payment for ‘special circumstances’ can be made by the Minister for Finance (or a delegate) under s 33 of the FMA Act. An example of a ‘special circumstance’ is where a person suffers loss caused by agency action that has an unintended outcome, or by legislation that has had an unintended, inequitable or anomalous effect. The act of grace payment can be a one-off or a periodic payment.
- A debt can be waived by the Minister for Finance (or a delegate) under s 34 of the FMA Act. Examples of where debts are waived are where the debt should not have been imposed or repayment of the debt would be an inequitable outcome or cause undue ongoing personal hardship. Waiver of a debt permanently expunges a debt and it is not repayable at a later time. Section 34 of the FMA Act also authorises the Minister for Finance or a delegate to postpone or defer the time for payment of a debt or allow payment of the debt by instalments.

- A debt can be written off by the agency to which it is owed under s 47 of the FMA Act. An agency might choose this option if it decides that it is not economical to pursue recovery of the debt. The debt is not extinguished and can later be recovered by the agency if the person’s circumstances change.
- Specific legislation administered by an agency may authorise waiver, write off, postponement or payment arrangements for a debt.
- An ex gratia payment can be authorised by the Prime Minister or the Cabinet. This option is less likely to apply as a remedy for wrongful administrative action, and is more likely to be used to deliver financial relief in special circumstances, for example, in response to a national disaster.

Apologies

When a person feels wronged by the actions of a government agency, often what they want most is an acknowledgement and an apology. The value of a well-placed, sincere and timely apology should not be underestimated. It can take the heat out of a difficult conflict and lead to its early resolution. If there is an ongoing relationship with the agency, an apology can restore the person’s trust in the agency. A willingness to apologise for an error also demonstrates an agency’s openness to learning from its mistakes.

Agencies sometimes resist apologising because they fear it will amount to admitting liability if a person chooses to sue. This fear is overstated. It is unlikely that an apology will be treated by a court as an admission of liability, and there are many examples of agencies apologising without legal complication. In fact, an apology can lessen a person’s motivation to pursue legal action, which can be protracted, expensive and stressful. Disputes that are unresolved are more likely to escalate. In most Australian jurisdictions legislation now specifically provides that an apology is not an admission of liability, except in very limited circumstances.

An effective apology will:

- admit the problem, to help the person feel heard and understood
- acknowledge that the agency was responsible,

if that in fact is the case

- explain to the person how the problem came about
- assure the person that the problem will not happen again, for example, by explaining what processes the agency has put in place
- recognise that a person's real grievance may have an emotive element and be different from how their complaint was expressed
- express sympathy, regret or contrition that the person suffered loss (an expression of sympathy will be more appropriate if the agency was not responsible for the loss)
- offer restitution for the loss (if appropriate) or explain the remedial action that will be taken.

An apology should be offered as soon as possible after an error was identified. Sometimes a complex matter will need to be investigated further before the cause is clear. If so, it may be premature to acknowledge the agency's responsibility, though an expression of sympathy for the person's difficulties may still be appropriate.

An apology must be sincere. An apology that is partial, that is vague and generalised, or that casts doubt on whether a problem occurred, is more likely to annoy the recipient and raise suspicion about the agency's motivation and sincerity. A poorly framed apology can make matters worse.

Depending on the circumstances, an apology can be made either verbally or in writing, although a written apology should always be considered in the final resolution of a matter. In appropriate cases the apology should be made by a senior officer, including the agency head. This sends a powerful message about the agency's commitment to putting things right.

DECIDING ON THE REMEDY

Take responsibility

The first step in deciding what remedy is appropriate is for an agency to take responsibility for resolving a problem. This may not be straightforward if there are multiple agencies involved and the problem is complex. The agencies may need to work together to resolve the problem or loss facing a person, even before it is fully

understand how the problem arose and how it can be prevented in future. Where an issue is confused or complex, there can be a greater obligation on agencies to search for a suitable remedy.

Act promptly

A core element of righting a wrong is to identify the problem and provide a remedy as quickly as possible. When an error is identified, an agency should not wait for a formal complaint to be made and investigated. If it is not immediately clear where responsibility for harm lies, the person who is affected should be told that the agency is investigating the matter and the person will be advised as soon as possible.

Be fair and proportionate

A remedy should be fair and proportionate to the harm a person has suffered. Fairness can require more than meeting a legal obligation: it involves considering what is reasonable, ethical and effective in the circumstances. To provide a remedy that is proportionate, an agency will need to understand at an early stage what a person is seeking, and whether their expectations are realistic and need to be managed. Not every administrative problem that a person experiences will warrant a remedy.

An agency should also aim to offer a solution that is comprehensive. A problem that is only partly fixed can cause further difficulty for the client and sour their relationship with the agency.

Look at all the circumstances

An agency should consider whether a person has contributed to a problem or could have taken steps to mitigate the hardship. Bear in mind, however, that a person may not have the same knowledge and access to resources as a government agency. A person's health, education, culture, language skills or personal experiences might affect their ability to understand their situation or avoid difficulties.

Consider alternative dispute resolution

Sometimes a person and an agency fundamentally disagree about what happened, whether an error was made or a loss incurred. If so, alternative dispute resolution through a third party may be the better path to follow. This option can also be more suitable when a person distrusts an agency,

or a problem seems intractable because of the time that has passed since it first arose.

IMPROVING PUBLIC ADMINISTRATION

An error or problem that has disadvantaged one person might have affected others too. There may be a risk that the problem could occur again. Agencies should always consider whether an error points to a wider—or systemic—problem that requires attention.

Basic fairness may require that an appropriate remedy is offered to others affected by the same poor administrative practice, even if no complaint was received. This can lessen the possibility of further complaints to the agency, the Ombudsman or the minister. It also marks the agency's sincerity and integrity to take responsibility for resolving problems that should not have happened. Often it will be reasonable to let the individual who first raised the problem know what the agency is doing about the wider issues.

Other remedial action may also be appropriate. To avoid the same problem happening again, it

may be necessary to change agency procedures or policies, to improve staff training or to alert government to the need for policy or legislative change. Broad action may be required if there were harsh or unintended consequences that have affected many people.

Agencies should be open and transparent about how they deal with problems and provide remedies. One way of doing this is to discuss the issue in the agency's service charter, or in published guidelines. Agencies should also be consistent in providing remedies, as people expect to be treated equally. It is nevertheless important to tailor a remedy to a person's individual circumstances, and not to be rigid about when and how to provide a remedy.

Complaints are a valuable source of information that agencies can use to improve their performance. Keeping accurate records, analysing and reporting on complaints and their outcomes helps agencies to learn from their mistakes, improve their standards and refine their delivery of services. Taking those steps also builds trust within the community.

More information?

More detail is available in the publication *Dealing with the Commonwealth Ombudsman's office—Information for Agencies*.

If you would like copies of other Commonwealth Ombudsman information and fact sheets, more information about the work of the Ombudsman's office, or a more detailed briefing for agency staff, please contact the Director Public Affairs.

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