Issue relating to

Oral Advice

CLIENTS BEWARE

Report under section 35 A

the *Ombudsman Act 1976*

December 1997

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List of case studies

Acronyms

AAT	Administrative Appeals Tribunal
A-G's	Attorney-General's Department
AGS	Australian Government Solicitor
ASO	Administrative Service Officer
ANAO	Australian National Audit Office
ARO	Authorised Review Officer
ATO	Australian Taxation Office
CCPS	Client Claims Processing System
CDDA	Compensation for Detriment as a result of Defective Administration
CDEP	Community Development Employment Program
CES	Commonwealth Employment Service
CSA	Child Support Agency
CSDA	Commonwealth Services Delivery Agency
DEETYA	Department of Employment, Education, Training and Youth Affairs
DHSH	Department of Human Services and Health
DSS	Department of Social Security
DVA	Department of Veterans' Affairs
JET Officer	Job, Education and Training Officer
JSA	Job Search Allowance
MAA	Mature Age Allowance
MAB/MIAC	Management Advisory Board/Management Information Advisory Committee
MSBS	Military Superannuation and Benefits Scheme
ODR	On-line Document Recording
PES	Pensioner Education Supplement
PM&C	Department of Prime Minister and Cabinet
SAC	Student Assistance Centre
SSAT	Social Security Appeals Tribunal
UK	United Kingdom
UPP	Undeducted Purchase Price
WRC	Welfare Rights Centre
YSU	Youth Services Unit

1. Executive summary

The nature of oral advice

1.1 The provision of information and advice is one of the primary 'services' provided by the public sector.

1.2 It provides the interface between the ordinary citizen and government on their entitlements and obligations. The laws and regulations governing a citizen's or client's[1] relationship with the public sector are often very complex and it is the agency and public servant who have the information, and can provide 'advice' on how these rules and regulations affect an individual.

1.3 This has always been the case, but alongside these tasks is a changing environment in which the public sector is now operating. This includes the increasing diversity of our population and its needs, the increased complexity of government legislation and regulations, and the need for the public sector to streamline its work procedures (and do more with less).

Volume of transactions

1.4 Oral advice is a cost effective way for departments to provide information and clients appear to like the immediacy and convenience of the service. The volume of telephone enquiries received by agencies shows that oral advice has become an important way of providing information and managing workloads. In fact, teleservice centres and regional offices providing oral advice are listed as two of the three major client contact points for the new Commonwealth Services Delivery Agency (CSDA).[2]

1.5 DEETYA's Student Assistance Centres (SAC) take approximately 1 million calls in the peak period between November and March each year. The Child Support Agency (CSA) handles approximately 8,000 enquiries each day. DSS teleservice centres have, in the past, dealt with approximately 12 million calls per year, and on current projections will take around 18 million calls in 1998.

1.6 In these circumstances, a tension can exist between 'managing' the workload and ensuring the quality of advice. This can result in the risks of poor quality oral advice being transferred to the client. This situation can be exacerbated by the current legislative provisions which limit retrospective payments, even where the agency is responsible for an error, or a person would

[1] Throughout this paper, the term client is used to denote both clients and prospective clients.

[2] 'Achieving Excellence in Service Delivery - Changing Service Delivery Arrangements for the Commonwealth Government', page 4. Paper presented to an AIC Conference on 'Public Sector Service Delivery', 26-27 May 1997, by Ms Sue Vardon, CEO of the Commonwealth Services Delivery Agency.

have been eligible for a payment had they applied. In addition, practices for recording oral advice given to clients have not kept pace with new service delivery mechanisms, and this means it can be very difficult for clients to obtain redress for incorrect advice.

Types of complaints

1.7 The term 'oral advice' is shorthand to describe a much broader concept. In fact we are dealing not just with oral advice, but all oral communications or transactions between a client or potential client, and an agency. Many of the issues or problems brought to our attention, arise from the characteristics of oral communication, particularly its transient nature.

1.8 The common thread of complaints to this office relate to:

- complex, ambiguous or incomplete information that does not address an individual's circumstances;
- wrong or inaccurate advice;
- failure to respond to requests;
- inadequate reasons for decisions;
- undue delays; and
- unfairness of policy.

1.9 All bar one of these issues are about quality of service, and most of them are also about the quality of advice. Last year, complaints about the quality of advice constituted 10% of complaint issues raised with this office. For DSS the percentage was 14.4% of the complaint issues raised with that Department. Appendix A to this paper provides a profile of complaints received for the period 1 July 1995 to 30 June 1997 for a number of agencies. In total some 5119 complaints were received about the quality of advice provided by DSS, DEETYA, CSA and ATO.

1.10 It is not possible to say how representative the complaints to this office are, or to what degree they represent the 'tip of the iceberg'. However, it is of concern that this office has been dealing with an increasing number of complaints where clients (and potential clients) claim to have suffered financial detriment as a consequence of acting on oral advice they received. The repercussions may involve entitlements forgone, or overpayments which must be repaid.

1.11 Analysis indicates that, during 1994/95, 1995/96, and 1996/97, complaints about oral advice constituted approximately 50% of the complaints received about advice more generally, and this is likely to be a conservative assessment. While these statistics are not large in themselves, it is the consequences of incorrect or inadequate oral advice which make these complaints significant.

1.12 To examine the reliability and level of service provided, the Ombudsman's office initiated an 'own motion' investigation to test the advice given in a number of situations and scenarios. A separate report on the results '*Survey of service standards and reliability of advice'* is being prepared.

1.13 The results of the investigation were mixed, with the advice ranging from good and thorough to inadequate and wrong. The results underline many of the issues raised in this report.

Policy and administrative questions

1.14 Our experience in complaint handling indicates that people generally assume that oral advice from a government agency is reliable, and that they should be able to act on it. Yet oral communication is, by its nature, a much riskier transaction than written; it is transient, and much more subject to misinterpretation or the uncertainties of memory. It may on occasion be less thorough and less precise, but nonetheless some agencies encourage their clients to seek it and to rely upon it.

1.15 The problems clients are experiencing with oral advice have raised a number of broader policy and administration questions:

- Should the current '*caveat emptor'* or '*self-assessment'* approach to recipients of oral advice operate against the intent of legislation which is meant to be 'beneficial' in nature?

- Can agencies identify those individuals or circumstances where extra care in providing oral advice is needed?

- What administrative procedures are available to ensure that more detailed and/or written advice can be provided when necessary?

- What record or audit trail should be maintained by agencies and clients about the information or advice given?

- What accountability and quality assurance mechanisms should be in place to ensure that clients have the best chance of getting correct and comprehensive advice, which meets their particular needs?

- How do agencies ensure consistency of advice in a devolved decision-making environment, and in environments where the administration of programs (and hence the advice given and requested) may cross the boundaries of a number of agencies?

- Are there some topics or transactions where clients should be warned not to rely on oral advice?

- What internal agency support mechanisms need to be in place to improve and maintain the standard of oral advice given by agencies (ie, staff training and information technology support)?

- Are there appropriate and fair arrangements in place to remedy the effect of incorrect or inadequate oral advice?

1.16 These questions are emerging as some of the most difficult and important in today's public administration. They are fundamental to issues of service quality, accountability, access and equity, and the establishment of appropriate risk management strategies for new agency procedures.

1.17 There is no simple 'right' answer. In June 1996, this office convened a workshop with representatives from the ATO, DSS, DEETYA, Veterans' Affairs, CSA, the Attorney-General's Department, PM&C, Finance, community legal centres, the Welfare Rights Centre, the SSAT, and two universities, to discuss the issues relating to oral advice. The outcomes from that workshop were incorporated into this paper.

1.18 This paper attempts to address the more significant problems facing individuals who get poor quality oral advice. It discusses the current policy, organisational and structural impediments to improving the quality of oral advice provided to clients of government services (and hence the quality of service). It makes a number of recommendations designed to:

- ensure clients are provided with information tailored to their circumstances, through client focussed means;

- improve the quality and consistency of advice given to clients; and

- re-balance the risks of incorrect or inadequate oral advice between the agency and the client.

The focus of this paper

1.19 This paper also highlights some of the cases that have arisen through the work of the Ombudsman's office, the SSAT and the AAT. It focuses on the oral advice issues which arise from major income support programs, particularly those presently administered by DSS and DEETYA. There are three reasons for this.

1.20 Firstly, because DSS and DEETYA perform major income support functions, there is a greater likelihood of persons suffering loss of the only or major source of their income as a result of relying on oral advice from them. Secondly, our experience of oral advice complaints is more likely to be drawn from these agencies, particularly where there has been a recommendation for compensation because oral advice has been incorrect or inadequate. Finally, these agencies, particularly DSS, have outlined more extensively their views both on individual cases, and on more general issues about oral advice which we have

raised with them. The questions and issues raised, however, have relevance to most other government agencies.

2. Oral advice: let the client beware

2.1 Many Commonwealth agencies deal with highly complex and rapidly changing legislation, and it is difficult for individuals to understand and keep abreast of the legislative provisions and policy relevant to their particular set of circumstances. In addition, a person's entitlement may be administered by more than one agency and be governed by more than one piece of legislation.

2.2 In particular, DSS and DEETYA administer beneficial legislation and policy that is designed to assist the most vulnerable members of our community. The consequences of poor service delivery in that context can be devastating. Incorrect oral advice about an entitlement to a pension or benefit can mean a person is without income for basic subsistence.

2.3 It is therefore crucial that clients have a good understanding of both their rights and responsibilities, and that the system is as fair and consistent as possible, within operating and legislative constraints.

2.4 However, in recent years, there has been a move towards what can be described as a 'self-assessment' based system for beneficial legislation; where the onus is largely on clients to work out their entitlement to services. This appears to run counter to the Government's philosophy of providing services based on the needs of individuals in an environment of increased consumer choice and contestability of services. Instead, it has increased the inequality in bargaining power and transferred the risk to the client.

Self-assessment

2.5 In this report, we refer to DSS/DEETYA and CSDA as operating a 'self-assessment system'. DSS does not accept this but agrees that the system could be described as based on 'customer vigilance'. As described below, however, the DSS system requires a client or potential client to apply for a particular pension or benefit. DSS does assess the rate payable but does not provide safeguards available in other legislatively based self-assessment systems. The issue is one of balance as to responsibility.

Beneficial legislation becomes a defacto self-assessment system

2.6 The public regards agencies as the 'experts' on legislation and policy governing their entitlement for benefits and circumstances which may vary those entitlements. They are the major (and in some cases, only) reliable source of information. Many people have little or no knowledge of the relevant legislation, or their eligibility for a benefit or pension. They are therefore dependent on the information provided to them by the agency.

2.7 However, as it currently operates, the system:

- places the onus on clients to ask the right questions about their eligibility for a benefit;

- places the onus on clients to seek a review of a decision, even where they have no (or insufficient) information to suggest that a decision may have been incorrect; and

- fails to provide clients with adequate protection compared to those available in a legislatively based self-assessment environment.

The need to ask the right questions

2.8 Agencies such as DSS and DEETYA do not consider that they have a duty to provide 'unsolicited advice' and legal advice from AGS suggests that there is no such legal duty in general. DSS has advised that it does not have the resources to invite claims, and that it is not prepared to compensate individuals for non-queried entitlements. It is generally not sufficient for a person to supply information on their particular circumstances at any given time, in the expectation that the agency will determine which payment they are entitled to receive (either then or in the future).

2.9 The basic effect of this approach is that the people with the least knowledge of the legislation and policy governing the provision of a pension or benefit, are the ones who are responsible for asking the 'right' questions to ensure that they get the 'right' advice about their eligibility or entitlement; for making a claim; and/or requesting a review of a decision. Where they are unable to ask the 'right' questions, the result may have a significant impact on their lives and livelihoods. DSS guidelines to staff go so far as to state that:

> 'there is no negligence where a staff member accepts a newstart allowance claim form from a person who is single with a child. **There is no legal obligation to advise that sole parent pension may be a better entitlement unless the person queries his or her correct entitlement'.**

2.10 The following case study demonstrates how difficult self-assessment can be for clients with little or no knowledge of their entitlements.

Case study 1 - The pitfalls of self-assessment

Mr W was a self-employed mechanical fitter when, in May 1994, he was diagnosed with chronic renal failure and had to close down his business. In June 1994, Mr W was also diagnosed with Chrones disease.

Because of mounting pharmaceutical costs and their inability to manage on Mrs W's income, between July 1994 and March 1995, Mr and Mrs W made a number of enquiries of DSS as to whether they were eligible for any financial assistance. Mrs W states they were advised on each occasion that they were not, because her income precluded the payment of sickness

allowance. Mrs W says that no mention was made of the possibility of her husband being eligible for a disability support pension (which has less stringent income limits).

In desperation, in March 1995, Mrs W again approached DSS to ask if she could at least receive a health care card. She completed a sickness allowance claim form and was then told that Mr W should apply for a disability support pension. Mr W lodged a claim and Mrs W applied for a wife's pension. These claims were granted. Mr and Mrs W then requested that arrears of disability support pension be paid to them. In accordance with Social Security legislation, Mr and Mrs W can only be paid from the date of the lodgement of the claim.

The SSAT concluded that Mrs W was not given any advice by DSS about the possibility of a claim for disability support pension prior to March 1995, and that the Department had failed in its duty of care to her and her husband not to enquire in more detail about Mr W's medical condition and ability to work. While the SSAT upheld the decision that Mr and Mrs W's pensions could not be backdated as a matter of law, the Tribunal suggested that the Department consider a payment under Finance Direction 21/3[3] to compensate the W's for their loss. The Department agreed to make this payment.

This case highlights the problems people can face accessing the income support system for the first time - where they are likely to have little knowledge of the range (and limitations) of benefits available, or whether they are eligible for them.

Changing circumstances and when to seek a review

2.11 The problems of a self-assessment system for beneficial legislation are not limited to those trying to obtain a benefit, or entering income support programs for the first time. It also presents difficulties for those already in the system. Existing clients may be the subject of extremely complex legislation and/or policy, for example, pensioners subject initially to the UK Social Security Agreement, whose pensions change when they become subject solely to domestic legislation. Their entitlement change is due to the passage of time, rather than any deliberate change of circumstances on their part, as the following case study shows.

Case Study 2 - When doing the 'right thing' is not enough

Mrs R arrived in Australia in August 1985, and was granted an age pension under the UK Agreement (ie. her UK pension was treated as a direct deduction when calculating her pension rate).

In April 1988 Mrs R told a DSS office in South Australia that she was moving to Queensland. The office advised her she should contact the local DSS office in Queensland in August 1990, when she had been in Australia for five years, as her pension entitlement would change. When she contacted DSS in Queensland, she was told that her pension would not increase until she had been in Australia for 10 years. She accepted DSS's advice as she had no way of knowing it was incorrect.

[3] A payment under Finance Direction 21/3 can be made where a 'settlement is considered to be "proper...in accordance with legal principle and practice" where the Commonwealth is likely to be legally liable for a loss. The issues surrounding compensation for incorrect oral advice are discussed in section eight of this paper.

At the time Mrs R's pension was granted, DSS also coded a review for August 1990, to invite her to claim for widow pension under domestic legislation, and again for August 1995, when she would have been eligible for age pension under domestic legislation. DSS file notes show that the review notation for August 1990 was deleted when it came up, without explanation. DSS undertook an entitlement review of Mrs R's pension in October 1990, but took no action at that time to invite a claim for widow pension. Mrs R was identified by a DSS review in late 1993 as being eligible for a higher rate of pension. The regional office responsible for Mrs R's file was notified of her case, but it failed to act until reminded in July 1994.

Mrs R suffered direct financial loss as a result of DSS's incorrect advice to her, its failure to carry out a scheduled review, and the delay in acting on her case when it was identified as one eligible for a higher rate of pension. This office recommended that Mrs R be paid compensation for her loss.

DSS sought advice from AGS.[4] AGS's view was that though there was no record of Mrs R's enquiry at DSS, her account of events was plausible and consistent, and could be accepted. DSS agreed to pay compensation on the grounds of legal liability. However, it is important to note that AGS did not consider that DSS had any obligation under law to carry out the scheduled review unless it had given an assurance that it would do so.

2.12 Mrs R's complaint highlights problems which can occur when self assessment is combined with inadequate information. The system operated in a way which placed the onus on her to request a review of her rate of pension, when she could not have had any knowledge of the basis for such a review. The responsibility for her financial loss was shifted on to her.

2.13 Agencies have consistently refused to accept responsibility in these sorts of cases. For example, DSS guidelines acknowledge that clients will often seek arrears where they believe they should have been told that a more generous benefit is available. However, DSS guidelines also state (for example):

> 'the Department has a policy of issuing claims for disability support pension when a child disability allowance child turns 16 and has a policy of issuing age pension claims to persons who reach age pension age. [However] there is generally no negligent misstatement in these cases as the **Department's actions in automatically advising clients of their likely entitlement are entirely voluntary**'. (emphasis added)

Comparison with a legislatively based self-assessment system

2.14 It is worth noting that, in a legislatively based self-assessment regime such as the one operating in the tax environment, the difficulties clients face have been acknowledged, and a number of strategies adopted to provide safeguards for clients. The following table identifies some of the actions taken by the ATO for this purpose. The table looks at the inequity in the level of protection for clients self assessing their eligibility under beneficial legislation.

[4] The Attorney-General's (A-G's) Department provides Commonwealth agencies with a wide range of legal services. The office of the Australian Government Solicitor (AGS) is in effect the 'firm' name under which the Secretary and designated officers act as legal practitioners within A-G's Legal Practice. Agencies generally seek advice from AGS on the issue of legal liability and this office usually sees AGS advice in cases where I have recommended the payment of compensation for incorrect or insufficiently comprehensive oral advice.

Safeguards in a self-assessment system: the Australian Taxation Office	**Safeguards in self assessment systems for DSS-DEETYA (beneficial legislation).**
System of registered tax agents to provide tax advice and prepare returns. Note: the use of paid Social Security Agents is not desirable or appropriate.	No registered agents. Individuals may nominate an agent to act on their behalf, but these agents are rarely 'professionals' in the relevant legislative area. Family members and community organisations (such as the Welfare Rights Centre and Community Legal Centres) may act as 'defacto' agents, on an 'as requested' basis. Dept of Veterans' Affairs trains advocates to act on behalf of clients with complaints.
Facilities for the electronic lodgement of returns via agents or Australia Post.	No equivalent process. DSS can backdate a claim to the date an oral enquiry is made regarding entitlement, providing the enquiry is acknowledged in writing, and a claim is lodged within a specified period after the enquiry was made.
Variety of methods to ensure tax agents are informed of legislative and procedural changes (regular meetings with peak bodies which represent agents; development of systems for producing and disseminating rulings and instructions; and increased technical training of staff).	Agencies may have specialist staff responsible for liaison with community groups (such as DSS's migrant liaison officers). Teleservice operators provide advice where requested.
Specific actions to assist tax payers who prepare their own returns, for example, the production of the TaxPack as a guide to completing the return form; the introduction of a formal system of binding private rulings to provide certainty in decision making in individual cases.	Pamphlets exist for certain issues, and Teleservice will provide some advice. However, there have been problems: for example, the Austudy Guide contained a number of errors and was incomplete. No equivalent of private binding rulings - clients must submit a claim in order to test the system.

Introduction of extended objection / appeal periods. The legislation enables the ATO to backdate assessments generally for a period up to four years. Tax payers may thus lodge an objection to their assessments for up to **four years** past, and are able to recover overpayments of tax made in those years. Similarly if the ATO otherwise discovers an error in an assessment made up to four years past, it may amend the assessment and refund any overpaid amount to the taxpayer.	Significant imbalance in appeal periods for individual and agency. Claims cannot be backdated beyond the date the claim was made (if incorrect advice is proven, arrears are paid via a compensation payment). Clients must request a review of a decision within **three months** of the decision being made, even where the agency is solely responsible for the error, and / or the client could not have been aware of the error. Backdated payments in client's favour limited to three months. However, DSS can recover debts up to six years old, and the debt can commence from the time the client could reasonably have become aware of the overpayment.

2.15 In the environment of self-assessment for beneficial legislation, it is the client who bears the risk. DSS has acknowledged that there are inherent difficulties in this approach. In April 1994, DSS expressed the view that:

> 'there is arguably a special relationship (that is, a relationship of dependence and vulnerability), between the client and the department, owing to the disparity between the knowledge of a departmental client and that of a departmental officer in relation to the provisions of a complex Act.'

2.16 Nevertheless, the Department has continued to resist suggestions that it should have a greater responsibility for assessing the eligibility of prospective clients, arguing that it does not have the resources to be more pro-active.

2.17 Even if precautions equivalent to those in the taxation system were introduced for beneficial legislation, they may not be sufficient for clients or groups who are identified as vulnerable. Case study 2 (page 15) demonstrates that even clients with good English language and literacy skills and some knowledge of the system, often have no way of knowing whether the advice they receive is correct. The difficulties clients face when dealing with the complexities of legislation and a self-assessment regime are increased even further when they have special needs. It is for these reasons that the legislation was originally designed to be **beneficial**.

Clients with special needs

2.18 Factors such as ethnicity, age, and level of education can greatly increase the risks associated with oral communication. Clients with special needs or who are particularly vulnerable need additional safeguards in a system based on self-assessment. This group also includes indigenous Australians (particularly those

in remote areas), frail aged persons, and persons with intellectual or psychiatric disabilities.

Case Study 3 - Isolation is not just about 'living in the bush'

Ms M is an Aboriginal woman living in a remote outback community. She has no formal education or written English language skills, no ready access to transport or telecommunications and no significant possessions or assets.

Until January 1992, Ms M received a sole parent pension and family payments. At that time her child went to live with Ms M's mother. Ms M's mother notified DSS of the changed circumstances and DSS stopped the family payments to Ms M, but a DSS administrative error meant that Ms M continued to be paid a sole parent pension.

Investigation established that Ms M was probably not aware of the differing eligibility criteria for DSS payments, and because her payments were reduced by the cessation of her family payments, she was not aware that DSS had not properly responded to her changed circumstances.

In November 1992, DSS issued Ms M with a notice seeking repayment of the overpayment of sole parent pension it made to Ms M from January to June 1992. DSS obtained Ms M's 'mark' on an agreement to repay the debt by deducting $50 from each subsequent DSS cheque issued to her. However, the only recovery action DSS took was the interception of a $500 tax refund cheque for the 1994 income year following Ms M's participation in a CDEP job program. Ms M's case highlights the difficulties faced by beneficiaries who have special needs. Ms M was not in a position to know that she was incorrectly receiving the sole parent pension, or that (despite the overpayment) she would have been entitled to Job Search payments during that period. In addition, the overpayment was caused by an administrative error, and the Social Security Act did not state that the only person who could notify DSS of a change was the affected person. Accordingly, it seemed unreasonable for DSS to recover the full amount of this money.

After representations by this office, DSS agreed to waive the debt and refund the $500 recovered.

2.19 Agencies such as DSS are attempting to solve some of the problems with the delivery of programs and services to clients with special needs by examining some of their administrative and community liaison processes. For example, DSS employs interpreters and Aboriginal Liaison Officers, and has recently agreed to extend the activity reporting requirements for some unemployed persons from two to eight weeks in the Alice Springs Region, because the prospects of some clients obtaining employment in that area are negligible.[5]

2.20 Commonwealth agencies also offer translation and interpreting services to clients from non-English speaking backgrounds. But complaints such as Ms M's indicate that the efforts of agencies to assist such groups may be thwarted because aspects of the system in which the income support programs operate are not appropriate to their special needs.

[5] This issue is discussed in more detail in this office's report: 'One size does not fit all: DSS Service Delivery to Alice Springs Town Camps'. August 1997

2.21 For example, a recent Ombudsman's report highlighted the fact that DSS failed to provide one of its most significant information products (the Recipient Notification Notice)[6] in anything other than English. The Department has continued to resist the Ombudsman's recommendation that the notice be available in a range of languages, or that, as a minimum, the notice contains a warning in the major languages that it contains information which may affect a client's payment, and that people can contact the Department to have it translated if they cannot read English.

2.22 DSS acknowledges that certain groups may have special service needs, and that this extends to the giving of oral advice. For example, the Teleservice centre manual advises staff that it is appropriate to refer an Aboriginal or Torres Strait Islander who is having difficulty in communicating or in determining which payments they may be eligible for, to an Aboriginal and Torres Strait Islander Officer who is trained to provide specialist assistance. Likewise, there is a procedure for referring complex enquiries about medical issues or training and rehabilitation opportunities to a Disability Support Officer, and for referring distressed clients, or clients with difficult personal or familial circumstances to a social worker.

2.23 DSS says it puts extra effort into advising clients with special needs of their entitlements, and that it takes these needs into account when considering whether staff took all reasonable steps to provide advice. While these policies are a step forward, Ms M's case shows that vulnerable clients do not always receive the level of assistance they require.

Conclusion

2.24 Under current arrangements, individuals are primarily responsible for testing the accuracy of an agency's advice, generally without having the knowledge they need to do so, and without adequate safeguards to protect them when errors occur. This includes errors over which they have no control, and which they could not reasonably have been expected to discover. Clients subject to beneficial legislation and those from disadvantaged groups are particularly vulnerable in this environment.

2.25 As a general rule, our view is that agencies should **not** require self assessment by individuals who do not have the appropriate information or skills (for example, those with poor English language skills and/or literacy, or groups designated as requiring additional assistance such as remote area Aboriginals and Torres Strait Islanders).

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[6] A recipient notification notice is provided to clients on the reverse of letters they receive, and outlines their obligations to inform DSS of certain changes in circumstances which may result in a change to the rate of their payment. DSS relies on the provision of such notices as evidence that it has met its obligation to inform clients of their statutory obligations, in forums such as the SSAT, AAT and to this office.

2.26 It is also important to acknowledge that the imperative to reduce costs has not always translated into cost competitiveness or better quality service; rather it can result in a rationing of services where the risk is borne by those most in need. Oral advice may be an illustration of this problem.

2.27 There is an urgent need to implement strategies which will reduce the risks to clients associated with incorrect or ambiguous oral advice. Given the current resource constraints in the public sector, a complete move away from a self assessment system would not be feasible, and government is, by its nature, limited in the range of options it can offer in the context of beneficial legislation.

2.28 The focus therefore has to be on the agency providing comprehensive, accurate, and readily understood information and advice. This means:

- moving away from a system where the agency responds to enquiries driven by clients (or potential clients), to one where the agency more actively provides assistance which gives individuals information, options, and/or assistance that meets their particular circumstances; and

- agencies taking all reasonable steps to ensure that high quality advice is given to clients and potential clients. The advice should be both correct in fact, and correct in terms of **what the client needs to know**.

2.29 This approach is supported by recent service wide studies which emphasise the desirability of a 'whole of client' approach by establishing more testing (but realistic) standards of client service, and devising means of delivery which are more client friendly.[7]

[7] 'Quality for our Clients: Improvement for the Future', page 1. This paper was a discussion paper prepared by an Interdepartmental Service Quality Working Group and distributed by the Department of Finance.

3. An alternative service charter

3.1 As a community we are expecting more from the public sector: some of us (but not all) are better educated and more aware of consumer rights; we have experience of comparable overseas services; and we are operating in an environment of social change where we do not have the time or willingness to tolerate inefficiency and incompetence.

3.2 In the past, the public sector's idea of client service was often based on providing service for a range of agency products, rather than on assessing the client's needs. For example, there has been considerable effort put into improving processing times for benefit claims, and a reduction in call waiting times and wastage, rather than on assessing whether clients are getting the most appropriate benefit, or their complete entitlement. It is important that client service organisations set quantitative targets (for example, x% of incoming calls should be answered within one minute). However, there is also a need to ensure that:

- the person dealing with the client is trained and competent to respond to enquiries **based on the client's needs**, and has sufficient authority to make a decision where appropriate; and

- the decisions and the respective obligations of the agency and the client are fair and transparent.

Improved service delivery initiatives

3.3 In more recent times, there have been initiatives specifically designed to meet the needs of clients, particularly in relation to more streamlined service delivery.

3.4 The creation of the CSDA is the most significant change in the way services will be provided to clients of beneficial legislation. The CSDA will operate as a 'one-stop-shop' for all DSS services, and a range of services from other agencies, including child care payments and services traditionally provided by the Commonwealth Employment Service. There is scope for other services to be added to the agency in the future. Hopefully, this will break down some of the artificial boundaries that have existed in the past between agencies, and improve the quality of information to clients whose needs presently cross agency boundaries (this issue is discussed further in the following section of this paper).

3.5 As put by one senior DSS officer:

> 'The new agency for all basic income support and employment services heralds a new era in customer service. Customers can expect simpler service delivery (through the provision of a one-stop-shop for many Commonwealth services), a streamlined but customer-

focused environment, and access via a number of means, such as telephone, face-to-face contact, or though a computer terminal.' [8]

3.6 The CSDA is to be commended for taking a new, 'whole of client' approach to the delivery of its services. In its draft service charter, the agency has given a commitment to clients that they will be provided with information which allows them to access the full range of the agency's services. The focus is on meeting the needs of 'an unemployed person' rather than simply responding to claims for particular benefits for which a person thinks they might be eligible. For example, services to the unemployed will include registration and assessment of new applicants for income support and employment assistance, provision for self-help job search facilities (such as access to a national vacancy data base through touch screens), and referrals to employment placement enterprises for labour market assistance. This means clients are being offered a significantly more integrated service.

3.7 The initiative in this area does not arise purely from the introduction of the CSDA. Prior to that decision, DSS had trialed a number of new service delivery strategies which combined the efforts of Commonwealth and state governments, and the community. These included:

- the establishment of ten Youth Service Units (YSUs) in 1994 to provide services to clients under 18 years old. The units assist young clients to address issues affecting their ability to access employment, education and training. For example a young person may need access to housing before being able to participate in education or training. A recent evaluation of YSUs showed that the centres had been positively received by customers, community agencies, and staff from DSS and DEETYA;

- in January 1996, DSS trialed the introduction of Family Service Centres in fourteen locations across Australia with a number of models being piloted. Six of the centres were established outside DSS premises (four in shopping centres, one in a community house and one in a mobile van). Other Commonwealth, State and local Government and community agencies which provide services to families also participated in the pilot by providing information products for display, visiting services, hotlines, referral services and seminars; and

- from July 1997, veterans who receive a disability pension from DVA can also have their age pension paid by that Department. The obvious advantage is that veterans will be able to have all their payments handled by one agency, whose primary concern is the welfare of the veteran community.

3.8 These pilot initiatives, if implemented more broadly, should ensure that clients have access to better quality information about the range of services which are available to them, and which of those services best meet their needs and

[8] 'The $64 Million Question: How do you bring about substantial organisational change? The DSS Experience', page 10, Social Security Journal, December 1996.

circumstances. However, in concert with these initiatives, it is important that the rights and responsibilities of **both** parties are transparent.

Reciprocal responsibilities

3.9 Citizens are expected to be honest in their statements to agencies. They are obliged, under legislation, to inform agencies of a range of changes in circumstances which have an impact on their payment (such as a change in their income or assets, or medical condition). There are significant sanctions where they do not comply with those obligations; their pension or benefit can be suspended or cancelled, and they are required to repay any overpayment which arises from a failure to inform the agency of a change in circumstances.

3.10 Agencies too, have obligations to provide information to clients. For example, decisions and appeal rights must be notified. But currently there is **no** requirement to notify a client of a change of circumstance which may benefit the client, and there are **no** requirements regarding the quality of information provided to clients to inform them of the basis on which a decision has been made.

3.11 The following case study demonstrates the difficulties this can present for clients.

Case study 4 - The need for transparent decision making.

Ms A applied for Austudy in February or March 1994. She made the claim after she had left her parental home on 24 February. She applied for payment on the grounds that she was a homeless student, and was granted Austudy at the homeless student rate.

DEET[9] advised her of the grant with an assessment notice, and she received her first payment in mid April 1994. The assessment notice stated that she was eligible for payment from the date she left home, but the payment started from 1 January 1994. Realising the discrepancy, Ms A contacted a student counsellor who rang a DEET Student Assistance Centre and informed them of the error. This was confirmed by the student counsellor.

DEET then sent two letters in late April and early May 1994. Those letters gave slightly different information, but both stated that Ms A was eligible from the day she left home **and** that she was eligible for assistance from 1 January. The second letter also stated that her entitlement had been incorrectly determined in the previous assessment and had now been corrected. There was no difference in the payment rates scheduled for the remainder of the year, and Ms A presumed that DEET had considered the information the counsellor supplied and was satisfied that her Austudy eligibility began on 1 January.

On 1 June 1994, she received a letter from DEET advising that she had been overpaid $2319, because she was not a full time student before 5 May 1994. Accordingly, DEET advised that it would withhold 30% of her future payments. This was despite the fact that Ms A had been a full time student since February 1994. She then received a letter which recognised the overpayment was raised in error. However, a new overpayment was raised for the period 1 January to 23 February 1994, when she had been paid the homeless rate.

[9] In 1994, the Department was known as the Department of Employment, Education and Training.

Ms A applied for a waiver of recovery of the overpayment on the basis that DEET had incorrectly assessed her rate in January and February, even though she had supplied the correct information on her claim form. After some initial resistance, DEET waived the debt and confirmed this in writing in August 1994.

On 7 September 1994, Ms A received a first and final notice claiming $396.93. However, the notice was clearly aimed at people who were not receiving an Austudy payment. After further intervention by the student counsellor, Ms A was advised that the Commonwealth had waived its right to recover the debt. The following day, Ms A left her studies alleging that the Austudy debt recovery process had contributed to her decision. She expected to incur a small overpayment as she had received an Austudy payment after leaving the course. On 28 September 1994, Ms A received a letter from DEET advising that she had been overpaid $1223.75. After further inquiries, DEET advised that the overpayment was in fact $298.85, and Ms A refunded the overpayment.

This case involved many incorrect decisions, but the quality of information contained in the assessment/overpayment notices was perhaps the greatest concern. Ms A was unable to understand many of the decisions and was given little information about the basis for the decisions. It is sometimes difficult for students to judge whether they are receiving their correct entitlement or whether the Department has correctly raised and recovered an overpayment. This leads to a situation where students must seek a review simply to determine the factual basis of the decision (which is an inappropriate use of the review system), or do nothing.

3.12 The result of agencies failing to provide information about decisions regarding entitlements is a significant inequity in the relationship between the agency and the client. It is also why many people complain to this office. Many clients say they had no way of knowing a decision was incorrect, and therefore they did not query it.

3.13 Clients need to be informed of the standard of information they can expect from agencies. The government has recently committed itself to improving the quality of service provided by agencies through a decision to require the introduction of service charters for any agency which has functions impacting on the public.

3.14 The CSDA has acknowledged the need to develop a customer charter, and has undertaken to ensure that:

> 'guaranteed service delivery standards will be adopted by the agency. The executive board will ensure that the agency performs for customers and the broader Australian community to the standards set out in its charter, and that it achieves the outcomes sought by Government.'[10]

3.15 There is no doubt that charters are useful for informing the community about the quality of service they can expect from agencies. But where there is a dispute about the level of service (for example, the advice given), there is a real question about the status of the charter, and what rights clients have when charter service standards are not met. Charters do not generally confer legally enforceable

[10] 'The $64 Million Question: How do you bring about substantial organisational change? The DSS Experience', page 11, Social Security Journal, December 1996.

rights on customers of agencies, although they should state information about rights which the charter may confer under relevant legislation.[11]

3.16 This issue is particularly important in the context of oral advice, where agencies have consistently adopted a narrow approach to compensation for incorrect or poor advice.[12] This means that agencies need to accept that they have a reciprocal responsibility to clients. For example, by:

- undertaking to advise clients about potential entitlements;

- notifying clients of changes in circumstances which may advantage the client (for example, when a client becomes eligible for a benefit under domestic legislation);

- ensuring procedures are undertaken in accordance with agency policy. This also means that, where a procedure is scheduled and not undertaken, and results in disadvantage to the client, there should be a means for allowing the payment to be backdated to the time when the procedure should have been undertaken; and

- ensuring greater transparency in how decisions are made. For example, providing clients with information on what details the agency has taken into account in determining a claim or calculating the rate of benefit, and on what basis any changes to the rate have been determined.

3.17 If implemented, these initiatives would assist clients by ensuring they have better quality information on which to make decisions about both their eligibility and their payments when accessing or receiving income support. They would also ensure that clients have sufficient information on which to query a decision or payment rate if there is any doubt about the manner in which the payment has been calculated.[13] This should advantage both clients and the agency by ensuring there are fewer:

- overpayments;

- requests for reviews and external appeals; and consequently

- significantly reduced administrative effort and cost.[14]

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[11] For a further discussion of this issue, see 'Putting Service First: Principles for Developing a Service Charter', March 1997, published by the Department of Industry, Science and Tourism.

[12] The issue of redress is discussed further in section eight of this paper.

[13] This is consistent with the requirements of the ATO when it sends a taxation assessment. Section eight of this paper discusses this issue in more detail, including the AAT's comments on a recent case of this nature (page 64 of this paper refers).

[14] The CSDA estimates that it $30 million can be saved from reducing unnecessary re-work associated with inadequate correspondence alone.

Conclusion

3.18 MAB/MIAC's publication 'Building a Better Public Service' urged agencies to change from an inward looking focus to a client focus. The establishment of the CSDA will hopefully be a significant step forward in improving client service delivery.

3.19 In addition to streamlined service delivery, there is a need to improve the quality of information provided to clients. At present agencies have the information and expertise advantage. The challenge will be to ensure clients have access to the information they need, in ways that are more client friendly. The following section of this paper deals with some strategies for achieving this outcome.

Recommendations

- Every agency should take all reasonable steps to advise clients of changes in circumstances, legislation and/or policy which may be beneficial to the client. (This would include, for example, advising pensioners paid under an agreement with another country when they become eligible for a pension under domestic legislation, or where some other reasonably foreseeable event suggests the person may be entitled to a more generous payment or benefit).

- Agency decision making should be transparent. That is, the client should be provided with sufficient information to understand the basis on which a decision is made (this includes, for example, details of the information taken into account in determining a rate of payment, and the basis of any change to a rate of payment etc.)

4. New practices and procedures

4.1 In addition to the need for a client oriented approach which recognises the responsibilities of all parties, it is important that clients are provided with a 'coordinated' service. Some entitlements may cross agency, program and/or legislative boundaries.

4.2 Many people are not aware of the distinctions between government departments and programs, and understand themselves to be receiving a service from 'the government' as a single entity. Regardless of whether clients understand the differing roles of agencies or not, they are requesting information about income support provided by government. The fact that some of these programs are implemented jointly by two (or more) agencies should not have a negative impact on their dealings.

Providing a coordinated approach

4.3 From a client's perspective, it is reasonable to expect a CES officer to answer simple enquiries relating to unemployment, by providing sufficient advice to enable a person to fulfil the requirements for obtaining Job Search Allowance (JSA) as soon as possible, even if some of that information relates to DSS requirements because DSS has responsibility for actually paying JSA.

4.4 However, Departmental officers are currently under an obligation not to provide specific information about the operation of another department. The concern is that while officers from one department may feel they are offering helpful advice on the operations of another, the advice may be wrong.

Case Study 5 - Artificial lines of responsibility

Ms H was sacked by her employer in May 1994, and on that day or the next, she phoned the CES to advise that she had been sacked, and to ask what she should do. The CES told her to get an Employer Separation Certificate from DSS. She went to DSS to obtain the certificate, but was told she must get it from her employer. After several attempts, and about a month later, she got the certificate from her employer. When she returned to DSS with the certificate to claim JSA, she was advised that she must first register with the CES. CES had not told her to register when she first made contact; if it had done so, she would have received JSA from the date of registration.

There was no record of Ms H's contact with the CES or DSS in May 1994. We asked DEET (as it was known then) what they considered was usual or reasonable action by the CES when responding to the sort of enquiry Ms H made. In our view it was reasonable to expect the CES to know that separation certificates were obtained from the employer, not DSS. We also
felt it was reasonable to expect CES officers to answer enquiries about unemployment by providing sufficient information to enable the enquirer to fulfil requirements for JSA as soon as possible, ie register at the CES and apply for JSA.

We argued that Ms H's initial enquiry gave sufficient indication of her situation for the CES to provide the correct advice that she should register with them. DEET agreed, and offered to make Ms H a payment equal to the amount of JSA forgone.

4.5 In Ms H's case, given the dual responsibility of DEET and DSS in administering programs for unemployed people, DEET recognised it should have qualified any advice about DSS matters, by referral to that department but should also have been as helpful as possible in directing the client to DSS. Importantly, in its reply to our submission on Ms H's complaint, DEET acknowledged that a CES officer should, generally, 'take the initiative and act on any non-specific implication that a person was unemployed or enquiring about income support.' DSS does not accept any responsibility to provide advice on DEET operations.

Case Study 6 - Who's responsible?

In May 1995, Ms C sought advice from a DSS JET Officer about what financial assistance she might obtain in addition to Sole Parent Benefit if she resigned from her job and took up full time study. She and the JET Officer discussed a number of options for courses.

Following consultations with either DEETYA, the institution, or both, the JET Officer discovered that one of the courses being considered by Ms C attracted Austudy, while the other did not. Ms C is certain that she was advised that the Certificate of Addiction Studies at Deakin University was the course which attracted Austudy. On the basis of this advice Ms C quit her job, applied for Austudy and enrolled at university.

She was subsequently advised that her course did not attract Austudy. Ms C sought compensation from DSS . The JET Officer could not remember whether she had received the relevant information from the university, DEETYA or both. However, she stated that, as a professional, she would not presume to advise anyone about an area in which she was not an expert, and that she had merely passed on information which she had obtained from elsewhere.

After some internal consideration, DSS denied liability on the basis that the JET Officer was not an authority on Austudy and therefore DSS could not be held liable for any material which the JET Officer had passed on in good faith. As there was no way to corroborate Ms C's story, this office was unable to obtain a remedy for Ms C.

4.6 It is disappointing that, despite the imminence of the CSDA, in specific cases DSS still denies its responsibility at the broader service level, even for clients with an acknowledged disability. In another case, this office has recently written to the Secretary regarding a complaint from a blind pensioner about DSS's failure to advise her about her eligibility for a Pensioner Education Supplement (PES). Although the supplement is administered by DEETYA, DSS's guidelines state that staff should advise pensioners of their eligibility, and DSS staff have acknowledged that PES and blind pensions are closely linked. In addition, the pensioner concerned was not referred to DEETYA to clarify her entitlement, and as she is blind, she is almost totally reliant on oral advice. Nevertheless, DSS is seeking to deny liability on the basis that the guidelines are advisory only, and do not carry a mandatory responsibility.

4.7 The introduction of the CSDA **may** resolve some of these problems for areas that have involved DSS and DEETYA, although details of any changes to legislation and procedures for cross-agency programs have not yet been provided. The need for a coordinated approach also will remain important where the cross-over involves agencies outside the CSDA. For example, 12 month trials of Retirement Service Centres are currently being conducted in six locations around Australia. These centres are a cross-portfolio endeavour between DSS, the Department of Veterans' Affairs and the Australian Taxation Office. As well as providing information about superannuation and the Departments' various programs, the centres will also process retired customers' claims for income support. The specialist financial information services of DSS and DVA are also available to customers.

4.8 While this initiative is a positive one from a client perspective, it may also increase the risks associated with incorrect advice. It is our view that clients must be advised when to confirm advice relating to another portfolio, with the expert agency. The following case study illustrates this point.

Case Study 7 - When referral is required.

Mr and Mrs M's son died in 1993 while he was a serving member of the Defence Force. Mr and Mrs M were entitled to receive a lump sum of
$224, 797 through the Military Superannuation and Benefits Scheme (MSBS). In August 1993, Mr M alleges he spoke to Comsuper staff (in the MSBS area) who said the cheque would be coming soon, and that they did not think there was any tax payable on the payment. Mr and Mrs M received the lump sum in late August 1993 and contacted Comsuper staff who again advised that tax was not usually payable on this type of payment. Mr & Mrs M alleged that they received the same advice from an officer of the Department of Defence and a navy welfare officer. Mr and Mrs M also stated that they were not advised by Comsuper to seek independent advice on the taxation treatment of the payment.

Mr and Mrs M (who were a retired couple) then moved back to the Gold Coast, bought a house, upgraded their cars and furniture and went on an overseas trip to see relatives. In October 1994, their accountant advised them

that there should be tax payable on the lump sum. Mr & Mrs M's other son, A, contacted Comsuper; they alleged that Comsuper indicated to him that no tax was payable. The file records note that A was advised by a Comsuper officer that there was no tax deductible by Comsuper, and that as far as she knew tax was not payable. The officer then rang a contact in the ATO who advised that tax would be payable if the payment went to a non-dependant. Mr A was subsequently advised that this was the case.

In November 1994 Mr & Mrs M were advised by the ATO that tax was payable and liability was assessed at $51,318. Mr and Mrs M had only $40,000 remaining in the bank. They argued that if they had known there was a tax liability, they would have held a sum in reserve and spent less on the house and other items. They said the uncertainty of having to go into debt to pay the tax caused them a great deal of stress and anxiety, especially coming on top of the death of their son.

Despite the obvious reliance placed on the advice given, it was argued that there was no legal liability in this case. Although the M's enquiry related to a serious matter, Comsuper said that it does not hold itself out as an expert on tax liability, and the advice was given orally without the M's providing full details of their circumstances. In addition, the sum of money involved was large. In the circumstances, it was our view that it would have been prudent for Mr & Mrs M to have sought advice from a third party (such as the ATO or an accountant) before spending the money.

The Ms, however, felt it was reasonable to rely on the advice from Comsuper, as it was the agency making the payment, and the payment was superannuation. In our opinion, there was supporting evidence to suggest the Ms had been given the advice they alleged they received. We felt it was possible that the Ms should be entitled to a payment under a scheme for compensation for defective administration. However, the amount of loss would be limited to actual loss - for example, any costs they incurred in borrowing money to repay the tax debt, but would not cover their lost expectations.

Mr and Mrs M submitted a claim for compensation. Comsuper rejected the claim on the basis there was insufficient evidence to establish that incorrect advice had been given. Fortunately, the ATO has since advised that it will not be seeking recovery of the tax debt. Since then, Comsuper has advised staff to tell beneficiaries to seek advice from the ATO on the taxation treatment of such payments, and updated its written advices to the same effect.

This case demonstrates that it is critical that agencies inform clients when they should not rely on advice relating to another portfolio area, or when to seek advice in writing.[15]

4.9 The value of any trial projects which encourage the provision of advice orally across a range of portfolio areas in an effort to improve client service is undermined if one participating agency then seeks to deny responsibility for incorrect or incomplete advice on narrow and legalistic grounds. The experience of Mr and Mrs M suggests that it is crucial that there are clear lines of accountability and standards of service where there are cross-agency or cross-program advice initiatives.

Other risk management strategies

4.10 In addition to the need for a coordinated approach, there are other strategies agencies can put in place to reduce the harshness of the self assessment regime and the risks of incorrect or ambiguous oral advice. These include:

- ensuring clients are advised of the need to test their eligibility;
- ensuring staff are more responsive to information requests from clients;
- developing more user-friendly claims procedures; and
- implementing client focussed information strategies.

[15] The issue of when clients should seek confirmation or advice in writing is addressed in section six of this paper.

Advice on testing eligibility

4.11 At present, when a client (or prospective client) calls a teleservice centre, they are asked to 'stream' themselves into an enquiry queue for various benefit groups (eg. pensions or family payments), so that the client is put through to an operator who is knowledgeable in that category of benefits. However, the automated voice message which directs the client, assumes a level of knowledge by the client about the type of benefit most suited to their situation, by referring to the various benefit categories by name. While this may be suitable for existing clients, it does not necessarily assist those people without any prior knowledge of income support programs, and who are trying to determine whether they might be eligible for some form of assistance.

4.12 In our view, it may be preferable to offer a dedicated enquiry 'stream' for those people enquiring about prospective eligibility and who have little or no knowledge of the system. Any such contact point would need to be staffed by officers with considerable knowledge across the full range of benefits and pensions available.

4.13 In addition to ensuring agencies are in a position to help clients seeking oral advice about potential eligibility, it is crucial that clients are advised of the need to test their eligibility via a claim, and that an officer does not give advice in a way which would discourage a person from lodging a claim. This is because a person can generally only receive a benefit from the date on which a claim is submitted, or the review requested. This office deals with many complaints regarding entitlements forgone, as a result of individuals allegedly not being advised that the only true test of eligibility is to submit a claim form.

4.14 DSS's recent update of its teleservice protocol reminds operators that they should advise a person at the time they make an enquiry about potential benefits, to test their eligibility. In addition, under legislation passed in late 1996, a person's claim can be backdated to the date of their enquiry (providing that their enquiry has been acknowledged in writing by the Department). In theory, this should help to overcome the sort of problem identified in the case study relating to Mr and Mrs W (page 14 refers).

4.15 I say in theory, because a member of this office recently rang the Teleservice centre from Canberra on three occasions, using Mrs W's circumstances as a 'model' enquiry to see whether these new arrangements are operating effectively. Although on all three occasions she was advised to get her husband to test his eligibility via a claim (only one officer explained that payment would only be made from the date of claim), **none** of the DSS officers asked for her name and address details in order to acknowledge the query in writing, so that the claim could be backdated to the date of the telephone enquiry.

4.16 DSS does acknowledge that one of its important responsibilities in responding to an enquirer orally (regarding entitlements at least) is to encourage clients to test their eligibility by making a claim, and this issue is addressed in training for teleservice staff. If there is any doubt about a person's potential

eligibility, teleservice and counter staff should advise potential applicants to lodge a formal application to allow a more detailed assessment of their case. That advice must be given sooner rather than later since claims cannot be backdated prior to the date of lodgement. The Secretary of DSS agreed to reinforce this work practice amongst his staff, but it appears that its application may be patchy. Unfortunately, our experience is that DEETYA is even less rigorous in advising clients to test eligibility via a claim.

Client responsiveness

4.17 Given the complexity of legislation, it is not feasible for teleservice staff to have knowledge at the depth required to give accurate advice about effects on entitlement, or potential eligibility for a payment, across all benefit programs. Although there are procedures in place to transfer calls to more experienced officers when an enquiry is complex, and for returning calls to clients where the operator is unable to answer a question, this office is advised that less than 5% of calls are transferred back to the regional office responsible for the client.

4.18 In our view, it is crucial to ensure that, in more complicated transactions, or enquiries involving eligibility or other information in program areas recognised by the agency as being more complex (such as portability, incapacity payments and family payments), the 'right' person gets back to the client, rather than the operator providing incomplete or ambiguous information in order to alleviate the pressure on the call centre and/or regional office staff. This means encouraging a philosophy of 'ring back' rather than 'ring around' - where an operator who cannot deal with an enquiry makes it their responsibility to get the information (or the person who has it) back to the client.

4.19 This office accepts that there is an additional cost with double handling of calls, and that current thinking on call centre service suggests that, wherever possible, a call should be handled at the point of first receipt. However, the costs of double handling must be balanced against the high costs of review, appeal and complaints to external bodies such as this office in relation to incorrect or incomplete advice.

4.20 Although arranging a 'call back' means the answer may not be as immediate as the client would like, our experience suggests that clients would generally prefer to be given correct advice tailored to their needs, than incorrect or insufficient information provided on the spot. Indeed, research from overseas indicates that clients are able to make trade-offs between immediacy and quality when they are aware of, and consulted on, the relative costs and benefits.[16] There is scope for further research by the CSDA on where the balance should lie. CSA has already done some work of this nature; through relative priority setting of such activities as answering calls and debt collection.

[16] See Quality for our Clients: Improvement for the Future', Chapter 4.

4.21 DSS has recognised that this is the case, and its Teleservice protocol now advises operators that it is better to tell a client that further investigation is needed and that someone will call back rather than provide incorrect information.

Friendlier claims procedures

4.22 There are also problems for clients when they actually reach the point of making a claim, which can be addressed via improved claims procedures. At present, clients are required to complete a claim form for a particular benefit. If they are not eligible, they then have to commence the claims process again, and their payment only commences from the date a claim is accepted.[17]

4.23 An alternative might be that a client or prospective client completes a generic questionnaire or claim, setting out all their circumstances. The agency would then use its own systems to determine whether the person was entitled to a payment, or assistance under a particular program, and which is the most appropriate form of assistance. Such a system would reflect more accurately the fact that the agency has the necessary information and knowledge to make the correct determination.

4.24 This office is aware that DSS is currently considering the development of a generic claim form for a related group of benefits, ie. Disability Support Pension, Sickness Allowance, Youth Training Allowance and Newstart. Under this arrangement, a client with a significant inability to work submits a generic claim form, and the Department then assesses which is the most appropriate benefit for that person's circumstances, rather than the individual having to identify and apply for a specific benefit up front.

4.25 The Department of Veterans' Affairs has also introduced a modular claim form where preliminary details form the basis of an 'informal claim' and the person then has up to three months in which to lodge a formal claim.

4.26 In our view, it should be possible to move to a combination of these approaches for the full range of DSS and DEETYA benefits and other beneficial legislation; where individuals provide some standard preliminary details, and a suitably trained and knowledgable person from the agency then contacts them to discuss the most appropriate benefit for their circumstances. The client would then have a fixed period within which to submit a full claim, which (providing the client was eligible on the day the preliminary details were provided) is backdated to the initial date of contact.

Client-friendly information strategies

4.27 Any improved agency procedures need to be accompanied by the development of information products and strategies more tailored to the needs of specific client groups. This office is pleased to note that there have been a number of initiatives in this regard.

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[17] Some claims can be 'deemed' to be claims for other benefits, where they fall within a related category. However, this is not the case for unrelated benefits.

They include:

- implementation of a range of strategies for advising particular clients groups about DSS programs and services (for example, the introduction of specialist liaison officers);

- DSS's development of social security 'magazines'. These magazines provide information relating to the range of benefits and pensions within a benefit category. For example, the 'You and Your Family' magazine is a guide to Commonwealth family payments and services and provides information on:
  - the family tax initiative;
  - 1997 rates for family payment;
  - parenting allowance;
  - health care cards;
  - help for sole parents;
  - child care assistance and cash rebates;
  - the family hotline; and
  - a checklist on the various payments and who can claim them.

  The magazine helps clients to identify the range of benefits to which they might be entitled, and provides information on how to apply. The magazines represent a kind of 'layman's guide' to a related group of benefits;

- the CSDA's intention to provide some clients with letters in their preferred language;

- DVA's use of community organisations to assist with providing information to its clients, to act as advocates, and to assist with simplifying the rules; and

- the establishment of video networks to teach clients about particular issues (for example, the use of the DEETYA network to inform clients about privacy issues).

4.28 These new ways of providing information to the community should assist people by providing them with information that better suits their needs in determining which benefits (if any) they may be entitled to.

Conclusion

4.29 The establishment of the CSDA will hopefully provide a substantial opportunity to improve client service delivery, based on a 'whole of client' approach. As stated by the new Chief Executive Officer of the Agency:

> 'The Agency has been given the challenge not only to improve access but to make government services simpler, friendlier, more personal and to streamline the way governments do business.'[18]

[18] 'Achieving Excellence in Service Delivery - Changing Service Delivery Arrangements for the Commonwealth Government', page 1.

4.30 A number of strategies are being trialed which support that aim. However, there is a need to extend these approaches across the full range of services for beneficial legislation, and for agencies which have a significant oral advice giving role to the public.

Recommendations

- There should be clear lines of accountability / responsibility where an agency is providing information which crosses agency, program, and / or legislative boundaries.

- Agencies must advise clients when oral advice should be tested in writing and / or with another agency.

- There should be 'knock for knock' agreements across the full range of beneficial legislation so clients are not penalised for incorrectly diagnosing which payment they are eligible for.

- Agencies implement procedures to ensure that clients are provided with correct and comprehensive information, even if that necessitates a 'ring back' approach.

- Where a client (or potential client) enquires about eligibility, they must be advised that the only sure way to test their eligibility is via a claim, and the consequences of failing to do so (ie. that payment is only made from the date of a successful claim). Clients with special needs should be given appropriate additional assistance to help them lodge a claim.

- That more user friendly claims forms be developed as matter of priority.

- That DSS report on its trial of a generic claim form for clients with a significant incapacity, and the suitability of extending this approach to other benefit related categories.

- Agencies investigate further opportunities for more client friendly information products and strategies across the range of beneficial legislation.

5. Accountability for oral advice

5.1 Where this office investigates a complaint, it is not uncommon to find that there is no record on a client's file of an alleged conversation, or of the advice provided. Clients themselves often do not perceive the need to make a record of the advice given to them or the person who gave it. Unless they have experience to the contrary, they generally assume that any advice given to them will be accurate and reliable, and will be recorded by the agency if necessary.

5.2 The result is that clients who receive incorrect or incomplete advice, often find it difficult to 'prove' they received that advice, because no record of their enquiry exists.[19]

Current recording arrangements

DSS

5.3 DSS acknowledges that it has a responsibility to take all reasonable steps to provide accurate and complete advice to clients about its programs. The Secretary also acknowledges that as a general practice, a summary of oral discussions between the Department and clients should be recorded.

5.4 However, the Secretary believes that it is not feasible to enforce the practice of recording oral advice in all cases, or to ensure that records cover all of the conversation. He submits that problems with oral advice will not disappear unless agencies take steps which are likely to be unacceptable from the public's point of view and its own, such as taping all conversations, or refusing oral communication outright. Accordingly, the level of generality of an enquiry, the context in which it is asked, and the queue of other enquiries will all affect the likelihood of it being recorded.

5.5 Nevertheless, DSS has recently introduced improvements to its guidelines for teleservice operators and regional offices. The Department's teleservice protocol now includes warnings about the consequences of providing incorrect information.

5.6 The protocol also instructs operators to:

- confirm information provided by the client by reading it back to them; and
- confirm any operator actions with the client, and make sure the client understands what is required on their part.

[19] The evidentiary requirements to 'prove' allegedly incorrect advice, and other related legal issues are discussed further in section eight of this paper.

5.7 The guidelines state that existing clients should also be provided with a four digit receipt number as a record of their conversation with the Department; they can use this number if there is a dispute about when (or whether) a call was made. The operator is then required to record the client contact on an 'On Line Document Recording System' (ODR) where:

- immediate action is required by the staff or the client;
- follow up action may be necessary; or
- information / action may affect eligibility or 'payability'.

5.8 A use of judgement / common-sense approach is urged, for example, where a client rings to ask office opening hours or an address, the contact will not be recorded on the ODR, but more significant interactions must be recorded (eg. advice of a change in circumstances). Regional office staff are expected to adhere to similar standards in dealing with face to face or telephone enquiries.

5.9 In addition, the Department's computer system will automatically note when an existing client's personal record is accessed. However, like the issuing of a reference code, this merely proves that an interaction took place, not what the nature of the interaction was, or what advice was or was not given. As detailed below (paragraph 24 refers), recording practices for queries from potential clients raise additional issues.

DEETYA

5.10 DEETYA operates on a similar principle to that used in the past by DSS - conversations perceived by the agency as significant should be recorded on the client's record. However, this office is not aware of any DEETYA equivalent to the DSS teleservice protocol, nor any protocol for over the counter advice. The quality of recording of advice given can also vary significantly across DEETYA offices.

5.11 For example, during peak periods (ie. the commencement of each study semester), an information line is established for DEETYA's Student Assistance Centres, but each Student Assistance Centre operates independently, and differences in practices can therefore occur. We are aware that at one centre last year, the hotline was staffed almost entirely by temporary staff with little or no knowledge of the relevant legislation or agency policies, while more experienced staff were used for the assessment of claims. In addition, some Student Assistance Centres have signs up in their offices advising that any oral information cannot be relied upon.

5.12 Such practices leave students enquiring about possible benefits exposed to incorrect, incomplete or ambiguous information, and with little or no protection if the advice they were given by temporary staff was poor. Unfortunately, we have found that where there is no record of contact, DEETYA has consistently refused to admit that incorrect advice was given.

CSA

5.13 CSA's practices are different again. In recent years the agency has moved to a case management approach, where an officer can record every transaction for a client. As a matter of policy, general enquiries are not recorded, nor are records kept for enquiries from individuals who are not existing clients. Because of problems with accountability for advice given, like DSS, the CSA has a policy that the officer's name and the name of their team is given to the client.

Non-government sector agencies

5.14 It is worth noting the difference in recording practices for advice in Commonwealth agencies, and those used by agencies in the non-government sector, such as the Welfare Rights Centre (WRC). That agency regards the recording of advice as a crucial part of any transaction with a client.

In a pro-forma format, Sydney WRC categorises the nature of the client's enquiry (and the agency it related to) through a series of check boxes, and then records the key advice given to **every** client. This record is later checked by someone else in the agency. Significantly, the WRC also considers it crucial to record that clients have been informed of the limitations of any advice given (for example, when written advice should be sought). As with Commonwealth agencies, more complex matters are dealt with face to face if possible, and the WRC produces advice on common problems and posts them out to clients where appropriate.

Casual versus serious enquiries

5.15 Our experience suggests that a key criterion which determines whether an enquiry or the advice given is likely to be recorded is whether the person giving the advice regards the enquiry as 'serious'. This is also a factor that AGS considers; it distinguishes between a 'casual' enquiry and a 'serious' one, or the provision of advice or general information without a specific transaction in mind, compared with advice relating to a specific transaction or entitlement.

5.16 However, in practice this distinction may not be easily determined. An enquiry might be couched in general terms, but its link to an entitlement or eligibility may be clear in the context of the individual conversation. The following case studies are cases in point.

Case Study 8 - Duty of care vs a duty to be careful

Mrs E received a War Widow's pension from the Department of Veterans' Affairs, and a part age pension from DSS. The *Social Security Act 1991* prescribed the maximum age pension payable. The Act also prescribed a component of the age pension which was designated as rental assistance if a person lived in rented accommodation; the rental assistance was not an additional allowance, but had the effect of reducing the amount of pension subject to taxation.

In March 1994, Mrs E, who was living in her own home at the time, telephoned DSS to say she was considering selling her home and buying a retirement unit, for which rent was payable to cover corporate fees, council rates, and maintenance costs. She asked if she would be eligible for rent assistance. After checking her details on the computer, DSS told her that if she paid $65.50 rent per week, she would be eligible for $27.50 per week rental assistance. DSS did not tell her that any rental assistance would be included in the amount she currently received as age pension, and not paid as an additional allowance.

Mrs E understood that the allowance would be in addition to her current age pension, and relying on this, she put her house on the market. Before she signed the contract for the construction of the unit, Mrs E visited DSS's office and asked again about rental assistance. The counter officer confirmed the earlier advice given to Mrs E. Believing this to be a second confirmation of her entitlement, she signed a contract for the construction of the unit. In August 1994 she received a letter from DSS confirming that rental assistance was not in addition to her current pension. Mrs E complained to the Ombudsman's office that she suffered financial loss by acting on DSS's advice.

Mrs E said she indicated in her enquiries to DSS that she wanted to sell her house and move to a retirement village, but the rent charges were too expensive. In our view, this indicated that DSS staff should have realised she was trusting them to give her accurate advice about rent assistance. Mrs E sought advice from DSS twice, the second time in person. On both occasions DSS checked her details from the computer before advising her, and there was no evidence DSS recommended she make a written enquiry. In our view, it was therefore reasonable for Mrs E to rely on the oral advice given.

AGS's original view was that DSS was not liable for the misleading advice. AGS stated that Mrs E's indication that she was considering selling her house and purchasing a retirement unit was essentially tentative and should not necessarily have caused the DSS officers to realise that she would take the course of action she subsequently did, on the basis of that advice. AGS also considered that oral advice by its nature was given in informal circumstances, and was intended as a guide only to probable entitlements. AGS relied on the fact that DSS told Mrs E she would have to complete an application form, and concluded that in those circumstances, it was not reasonable for Mrs E to rely on the oral advice.

However, in March 1996 DSS sought further advice from AGS on this matter. DSS informed AGS that it promotes teleservice as a reliable source of information and encourages clients to act on the basis of advice received via teleservice or over the counter. On the basis of this information, AGS changed its opinion and now considers that a court would be likely to find that DSS owed a duty of care to Mrs E, as DSS actions in encouraging reliance on oral advice lessens the need for reliance to be reasonable.

5.17 In DSS's view, the Government has quite clearly indicated that an agency like DSS does not have strict liability in the advice it gives or the action it takes, but that it has the responsibility to provide a level of service based on what is 'reasonable', and in light of the common law duty of care in negligence.[20]

5.18 Nevertheless, DSS promotes teleservice as a reliable source of information and encourages clients to act on the basis of advice received via teleservice or over

[20] DSS has provided substantial comments on how it sees its responsibilities in providing oral advice. The Secretary of DSS also outlined his views on the issue of accountability for oral advice in a paper titled 'Accountability Processes and the Administration', delivered in April 1995 to an Australian Institute of Administrative Law (AIAL) conference.

the counter. Accordingly, the AGS has recently indicated that where incorrect advice is given in this context, this **could** amount to a voluntary assumption of responsibility by the Department, and could thus eliminate the requirement for reasonable reliance altogether.

5.19 We welcome AGS's opinion, which has potential application in other agencies which have established oral advice services. Whether this view will be followed in other matters remains to be seen.

5.20 We suggest that the following factors would provide for a better assessment of whether it was reasonable for a person to rely on the information they received:

- the significance of the information to the person concerned (for example, if they are considering leaving a job, selling a house or going overseas
- the chances of a person getting advice elsewhere; and
- the consequences to the client of incorrect advice (for example, incorrect advice would mean that they were without income support).

5.21 Using this test suggests that, at least in the area of beneficial legislation, it would be reasonable in the vast majority of cases for the client to expect that they ought to be able to rely on the advice they received. This is also consistent with the experience of this office and agencies such as the AAT and SSAT. Clients commonly assume that the information they are given is reliable.

The need for a new approach

5.22 Under current arrangements, the accountability and recording practices of agencies providing oral advice to clients vary significantly, even within the area of beneficial legislation. In our view, there is a need to ensure that there is a consistent approach across all agencies with a significant advice giving role to the public. Any common approach should meet a set of minimum recording and accountability requirements.

5.23 While DSS has the more advanced recording practices of agencies in the beneficial legislation arena, one of the most significant shortcomings of DSS's practices is that they provide very little accountability for advice given to potential clients. As indicated in section four of this paper, experience shows that clients do not always have their enquiries about eligibility recorded and acknowledged, and the reference number and client record annotation systems only apply to existing clients. This leaves potential clients particularly exposed to the risks of incorrect advice.

5.24 We recognise that Commonwealth agencies are not in a position to record the detail of every call, or all advice given. However, improved recording practices need not require a 'one size fits all' approach. Experience suggests that there are areas where the recording of advice has, in the past, been insufficient,

and where the risk to the agency and the client is high enough to suggest that improved record keeping would be a sensible management strategy.

Risk based recording

5.25 Traditional recording practices have meant that a call is more likely to be recorded if a specific question is asked, the call is likely to relate in a change to the rate of payment, and the call relates to an existing client. However, applying a risk management approach suggests that:

- certain minimum recording standards are set (which would apply to most transactions)[21]; and

- a more complete record should be made if the consequences of failing to keep a proper record are likely to be high for the agency (for example, a client whose benefit is likely to be subject to fluctuations in income) and / or the client (for example, where a client enquires about eligibility for a benefit).

Minimum recording standards

5.26 The Attorney-General's Department has advised me that, from a legal perspective, the minimum details which should be recorded where oral advice is provided are:

- the name or identifier of the officer giving advice, and if possible, the name of the person to whom the advice was given;

- the date and time the advice was given;

- the question asked (AGS considers this crucial for determining questions such as whether the agency ought to have known that the client was intending to rely on the advice given, and whether the enquiry was 'serious'); and

- the response given and whether there was any qualification of the response (such as advice that the client should submit a claim).

5.27 This office agrees with AGS's advice on this matter. The most difficult aspect of the recording will be the question(s) asked and the advice given, but it should be possible to record this information (at least in part) by using codes or ticking boxes, either electronically or in hard copy, such as occurs in the Sydney WRC. This has the additional advantage of providing recording prompts in a pro-forma format, rather than the staff member being expected to remember all the information they are required to record.

5.28 Additional standards could be added to suit the needs of particular agencies. For example, in relation to the new CSDA, it may be desirable to record

[21] The exception would be for enquiries relating to administration, eg. enquiries about office opening hours, payment arrangements where public holidays have an effect.

details (where they are provided) when a client gives an indication they intend to take (or not take) some action consequent upon the oral advice given to them. For example, when a client indicates that they will be going overseas.

Assessing when a higher level of risk exists

5.29 DSS has already identified some factors which suggest that there is a higher level of risk associated with incorrect or ambiguous advice in its teleservice protocol - such as the need to record advice on matters which are likely to affect a client's rate of payment or where follow-up action may be necessary. The new CSDA has also recognised that some clients are more 'at risk'. This is part of the reason for moving to appointments for regional offices; staff are then able to prepare for these clients.

5.30 Agencies such as DSS and DEETYA should have a good knowledge of the most common causes of overpayments and rate changes within a group of benefits. They currently use this information to develop fraud control and review programs targeted at specific groups of clients and/or payments.

5.31 It should also be possible to use this type of information to 'flag' those groups of payments as being ones 'at risk', and therefore identifying to officers in the teleservice and regional offices that any advice provided to clients on payments which fall within such categories should be carefully recorded. It should also be possible to 'flag' individual clients who are 'at risk' either because of the nature of their circumstances, or because they may have special needs.

5.32 For example, a client in receipt of disability support pension whose partner works part-time on an irregular basis, but earns sufficient income to reduce the pension payment, is far more at 'risk' of a change in payment rate than a client on the same payment whose spouse earns a regular income which is well below the income limit allowable. Similarly, a client with a known language or literacy difficulty is more 'at risk' than someone who is English proficient and literate.

5.33 Experience also suggests that enquiries about potential eligibility are an 'at risk' area in relation to incorrect oral advice, and there should be a mechanism for recording such enquiries for potential as well as existing clients.

5.34 It will also be necessary to record additional information in the case of clients with special needs, such as:

- whether the person was advised by (or in the presence of) an agent nominated by them, or a specialist agency officer (such as an Aboriginal or Torres Strait Islander Officer or Migrant Liaison Officer);

- whether any translation or interpreting service was used (or a staff member fluent in a language translated or interpreted);

- whether the client was advised to (or indicated they would) take particular action in relation to the advice given; and

- any specific difficulties encountered during the provision of advice (eg. client was very distressed, or appeared to be having difficulty hearing or understanding the advice given, or they were advised to make an appointment to discuss their situation).

Conclusion

5.35 At present, there is considerable inconsistency in the way agencies handle the recording of oral advice and, as a result, they are often unaccountable for any allegedly incorrect or ambiguous advice given to clients. In our view, it is not reasonable for agencies to encourage oral communication with its clients, if the agency subsequently states (in considering whether compensation ought to be paid for any allegedly incorrect oral advice) that the client should not rely on the accuracy of information or advice they were given orally. Nor is it reasonable to encourage oral advice, and then to put up signs that advise clients not to rely on it as at least two agencies previously have done.

5.36 It is understood that, at least in the initial stage of the new CSDA, the functional areas of DSS and DEETYA will continue to operate as they have in the past, until such time as the CSDA develops its own policy and procedures for dealing with oral advice. It is not yet clear what the policy and procedures will be.

5.37 In our view, the establishment of the CSDA to deliver benefits across social security, employment, education and training areas provides an opportunity to ensure that the oral advice and recording practices are maintained at a single, acceptable standard, in line with the principles outlined above. Other agencies administering beneficial legislation should also be reviewing their recording and accountability mechanisms.

5.38 Our view is that the costs and benefits of providing additional record and audit trails for oral advice need to be explored further. This view has been supported by the ANAO. The Auditor-General recommended that:

> 'DSS review the sufficiency of existing audit trail arrangements for teleservice enquiries and the costs and benefits of establishing fuller and more systematic arrangements.'[22]

5.39 However, any cost benefit analysis **must** take into account the nature of an agency's clients and any disadvantages they may face. A distinction can be made between departments assessing the eligibility of entitlements and other agencies where the consequences of non-payment may not be as important.

5.40 For example, Australia Post has changed its practices in order to streamline and remove the need for record keeping of mail movements. At the same time

[22] Audit Report No 9. Performance Audit: Teleservice Centres, Department of Social Security, 1995/96, Australian National Audit Office, Recommendation 15, page 41.

Australia Post has generally adopted a 'business approach'[23] for compensation in the event of lost mail.[24]

5.41 The Ombudsman's office agreed that this combination of reduced records and 'business approach' to claims is appropriate in the Australia Post environment. However, such an approach would not be appropriate in the context of beneficial legislation, where entitlements are in question and other legislative requirements must be met (eg. compliance with the Audit Act).

Recommendations

- The reference number system currently in place for existing DSS clients (which allows the client's call, and the operator to whom they spoke to be identified) should be extended to individuals who ring enquiring about potential eligibility.

- Minimum standards of data recording be set for all agencies administering beneficial legislation and/or with a significant role in giving advice to the public.

- Agencies implement strategies to ensure higher level recording of oral advice where there are indications that there is an increased risk (either to the client or the agency) of incorrect or ambiguous advice.

[23] That is, the cost of additional audit trails and dealing with arguments about liability as opposed to the cost of paying compensation.

[24] More recently Australia Post has introduced an electronic bar code system which will improve the audit and tracing of mail.

6. Quality assurance

6.1 One of the most challenging issues facing agencies which provide oral advice to clients is how to ensure that the quality of advice is of an appropriate standard across the whole of the agency's oral advice network.

6.2 DSS's current continuous improvement standards have been largely focussed on timeliness (waiting times for office and teleservice queues) rather than quality. The Auditor-General recently raised this as an issue of concern, saying that:

> 'while DSS has set ambitious timeliness targets and established information systems to monitor this, the area of service quality has received relatively little attention. This report has referred to the potential for conflict between concentrating on targets emphasising timeliness and quality of service.'[25]

6.3 Consequently, the Auditor-General made a number of recommendations for improving the quality assurance of information provided to DSS clients, including:

- monitoring of individual operators through listening-in and thorough analysis of operator call data in accordance with industry practice and privacy requirements;
- the development of protocols which clearly specify to operators the limits of their operational scope;
- adequate identification of operators to management;
- improved consultation with client groups to determine appropriate standards and operational approaches to service delivery;
- improved use of client satisfaction surveys; and
- establishment of client service priorities.

6.4 DSS agreed to the Auditor-General's recommendations, and has already taken some steps towards their implementation. For example, the Department has introduced:

- an improved teleservice protocol (which more clearly defines responsibilities);
- a policy that operators are to identify themselves and the section in which they work to the client when they answer a call; and

[25] Australian National Audit Office report on Teleservice Centres, Audit Report number 9, 1995/96, page 40.

- arrangements to ensure that operators are identifiable to management.

6.5 In addition to the Auditor-General's recommendations for improved quality assurance, our experience suggests that there is a need to pay particular attention to whether:

- advice given is accurate and **consistent** across increasingly decentralised agency environments; and

- there are some occasions where circumstances suggest that information should not be provided orally, and clients should be advised to seek the advice (or confirmation) in writing and/or that other assistance is provided as appropriate.

Consistency of advice

6.6 This office is aware that DSS is presently looking at ways to improve its capacity to monitor the advice given via teleservice operators through better call listening-in arrangements. This should help to ensure that individual operators are providing accurate and sufficiently comprehensive advice to clients. There may also be a capacity in the future to monitor operators on a national basis, so that consistency across the teleservice network can be monitored.

6.7 However, this office is not aware of any similar arrangements for advice given at Regional Offices (either over the counter or via the telephone), and there will also be significant difficulties in monitoring the consistency and quality of advice given in kiosks, mobile information vans, and other 'outposts' established within the community. This will be a significant challenge for the new CSDA, with the increase in programs administered, the large numbers of staff involved, and the introduction of new ways of providing advice to the community.

6.8 The following case study provides an example of how advice can vary between branch offices of an agency.

Case study 9 - Differing advice to taxpayers

Mrs A was receiving a British pension, and since 1978 had been claiming a deduction for the Un-deducted Purchase Price (UPP) in respect of that pension.

In May 1993 the ATO issued Income Tax Ruling TR 93/13 which acknowledged the difficulties pensioners were having in calculating UPP, and provided an alternative method of calculation which would normally give rise to a higher deductible amount than the complainant had been claiming.

Mrs A rang the Northbridge office of the ATO and asked if she could switch to the new method of claiming UPP given the terms of TR 93/13. She did this because she felt the ruling was not clear on the subject. Mrs A said she was told that she did not have the option of switching to the new method which was beneficial to her. She then complained to us about the ATO's advice in the light of the ruling.

After examining the ruling we did not believe that it positively stated the position regarding switching clearly, especially given that people of varying degrees of comprehension would be using the ruling. The ATO responded by saying that it believed the ruling was clear on the switching issue and that branch offices were advised of the issue and the correct answer.

Faced with this response, the Special Tax Adviser in this office made enquiries of 21 ATO branch offices to establish what answers those offices were giving on the switching issue. Of the 21 officers questioned, 14 clearly and generally without hesitation, indicated that swapping was permitted. However, seven responded that swapping was not permitted, and what was surprising was that in some of these cases, the staff giving the advice were from the ATO's Advisings Group. In some of the cases where the correct advice was given, it took only a few seconds for the answer to be given which indicated that the information retrieval systems were working well.

When presented with this information the ATO accepted that the position may not be as clear as they had originally suggested.

6.9 In our view it is essential that agencies consider what procedures should be in play to ensure consistency of advice, preferably at the time any new advice giving mechanism is implemented (for example, when a decision is taken to establish advice kiosks in shopping centres).

6.10 There are a number of options for testing the consistency of advice on a national basis, including 'shopping' for information, monitoring operators, and / or evaluation of complaints regarding advice given. Ideally, agencies should be in a position to conduct a comprehensive analysis of data on complaints regarding oral advice (or advice more generally). Such an analysis should identify:

- trends or recurring problems faced by clients;

- whether there are patterns which need to be addressed through training and improved information to staff (for example, in particular regional or teleservice offices, or in relation to particular subject matters); and

- how complaints or challenges regarding oral advice were handled, and with what outcome (including information such as rates of acceptance / rejection of the complaint, costs associated with review, timeliness of resolution, costs of settlement etc).

11. Agencies currently have access to a range of information sources for this purpose, including:

- requests for review by Authorised Review Officers (in DSS and DEETYA, or equivalent decision makers in other agencies) and subsequent appeals;

- details of complaints to external agencies (such as the Welfare Rights Network, Legal Aid offices, and pensioner lobby groups); and

6.12 any information collected internally regarding such complaints.

6.13 This office provides quarterly feedback to agencies on issues which are highlighted by the complaints received, including those relating to incorrect or misleading advice.

6.14 DSS presently collects information nationally on cases where a compensation payment is made because of negligence or defective administration, to identify where additional training might be required. While this is useful, it does not take account of the concerns of clients whose claims for compensation are not successful, and it is not clear that the information derived from various sources (eg. ARO reviews, appeals and external complaints) has been reviewed in an integrated way in the past.

6.15 We are pleased to see that the new CSDA has issued guidelines to establish an internal complaints mechanism. Under those arrangements, all significant complaints will be recorded on a national database, which can then be used to identify areas of operation needing improvement, and to improve customer relations more generally. This approach, combined with information from requests for review, appeals and cases where compensation or arrears is **sought** as a result of incorrect advice, will provide a more comprehensive basis on which to determine what further strategies, training or information are required to reduce the risk of incorrect or insufficient advice.

When to get confirmation in writing

6.16 It is not unusual for this office to find that liability is denied for oral advice on the ground that it was inappropriate for the individual concerned to rely on that advice, despite the fact that the advice was not qualified, or the client was not advised to test the advice in writing or via a claim (case studies 8 and 11 on pages 41 and 54).

6.17 Experience shows that most clients are not aware that when they call a teleservice centre, they are not necessarily talking to someone who is part of their local regional office, or who has access to their file (in some areas clients' files will actually be stored 'off site'). While many of a client's details are available on screen, and complex enquiries should be transferred to a Regional Office, the experience of this office and agencies such as the Welfare Rights Centre is that DSS operators will sometimes give out complex information without being fully cognisant of the client's history.

6.18 As indicated in section 4 of this paper, we believe it would be preferable if clients with complex enquiries are referred to someone with knowledge of their circumstances, and/or access to their complete details. In some cases, it will also be appropriate for an officer to advise a client that the information being provided should be tested or confirmed in writing, or that the client should take some other action which suggests they should not rely solely on the oral advice provided. This office would not want to see this as a means for avoiding responsibility, but

its prudent use may in the short term help to clarify for clients the possible limitations of oral advice.

Case Study 10 - When oral advice isn't enough

Mr G received a letter from DSS in September 1992 outlining changes to payments he received for his children under Disability Support Pension. The letter stated that any payments in 1993 would be made as Family Payment, and that he might be eligible to receive Additional Family Payment, but that an application was required to determine this. Mr G claims he called the DSS teleservice on 2 occasions and was told that he would continue to receive payments for the children in 1993. On the basis of that information he made certain financial decisions. He found when the application was assessed, that he was not entitled to any Additional Family Payment because of his income.

There was no reason to doubt that Mr G made the calls. He was not, however, able to clarify whether his enquiry was about Additional Family Payment, rather than the basic payment. More significantly, the DSS letter of September 1992 indicated clearly that eligibility for payments in 1993 would be determined by DSS assessing a claim. It would be difficult for anyone to argue that it was reasonable for Mr G to rely solely on the oral information he received, given the clear information in the letter.

6.19 Once a claim is lodged or written advice is requested, a much stronger framework of safeguards comes into play; agencies must provide written notification of decisions, and outline the client's review rights. In other words, the system is clearly geared to test the information presented in the claim, in accordance with the legislation.

6.20 The lodging of claims is not a complete safeguard, however, as there may be situations where:

- a client is unaware of a particular entitlement and is not informed by an agency (see for example, case study 2 on page 15);

- a claim is 'speculative' and cannot be lodged, such as in the case of Mrs E on page 41 (Mrs E could only lodge a claim for rent assistance **after** she had sold her house and was incurring the additional expenses); and

- a person is advised of a decision which is incorrect, but they are unaware of the error (for example, because the information provided to them is insufficient to detect that an error has occurred, case study 15 on page 74 of this paper refers).

6.21 Given the pressures of the volume of enquiries at counters, Student Assistance Centres, and teleservices, advice on the need to confirm information in writing is not routinely volunteered. Presently, it is up to the **enquirer** to request written confirmation of complex matters, or matters where there is some uncertainty about the effect of information on entitlements, for example where the information may lead the enquirer to make financial decisions which cannot be directly tested by a claim. Even then the agency may not readily respond to the request and there can be significant delays in obtaining the advice, which can result in a delay in submitting a claim. It is therefore important that the client is

also informed about any consequences to their payment (or eligibility) as a result of the need to obtain information in writing.

6.22 It is important to note that the problems with oral advice are not restricted to income support programs or pensions.

Case Study 11 - Caveat emptor

A nursing home proprietor inherited a debt with her newly purchased nursing home. The debt was raised after the purchase, and arose from a Department of Human Services and Health (DHSH) overpayment to the previous proprietor.

Before buying the home, the proprietor sought information about overpayments. She met with Departmental representatives, and was

informed by DHSH that any overpayments would be recovered from the previous owner. The Department knew the purpose of the meeting but gave wrong advice. The advice had been provided orally and the Department provided no warning that written confirmation should be sought.

When DHSH could not recover the debt from the previous owner, it took recovery action against the new proprietor, despite its earlier advice. AGS advised DHSH that it (DHSH) was not legally liable for the incorrect advice because among a number of other related factors it was given orally.

On my recommendation, DHSH sought an act of grace payment for the proprietor from the Minister for Finance. Because the payment exceeded $50,000 the matter was considered by a committee comprising senior Commonwealth officers from three departments. The committee advised the Minister for Finance not to compensate, arguing 'caveat emptor' - buyer beware. The Minister accepted that advice and refused to approve a payment.

It appears that part of the thinking was that the proprietor should only have relied on written advice and taken more steps to protect herself. I subsequently referred this case to the Prime Minister for his consideration. He agreed that there were clearly shortcomings in the advice provided to Mrs L, and the fact that the advice was provided orally did not remove the Department's responsibility for that advice. However, he also considered that Mrs L was not sufficiently diligent in her enquiries in relation to the acquisition of the business. He therefore also declined to agree to make a payment of compensation to Mrs L.

6.23 In our view, agencies should acknowledge that it is reasonable for a client to rely on the advice given to them orally, where the agency promotes oral advice as a reliable means of obtaining information. The exception should be where the **agency** indicates that the advice should be tested in writing, and the **agency** should be responsible for advising a client of the need to do so.

6.24 In recognition of this problem, the Australian Taxation Office is considering including in its client service charter that clients will be advised when they should seek written confirmation or a ruling. This seems to be a sensible and fair approach, and one which should be adopted across all agencies. In addition, charters should include details of:

- the time frame in which the client should expect to receive a response to any written enquiry; and

- the remedies available as a result of incorrect or insufficiently comprehensive advice where the agency does not meet its obligations as outlined in the charter.

6.25 It may be more feasible for departmental staff to provide written confirmation of oral advice, if information technology systems were better geared to providing printed backup information based on the common questions asked over the phone or at the counter. This issue is discussed further in the following section of this paper.

6.26 If a standardised system for recording advice is introduced as this paper recommends, it would also be appropriate for the officer providing the advice to indicate on the record where a brochure or claim form, or some other form of information was provided or posted to the client, in support of the advice given. This would assist in further reducing the risks of incorrect or incomplete advice faced by both clients and agencies.

Conclusion

6.27 In the past, agencies have generally set very few performance indicators designed to measure the quality of the service or information they provide to clients. The experience of this office and agencies such as the Welfare Rights Centre, the SSAT and the AAT suggests that there is a strong need for better quality assurance of oral advice provided to clients.

6.28 In particular, agencies need to develop quality assurance mechanisms when new information strategies are implemented. Those mechanisms should address:

- the standard of information provided;
- the consistency of information provided; and
- whether oral advice is being given in situations where it is inappropriate, or clients should be advised to test the information (either via a claim or by submitting a request for written advice).

Recommendations

- Agencies develop service quality standards for oral advice in addition to quantitative measures. Clients should be advised what remedies are available when these standards are not met, and any limitations on remedies.
- Agencies implement quality assurance mechanisms to ensure:
  - clients are provided with correct and comprehensive advice suited to their needs;

  - advice is consistent across the agency's advice giving network; and
  - clients are advised to request confirmation in writing (or to test the advice given) when they should not be relying solely on the oral advice given to them.

- Agencies implement procedures which allow for a systematic and integrated review of complaints about oral advice. Those procedures must be accompanied by arrangements for dealing with occasions where an agency becomes aware that incorrect advice may have been given to a client, but the client may be unaware of the problem.

7. Support for staff giving oral advice

7.1 The large scale provision of oral advice via teleservice type centres is a relatively new 'business' for the public sector. In the context of DSS, it has taken three years to come within service targets and wait times. DSS advises that the problem has not been budgetary, rather insufficient staff and management expertise.

7.2 DSS says that there is no pressure on call times or numbers, and that a high level of supervision exists. Nevertheless, there have been delays of up to fifteen minutes to get onto a teleservice operator. This is not unique to the teleservice. At DSS and CES offices, queues sometimes form outside the premises, and require these agencies to adopt measures just to deal with the volume of clients. The high number of callers or visitors places additional pressure on staff to complete one enquiry as quickly as possible, and move on to the next.

7.3 This pressure can result in an increase in the risk of incorrect or insufficiently comprehensive advice. In addition to improvements to procedures and quality assurance to reduce that risk, it is essential that staff providing oral advice are:

- supported by appropriate information technology and training; and
- suitably classified and experienced.

Information technology support

7.4 Agencies such as DSS, DEETYA and CSA possess technology that enables them to process and store vast amounts of data, to undertake high volume, complex calculations and searches to determine and monitor entitlements, and to process payments and minimise abuse of government laws and policies. Agencies are also focussing on the development of more sophisticated IT systems to enable them to handle higher volumes of complex transactions at greater speed, in a cost effective manner.

7.5 However, until recently, system enhancements have generally been aimed at improving agency processes (such as data matching and recording client transactions) rather than at improved decision making and advice.

7.6 In our view, there is a need to explore in greater detail the capabilities of agencies' IT systems to provide a backup to oral advice. For example, it may be possible in the future for an agency's system to provide an information sheet which is tailored to the set of information/factors provided. This 'sheet' can be computer read for the purposes of giving information over the phone, and can be handed (or sent) to the enquirer as confirmation of the enquiry; it may also contain important information about lodging claims etc.

7.7 DSS is already considering this sort of option for the future. In a recent paper on the management of organisational change within DSS, a senior member of the Department stated:

> 'Developments in information technology have already significantly changed the way in which DSS conducts its work; it was recently estimated that investment in IT in DSS has produced efficiencies of over threefold ... information technologies offer vast opportunities to open up access to information to both current and prospective customers, present numerous service delivery scenarios and offer the potential to enable customers to access defined parts of their records, much as financial institutions are now doing. In the longer term, the lodgement of claims and self-assessment by customers themselves are within the realms of possibility, while flexibility and managing complexity (rather than sheer volume) are rapidly becoming major challenges ...
>
> It may [also] be possible to use technologies like the Internet to obtain and assess information from medical and vocational professionals which could be used to assess claims for disability payments. Other opportunities may be available through the introduction of the Internet, for example, dramatically different ways for communicating with external stakeholders, and new ways for customers to provide information to DSS and to lodge claims ...'[26]

7.8 DSS has, in fact, trialed the introduction of an 'expert system' where clients' circumstances were assessed and matched with an appropriate payment. This approach could represent a significant shift from the traditional client self-assessment process.

7.9 While results of the trial were quite positive from both a client and staff perspective, there are technical issues which need to be resolved before the trial can be implemented nation wide. Unfortunately, we understand that the current status of the trial is undetermined while resource and IT strategy issues are considered further.

7.10 DSS is also considering the introduction of a number of other information technology based initiatives, for example:

- improvements to automated voice response systems used when a client dials a teleservice or Regional Office (for example, recorded messages which automatically advise clients of the impact of a public holiday on payments processing, and when payments will be made). DSS advises that up to 20% of calls should be able to be dealt with through improvements to the response system. It is envisaged that this would release resources to deal with more complex client enquiries and reduce the pressure on call waiting times and numbers;

- use of computer based shopfront kiosks; and

[26] 'The $64 Million Question: How do you bring about substantial organisational change? The DSS Experience', pages 19-20, Social Security Journal, December 1996.

- providing DSS clients with access to computer technology to deal more effectively with DSS.

7.11 Like DSS, other agencies have also been looking at information technology enhancements to service delivery. DVA has a computer based 'expert system', the 'CCPS (Client Claims Processing System)' which, in the September quarter of 1994, cut claim processing times by half. DEETYA is also working on the introduction of a new 'smart' computer system. This office understands that the development of innovative technology for service delivery of beneficial legislation is something which will be continued under the CSDA.

7.12 With the introduction of these new technologies, and the opportunities for diversification in service delivery methods they present, care needs to be taken to ensure that the design of these systems not only meets agency and client demands, but also that appropriate updating, recording and accountability processes are built in from the outset. For example, in the past, many CSA complaints have related to the failure of the CSA to keep up to date information about the changed circumstances of their clients and the provision of computer generated letters that were conflicting in their advice. With the introduction of shop-front kiosks, mobile 'info vans' and other 'remote' advice points, comes a need to ensure that:

- there are appropriate standards in place for the timeliness of updating clients records where their details change, and for 'programming in' changes to legislation and policy; and

- clients can still identify the person (or system) from whom they obtained advice.

Staff classification, training and experience

7.13 The level of knowledge and classification, turnover and experience of telephone enquiry and counter officers are factors which may limit their ability to provide correct advice on more complex matters. Problems associated with the resources for teleservice centres in DSS were highlighted in the ANAO's report. The report said:

> 'Teleservice Centres have failed to meet operational and performance targets since implementation ... DSS will not be able to resolve these problems effectively until it makes systematic use of established call centre resourcing methods in order to effectively match service-level targets to efficient use of resources. The concepts behind those methods are not new and they are well established, widely used and readily available.'[27]

7.14 At the time of the Auditor-General's report last year, there was no formal teleservice centre training program, other than an old Regional Office telephone skills training package. In-house trainers in the centres were therefore left to develop their own training programs.

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[27] Australian National Audit Office report on Teleservice Centres, Audit Report number 9, 1995/96, page 20.

7.15 Since that report, a teleservice centre training program has been developed, and staff now receive training in dealing with the public, broad technical training, and then more specialised training in a particular sub-group of programs. During 1996, all staff undertook advanced telephone techniques training, and training commenced for all senior managers of teleservice centres in call management. In the future, all new staff will go through customer training before they can take up duty.

Levels of responsibility at the front line

7.16 Point of contact staff responsible for providing oral advice to clients are usually at the ASO3 grade. This raises a question about whether the classification levels for staff are appropriate in terms of the agency's overall structure and its strategic plan, and whether there is sufficient variety and career opportunity for these staff. The practice of putting the lowest grade and least experienced officer on a counter or in teleservice centres is also likely to increase the risks in an environment where people are encouraged to seek advice orally.

7.17 This office understands that, in the past, DSS has focussed its training and placement of staff around its products, rather than the client. This specialisation in particular categories of benefits not only has disadvantages for clients (for example, a reduction in the service's ability to have other operators deal with calls when the demand for operators in one category peaks),[28] but also for staff - it offers them less opportunity for diversification, career advancement and improving their skills base.

7.18 DSS has recognised this issue, and through its Job Redesign and continuous improvement initiatives,[29] has been introducing the concept of 'self managing teams' and broadbanding of customer service officers. In addition, consultants have recommended changes to organisational structures and work practices aimed at improving skills and productivity. This should offer improvements in work variety, additional responsibility, reduced hierarchy and red tape, and further incentives via salary rates linked to competency levels.

7.19 This office understands that these new initiatives are to be adopted by the CSDA. Hopefully, they will also indirectly have a positive effect on the quality of advice given to clients.

Conclusion

7.20 If the new CSDA and other agencies are to move to a more client oriented approach, they will need to ensure that appropriate changes to information

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[28] For a further discussion of this issue, see Australian National Audit Office report on Teleservice Centres, Audit Report number 9, 1995/96, pages 24-25 and 44.

[29] For further discussion of these initiatives, see 'The $64 Million Question: How do you bring about substantial organisational change? The DSS Experience', page 6, Social Security Journal, December 1996.

technology and staffing structures are made. Those structures will need to be supported by a commitment to training and development, improved career opportunities for staff, and continuous improvement initiatives.

7.21 There have been encouraging developments in this regard. However, there is a need to ensure that issues of information currency, quality assurance and consistency are considered in new technology and staffing arrangements.

Recommendations

- The development of 'expert systems' should be sustained to provide better support and advice to staff, clients and potential clients.

- Developments in information technology must be accompanied by appropriate updating, recording and accountability standards at the time new technologies are introduced.

- Agencies must ensure adequate resources for oral advice centres, so that the quality and comprehensiveness of advice to clients is not adversely affected by pressures from queues and call waiting times.

- Agencies must implement comprehensive training programs for staff providing oral advice. Those programs should emphasise the need to provide correct and comprehensive advice tailored to client's needs.

- Staff responsible for providing oral advice must be appropriately classified, and have access to adequate career enhancement and staff development opportunities.

8. Legal issues

8.1 At present, there are a number of legal issues which can prevent clients from obtaining a remedy for poor quality oral advice which results in a financial loss. The most significant problems arise from:

- difficulties clients face in meeting the evidentiary requirements to substantiate a claim that they were provided with incorrect, or insufficiently comprehensive advice. Notwithstanding legal advice that a claimant who puts forward an uncontradicted and credible case that he/she received certain advice, the onus of proof required to establish incorrect advice is more difficult to satisfy for oral advice than written;

- the application of statutory time frames which prevent the backdating of a client's payment where they may have been underpaid (or received no payment at all), even though an error was made by the Department and/or the client had no way of knowing that an error had occurred; and

- the detailed legal principles underlying the Commonwealth's compensation arrangements can mean that, even if a client can provide sufficient evidence of the advice given, and prove that it was reasonable to rely on that advice, they may not be able to obtain a financial remedy for any loss they suffered.

8.2 Unfortunately, our experience also suggests that these problems may be exacerbated by contracting out core government services.[30] Many Commonwealth agencies are now looking to outsource various core services. We understand there is a possibility that functions such as the teleservice may be contracted to the private sector in the future. Where that occurs, this is likely to increase the difficulties in obtaining redress for incorrect or ambiguous oral advice.

8.3 Unless there are arrangements built into contracts which provide for a chain of accountability back to the 'principal agency', then clients may be left in the situation of having to sue a private sector agency for financial loss as a result of incorrect advice. The reality is that clients of beneficial legislation would rarely be in a position to take this sort of action, and would therefore have to 'wear the loss'.

Evidentiary requirements

8.4 The threshold question in any claim that an agency gave incorrect or insufficiently comprehensive oral advice, is determining what was actually said. As indicated in section five of this paper, where this office investigates a complaint it is not uncommon to find there is no record on a client's file of an

[30] This issue is discussed further in this office's submission (February 1997) to the Senate Finance Public Administration References Committee 'Inquiry into Contracting Out of Government Services'.

alleged conversation, or of the advice provided. It is undoubtedly easier to establish a claim if there is a record of the advice given.

8.5 DSS makes the point that even where records do exist, they will not necessarily resolve a disputed issue, as it is often only with hindsight that it is possible to determine the element of the conversation crucial to the matter in dispute. However, the existence of a record (even though it may not be as comprehensive as desired) provides a starting point for considering a client or agency's claims about the advice allegedly given, and is certainly superior to having no record at all.

8.6 In the absence of firm evidence, an assessment must be made of the **probability** of what was (or was not) said, taking into account the total circumstances surrounding the advice allegedly given. There must also be an assessment of where the responsibility lies at particular points of the transaction. It is reasonable to expect that individuals will take some steps to gain relevant information about their eligibility and / or protect their interests. But it is also reasonable for agencies to acknowledge that the rules and procedures may not always be evident to clients, and that clients may have special needs which may require agencies to take extra precautions. It is also appropriate for agencies to acknowledge that procedures may not always have been followed.

8.7 Agencies have at times perceived that this office is willing to accept the complainant's version of events without corroboration. Clearly this should not be the case. However, this office does not think it is reasonable for agencies to rely on the absence of records and accountability systems to argue that the client's versions of events should not be accepted because it cannot be 'proven'.

8.8 The fact that an agency or client cannot produce a record of a conversation does not mean that evidence does not exist, and this office does not think that an absence of records should be the **sole** reason for an agency to claim that an event did not occur. Given the volume of enquiries agencies such as DSS handle, and the high turnover of staff, it is simply not credible for an agency to attempt to deny that a conversation did not occur on the basis:

- of assumptions about the credibility of a client;
- that there is no record;
- that no-one can remember the conversation; and / or
- that the individual who allegedly gave the advice is perceived to be experienced or unlikely to have made an error.

8.9 The following case study illustrates the difficulties in proving that particular advice was given in the absence of any record of that advice, and how there can be a tendency to make irrelevant assumptions about the credibility of a client when assessing whether they may have received incorrect advice.

Case Study 12 - A credible story

Mr L was employed by a clothing company which closed down during the Christmas / New Year period; he was entitled to one week's leave only. Mr L claims his wife telephoned the DSS teleservice to enquire whether he would be eligible for any benefits during the seasonal close down. The teleservice officer allegedly told Mrs L there was nothing that could be done. Because the officer did not ask any further questions and gave a firm response, Mr and Mrs L believed there was a definite rule about such cases, and relied on that information. As a result, Mr L did not claim benefits for the close down period.

The CES subsequently advised Mr L that he could have been entitled to Jobsearch Allowance during the shut down period if he had made a claim. Mr L then requested payment for the period in question. DSS rejected his request for payment for the period because he had not made a claim, there was no record of the conversation, and because to obtain the benefit he would have had to satisfy an activity test which he had failed on a later, similar occasion.

This office concluded that despite a lack of record of the enquiry, both Mr and Mrs L's versions of events were consistent and credible over time, and should therefore be accepted as evidence that the enquiry was made, and the particular advice given. Mr L's recollection of his wife's account of events was corroborative, and his behaviour in claiming benefits at other times during a factory close down period demonstrated that he took appropriate steps to claim a benefit when he believed he was entitled to it. Mr L's failure to meet the activity test on another occasion was **not** a relevant consideration, as each claim must be considered on the basis of the circumstances at the time it is made, and the Department's opinion about whether he was likely to meet the eligibility test on this occasion was conjecture. The Department subsequently agreed to compensate Mr L for the period in question.

Balance of probabilities judgements

8.10 In considering whether there is sufficient evidence to make a 'balance of probabilities' judgement on what occurred, this office:

- establishes all relevant facts of the case, and sets out in as much detail as possible the particulars of the alleged oral advice, and the client and agency's version of events; and

- looks at whether there is any corroborating evidence. It is important to determine whether there is any objective evidence to support the complainant's or the agency's version.

8.11 Corroborating evidence can take a number of forms:

- documents which confirm the version of events, including agency records (but noting the comments of DSS regarding the limitations of such records) and contemporaneous notes by the complainant recording the date of contact with the agency;

- witnesses to the alleged advice, whether their version of events is consistent with that of the complainant or the agency, and whether they are independent and credible witnesses; and

- the actions of the complainant after receiving the alleged advice, and whether this action was consistent with the advice they say they received.[31]

8.12 This office is also guided by the following principles in determining whether there is sufficient evidence that advice of a particular nature was given at a particular time:

- the fact that there is no record of the alleged advice does not mean that it was not given, but it is important for this office to be satisfied that the complainant's version of events is credible, and consistent. This will involve looking at the sequence of events; the nature of action taken; any history of dealing with the agency which could reasonably have determined the complainant's approach; examining the consistency of the complainant's statements over time; and the conduct of the complainant following the alleged advice; and

- considering all the available evidence, is it more likely than not that the version of events the complainant put forward is accurate? For example, does the evidence support the fact that the agency gave the advice as alleged and that the complainant relied on its accuracy?

8.13 It should be noted that such an approach can provide 'justice' in only a small number of cases not otherwise able to be substantiated since such supporting evidence is not always available even though the person appears to be credible.

Case Study 13 - Balancing probabilities and fairness.

Mr C claimed that in late 1989, he attended a DSS office with his wife in response to DSS's request to see financial documents and review his wife's entitlement to age pension. Mr C claims that he asked about his eligibility for age pension as he was turning 65 in three months time. He claimed the counter officer checked the income details for himself and his wife, and told him that he would not be eligible because of his superannuation payments. In June 1992, while making enquiries at a DVA stand during Veterans Awareness Week, he discovered that he had most likely been eligible for an age pension since 1990. Mr C sought compensation for pension foregone until he applied in July 1992.

There appeared no reason to doubt that Mr and Mrs C visited DSS in November 1989, and provided financial documents in relation to the review of Mrs C's age pension entitlement. Nevertheless, despite the complainants providing detailed information about when they visited DSS, there was no information to corroborate what enquiry Mr C made, and what advice DSS gave. There were some inconsistencies in the various versions of events, and this fact, together with the fact that the events took place some four years before we examined the issue, gave rise to doubts about Mr C's recollection of events. We concluded that it was not possible for our office to establish 'on the balance of probabilities' what questions were asked, and that the alleged incorrect advice was given.

[31] However, in considering a person's actions we acknowledge also that there will be cases where a client misunderstands the advice given (through no fault of the person giving the advice) and acts accordingly.

Questions arise, however, as to the 'fairness' of this given that Mr C would have been eligible for the age pension had he applied. (This point is considered at page 79)

Application of statutory time limits

8.14 Statutory rules place the onus on the client to apply for a review of a decision, within statutory time frames. For example, a DSS client who does not apply for review within the statutory three month time frame, is at present not entitled to receive compensation for payments forgone as a result of a successful review brought outside the time frame. This limit means that a pension or benefit cannot be backdated beyond three months, irrespective of who the client is and whether they have special needs.[34]

8.15 This rule applies in situations even where:

- the Department acknowledges that it gave incorrect advice;
- the client had no way of knowing that the decision was incorrect; and
- the person would have been entitled to the pension or benefit had they applied (case study 14, page 67 refers).

8.16 The unfairness of this provision becomes more stark when considered in light of the rules for the recovery of debts. An overpayment can be raised, and a debt recovered anytime up to six years past, and the period of the overpayment can commence from the time the person could 'reasonably have become aware' of the overpayment. There is considerable inequity in the rules relating to under and overpayments, which clearly benefits the Commonwealth.

Case Study 14 - The effect of statutory time limits

Mrs M was an age pensioner who lived in her own home. In September 1992, she advised DSS she was moving to Tweed Heads for an indefinite period to look after an old friend who had just had an operation. She advised she would be provided with rent free accommodation in return for performing house-hold chores and would not be in a 'marriage-like' relationship.

In December, the Department sought details of her real estate holdings and furniture, which Mrs M duly provided. The value of her holdings was $85,000. For some unexplained reason, the Department recorded this on Mrs M's computer record under the category of 'Savings and Investments'. This artificially inflated her means for the calculation of her pension, and her pension was reduced drastically as a result (ultimately from $239.90 to

[32] Secretary of Social Security v Cooper (1991) 21 ALD 155.

[33] Section 34A of the *Audit Act 1901* is the provision governing act of grace payments by the Commonwealth. The issue of compensation payments is discussed further in paragraphs 30 - 66.

[34] DSS has advised me that it is prepared, however, to take 'special needs' considerations into account when considering whether the agency acted with reasonable care in providing the advice.

\$47.70 per fortnight). Mrs M was advised in writing that the reduction of her pension was because of a change in her circumstances.

In early 1995, when compelled to draw on her shrinking savings, Mrs M consulted the manager of her bank. He came to the conclusion that her pension rate had been calculated incorrectly. The Department was notified, and Mrs M's pension rate was corrected from June 1995. Mrs M sought arrears of pension but DSS refused. She then appealed to the SSAT, which concluded that, because Mrs M had not sought a review of the decision to reduce her pension within three months, DSS was under no obligation to pay

full arrears. Mrs M then appealed to the AAT. The AAT was compelled to affirm the decision at law. However, in making his decision, Deputy President Forgie commented:

'Mrs M innocently accepted that her changed circumstances had the consequence of these drastic reductions in her pension entitlement on the not unreasonable assumption that the Department knew its business, little suspecting that, in her case, it had made a blunder of major proportions ... It is not disputed that as a result of the Department's error, there has been a gross underpayment of the pensioner's appropriate rate of payment of several thousand dollars ....

The first thing to observe is that the Department's resistance to pay the pensioner arrears of which she has been deprived by a Departmental error has little to recommend it in equity. The Department has admitted a grievous error and relies on the bare bones of the legislation to justify its refusal to make proper restitution ... I might add in parenthesis that it was only yesterday that I sat on a case ... in which the Department sought reimbursement of an overpayment of family payment, claimed as a debt due to the Commonwealth ... The overpayment was only a few thousand dollars, but the couple was pursued relentlessly by the Commonwealth as creditor. Yet when the Commonwealth is a debtor, it is able to shelter behind legislation to avoid payment of monies wrongly withheld from an old age pensioner ....

this pensioner is an elderly lady with little training in statutory interpretation, let alone making sense of the Social Security Act 1991 neatly condensed into three volumes ... I feel acutely embarrassed at having to endorse a Departmental decision based on the clear negligence of an assessor and adopted by the Delegate ... If the Commonwealth maintains that a [Finance Direction 21/3] payment is not available on the grounds that the negligent decision was subject to a right of review ... it seems to me that the instant case is a classic example where an [act of grace] payment is indicated on the basis that the legislation produces an inequitable result.'[35]

8.17 There may be some relief from the unfairness of this sort of outcome as a result of a recent AAT decision, which indicated that where an underpayment is due **solely** to departmental error, the AAT may make an order for full arrears.

8.18 In *Re Frost and Secretary, DSS*[36] the applicant was underpaid a carer's pension for approximately 18 months because DSS mistakenly omitted to include rental assistance in her rate of pension. The AAT found that the legislative time limit for appeal was irrelevant because the error was solely the responsibility of the Department. It ordered that DSS pay the applicant full arrears. The

[35] AAT Q96/441. The issue of remedies, and anomalies in the Commonwealth's compensation arrangements in cases of this nature are discussed further in the following sub-section of this paper.
[36] AAT Q94/842.

Department did not appeal this case,[37] but it did appeal a case which followed the Frost decision. That case was the case of *Sting and Secretary, DSS*.[38]

8.19 In that case, Mr Sting applied for Unemployment Benefits. He applied to be paid at the married rate, but his partner failed to provide sufficient proof of identity documentation within the required time frame. Mr Sting also failed to provide an employer separation certificate. He was subsequently advised that his application had been refused, because he had not given enough evidence that he was unemployed.

8.20 In March 1991, Mr Sting's claim was reconsidered, and the payment of unemployment benefits approved at the **single rate**. The letter sent to him only stated the $ rate at which he would be paid, and gave no indication that this was calculated at a single rather than a married rate. In 1994, Mr Sting's entitlement was reviewed, as were his partner's details, and it was then that he discovered that he had previously been paid at the single rate only. Because Mr Sting had not appealed the decision granting his benefit at the single rate within three months of the decision being made (and regardless of the fact that he had no way of knowing that he was only being paid at the single rate), the increase in his pension to the married rate could only be backdated to the date of his request for a review of the decision (ie. in 1994).

8.21 The AAT found in the Department's favour, finding that, at law, the Department was only required to advise the client of the rate of payment. However, in finalising the decision, Deputy President Forgie said:

> 'Before leaving this decision, I should observe that I consider that the Department should improve the information which it gives social security recipients regarding the rate of their entitlements. The information which it is said was printed on the back of Mr Sting's letter contains a great deal of closely typed information. That information deals with matters such as the recipient's obligations to advise the Department of changes in his or her circumstances, the nature of income and assets, taxation obligations and the recipient's rights to have the decision reviewed. It does not deal with the way in which the rate of entitlement has been calculated. **Nowhere on the front or back of the letter is there any indication whether the person is being paid at the married or single rate, is being paid a pharmaceutical or rental allowance or that his or her rate has been adjusted for some other reason such as his or her age. Those matters cannot be worked out by reference to the total payable for people cannot be expected to know the relevant rates.**
>
> **That sort of information should be available in much the same way as the Australian Taxation Office is able to make information available when it sends a taxpayer a taxation assessment. It should be available so that a person is able to determine whether or not he or she thinks the rate appropriate.** For people such as Mr Sting, who live in a country town with no access to a regional office of the Department, information is not readily obtainable. Telephones and letters are not always viable means of

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[37] This was because the Department considered that the matter should not have gone to the AAT because the Departmental review process was not finalised. The Department has also said that these cases 'are clearly incorrect in their analysis'. However, it went on to say that the decisions were not appealed because there was evidence from which it could be said that the customer sought review within 3 months of notification of decision, and '[T]hat should have been the basis for a decision in the customer's favour.'

[38] AAT Q95/136

communication. In addition, experience in this Tribunal shows that there is often a general assumption that the Department will have calculated the rate correctly. That assumption is only dispelled by some other occurrence. By the time it is dispelled the time for review has passed and so too have a person's rights to be paid that to which he or she would otherwise have been entitled.

While it may be possible to understand why Parliament has sought to limit the amount of arrears payable to a person, it is not possible to understand why it has not imposed an obligation upon the Secretary to give recipients sufficient notice to enable them at least to be on notice that they should make further enquiries regarding the rate of their newstart allowance' (emphasis added).

8.22 Despite the AAT's decision in the Sting case, in *Kelly and Secretary, DSS*[39] the AAT ruled that arrears of the Kelly's pensions should be backdated to the date of the error. In that case, the Department had underpaid the applicants' pensions for approximately 17 months because of an error in transferring their asset records from a manual to a computerised system. The AAT held that it was **not** appropriate to resolve the matter through the exercise of review powers in the Act, and that the 3 month rule therefore did not prevent the correction of the error taking effect from the date of the error.

8.23 Should other decisions follow this one, and the Department appeals, it remains to be seen whether the Federal Court would uphold the liberal interpretation which the AAT applied in the Kelly case.

8.24 In the interim, DSS is continuing to backdate payments only where the client has requested a review within the three month time limit. While this practice continues, the only way for clients to be sure of the accuracy of the advice they are given and to protect themselves is to request a review of **every** decision (within statutory time frames) as a precautionary measure. This is clearly undesirable from a workload perspective, but under a self-assessing system it may be the only measure clients can take to avoid missing out on entitlements where it is later found that incorrect or incomplete advice was given.

8.25 As discussed in the following section of this paper, the current compensation arrangements are insufficient to provide a remedy in these cases. In our view, the more equitable and appropriate means of resolving this situation is to amend the legislation so that statutory limits do not apply in cases where the agency is solely or substantially responsible for the error, and/or the client could not have 'reasonably' been expected to know that an error had occurred.

8.26 We support the proposal of the AAT that the legislation should be amended to require agencies to ensure that, when clients are provided with notice of a decision or a change in rate of payment, they are also provided with sufficient information to allow them to make an informed judgement on whether a decision about their entitlement is correct (favourable or otherwise). This would include, for example, information on the component parts of any payment and the basis on which the rate has been determined.

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[39] AAT V95/254.

The Commonwealth's compensation arrangements for incorrect advice

8.27 Once this office concludes that one version of events is more likely than the other, any avenues of remedy need to be considered, including compensation. At present, the only means of remedying a financial loss due to incorrect oral advice are:

- Finance Direction 21/3 (where the advice is negligent and the Commonwealth is legally liable);
- the act of grace provisions of the *Audit Act 1901*; and
- an ex gratia scheme for compensation for detriment caused by defective administration.[40]

Legal liability for incorrect or misleading oral advice

8.28 Finance Direction 21/3 provides that claims against the Commonwealth involving potential legal liability of up to $10 000 can be settled by a departmental Secretary.[41] Claims in excess of this amount can only be settled with the agreement of AGS. In deciding whether to settle a claim, most agencies routinely seek AGS advice about whether it is AGS's view that legal liability might exist in a particular set of circumstances where compensation has been sought.

8.29 A-G's Legal Practice Briefing No. 6 sets out the general principles for considering the issue of legal liability for negligent advice (including oral advice). AGS recognises that liability will arise where:

- a duty exists to exercise reasonable care in giving advice;
- there has been a breach of the duty; and
- the recipient of the advice has suffered a reasonably foreseeable and proximate loss as a result of relying on the advice.

8.30 AGS considers the following factors, adopted from *Shaddock & Associates v Parramatta City Council* [(1981) 150 CLR 255], in assessing whether it believes there is a duty to exercise reasonable care:

- whether the matter on which advice is given is serious (as a general rule, it has been accepted by AGS that advice on financial entitlements is 'serious');

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[40] Both the Act of Grace provisions and the scheme for remedying defective administration are ex gratia schemes. That is, the payment of compensation is not made on any legal grounds, but rather because there is a perception that there are 'moral' grounds which suggest that compensation is warranted.

[41] This financial limit has only recently risen from $2000.

- whether the speaker realises, or ought to realise, that the enquirer will rely on that information as a basis for some action; and

- whether it is reasonable for the enquirer to rely on the advice.

8.31 As an example of the difficulties that can arise, in case study 8 (page 41), AGS accepted Mrs E's version of the facts, but advised DSS in the first instance that Mrs E had not demonstrated to the information provider that she would rely on the information provided because she had only indicated that she was **considering** selling her home. This office argued that Mrs E **had** demonstrated that she had a specific transaction in mind (selling her home and moving into a specific retirement village with specific weekly costs), and that in these circumstances a duty of care could be established. To rely on the fact that she said she was 'considering' selling her home is to suggest that she could only rely on the advice if she specifically warned the DSS officer that she would be doing so.

8.32 AGS reconsidered Mrs E's case, and now accepts that DSS could be held liable for negligent oral advice in that case. This latter advice suggests a more limited role for AGS's concept of 'objective reasonableness' in assessing possible claims for incorrect oral advice in cases where clients ring an established advice service (such as DSS teleservice), because the agency involved is aware of (and encourages) client reliance on its advice.

8.33 However, there are also other significant difficulties with the AGS's interpretation and application of the law relating to claims of negligent advice.

Issues relating to the Jones case

8.34 An issue which frequently arises in the context of allegedly negligent oral advice is the effect of the decision in the UK case of *Jones v Department of Employment* ([1989] 1 GB 1). In essence, this case held that:

- as a general principle, the exercise of a statutory power in good faith will not give rise to a common law duty of care where the exercise of that power is subject to a right of review; and

- the failure to exercise a statutory power, where the failure to do so is subject to a right of review, will not give rise to a common law duty of care.

8.35 The broad application of these principles has been far reaching - particularly in the DSS context where the Social Security Act generally limits the payment of full arrears to situations where the person has sought review within 3 months of notification of a reviewable decision.

8.36 The application of the *Jones* principle has also been used in cases where allegedly negligent **advice** is involved. In our view, both the *Jones* case and its only Australian application *(Coshott v Woollahra Municipal Council* ([1988] 14 NSWLR) are limited to the question of negligent / incorrect **decisions**, as distinct

from the question of whether there is a common law duty of care in giving **advice**. Dennis Rose QC noted this in his advice to DSS in June 1994:

> '**Decisions under the Act should be contrasted, in my opinion, with advice** to a client which induces a person not to make a claim or not to pursue a right of review ... **there could conceivably be circumstances involving sufficient proximity and reasonable reliance to found a duty of care subject only to the question of whether it is impliedly excluded by the Act**. There are no statutory remedies in such cases, and I see no basis for thinking that a common law duty is impliedly excluded' (emphasis added).

8.37 The former Chief General Counsel's position therefore appears to be that the principle in the *Jones* case may or may not apply, depending on the circumstances. Mr Rose's view appears to be that there is a difference between making a **decision** (which a person can appeal against), and giving **advice** which leads a person **not** to do something, because if they do not take any action which leads to a decision, they have no avenue for review.

8.38 Mr Rose's view contrasts with the earlier view in A-G's Legal Practice Briefing No 6, which considers that any distinction between making a decision, and giving advice which causes a person not to do something, may not be relevant. Legal Practice Briefing No. 6 states that:

> 'it is arguable that the principle underlying the decision in that case (*Jones*) should apply to the giving by an officer of advice concerning entitlement to a pension or benefit in circumstances where, if a decision was made concerning that entitlement, there would be a right of review of the decision. In this regard, it is arguable that there is **no relevant distinction** between, for example, **an officer giving advice** to a person that causes that person to refrain from applying for a pension or benefit, **and a situation where an officer rejects an application** for pension or benefit which has actually been made' (emphasis added).

8.39 We are aware of legal advice confirming Commonwealth liability in respect of a person incorrectly advised not to claim a benefit, who, relying on that advice, refrained from making a claim. This principle is not always followed. For example, DSS policy is that, if a person is issued with a notice of an incorrect decision, but does not appeal within three months, no claim (for compensation) should be invited if the error is discovered after the three month period because a negligence claim would not be successful.

8.40 We do not agree with that position; an appeal mechanism must be real rather than illusory. In our view, focussing on the existence of unexercised review rights, and the subsequent limitation on payment of arrears under the Social Security Act, as justification for non-payment of compensation should be tempered by certain considerations. Most importantly, there should be an assessment of the feasibility of a client exercising those review rights in their particular circumstances. We believe this requires the assessment of the quality of information provided by the agency about the relevant decision, and whether it was reasonable to expect the client to have been aware of an incorrect decision. The following case study demonstrates this point.

Case study 15 - Real or illusory appeal rights?

Mr J received an income stream from an allocated pension. DSS took this income into account in calculating his Mature Age Allowance (MAA) entitlement. There is a DSS file copy of advice provided to Mr J in February 1994 of his allocated pension details including its commencement date.

In July 1994, assent was given to new legislation with the effect that the

current account balance of allocated pensions, purchased on or after 1 July 1992, would be assessed under the social security assets test. In August 1994, DSS wrote to Mr J informing him that as of 11 August 1994, his MAA would stop as his assets were too high.

On 22 May 1995, Mr J was informed by a financial adviser that his allocated pension account balance should be excluded from the asset test as it commenced prior to 1 July 1992. Mr J immediately contacted DSS and his MAA payments recommenced from 1 June 1995.

An ARO refused to pay arrears, and this decision was affirmed by the SSAT. The SSAT then recommended that Mr J be compensated for his loss. However, AGS advised that there was no legal liability to compensate because the decision was subject to statutory review rights. This was despite the fact that Mr J had no way of knowing the assessment of his allocated pension was incorrect, and he did not, therefore, know he should appeal the decision to cancel his MAA.

8.41 Because of concerns about this issue, last year this office invited two lawyers[42] with expertise in this area to a workshop on the issue of oral advice. Both lawyers took a different view of the *Jones* case from that of the AGS. They advised that they do not think the *Jones* case can be extrapolated to any legislative structure that provides an appeal mechanism, and that it is not an authority for any general legal principles since it turned on a particular legal context. This office is aware of other lawyers experienced in this area who also disagree with the AGS's view of the applicability of the *Jones* case in the Australian context.

8.42 The AGS's representative at the workshop responded by advising that the AGS had reviewed its position on this matter, and they agree that the *Jones* case is less relevant to advice than to decisions. Nevertheless, the AGS remains of the view that *Jones* is applicable, and the Commonwealth is therefore bound to follow it.

8.43 This office is concerned that the AGS considers itself bound to apply the *Jones* case in this way, until such time as it is tested. The individuals affected by this interpretation of the law are those with the least capacity to test it in litigation. Even if this matter were to be tested by litigation, it would not necessarily result in an acceptable outcome, it would only resolve the legal argument. The reality is that the application of the *Jones* case is resulting in unreasonable and unjust outcomes for some individuals. As indicated elsewhere in this paper, the preferable solution is to amend the legislation to ensure that statutory limits for

[42] Ms Linda Pearson, law lecturer at Macquarie University and Ms Margot Stubbs, law lecturer at the Australian National University.

seeking a review of advice or a decision, or for backdating payments should not apply where:

- the agency is solely or substantially responsible for the error; and/or
- the client could not reasonably be expected to know that an error occurred; and/or
- an equivalent or higher pension or benefit would have been available if the person had applied.

Ex gratia payments

8.44 Where there is no legal liability for incorrect advice, it may be possible for an agency to pay compensation under section 34A of the *Audit Act 1901*, or a relatively new scheme where payment can be made to remedy the effect of defective administration.

Act of grace payments

8.45 Until late 1995, most Commonwealth agency heads had the authority to approve an act of grace payment (upon an Ombudsman recommendation, and up to a financial limit of $50,000) where there was no legal liability, but there were special circumstances which suggested that the Commonwealth had a 'moral obligation' to pay compensation.

8.46 Payments under the act of grace mechanism were generally made where there were purely moral or 'humanitarian' grounds for payment, or where defective administration by an agency had clearly resulted in an unacceptable outcome. In late 1995 Cabinet agreed that, consistent with an environment of increased devolution and accountability for agency heads, a new scheme for defective administration should be established, and payments approved by Ministers (or persons authorised by them). Under the new arrangements, act of grace payments can still be made, but claims have to be referred to the Department of Finance, and would generally be reserved for the 'purely moral and humanitarian' cases.

8.47 The Department of Finance maintains a restrictive interpretation of its guidelines for act of grace payments, particularly in relation to what constitutes 'special circumstances'. For example, the Department's own guidelines state that the act of grace provisions can be used to remedy the effects of legislation which has produced an **unintended, anomalous, inequitable, unjust or otherwise unacceptable result.** Despite this, the Department has refused on a number of occasions to exercise the act of grace power because it believes the power should not be used to remedy the effects of legislation or the intent of Parliament. (Case study 17 on page 80 refers)

8.48 The Department of Finance has indicated that the act of grace discretionary remedy should not be employed to overcome 'structural' flaws in legislation affecting particular categories of people - that being the role of Parliament itself. To illustrate, there have also been cases where an act of grace payment has been refused on the grounds that the person's circumstances were not sufficiently unique - a number of other individuals had been similarly affected - and the Department's view was therefore that the claim was not sufficiently 'special'. In my opinion, such an approach has little regard to the real purpose of the legislation, which is to remedy situations where the outcome is unjust.

8.49 In our experience, incorrect oral advice cases would rarely fall within the criteria the Department of Finance applies to act of grace cases, and cases have in the past been refused because they may act as a 'precedent' for other cases. This is despite the fact that a 'precedent' in the legal sense cannot occur within an ex gratia scheme, because payments are purely discretionary and not based on any legal obligation.

8.50 Given that the act of grace mechanism is unlikely to be used for incorrect oral advice cases (except in very rare cases), the most commonly considered other remedy available is under the scheme for compensation for defective administration.

Compensation for defective administration

8.51 Payment under the scheme for compensation for defective administration can be made where an authorised person is of the opinion that an agency official, acting in the course of his or her duty, has directly caused a claimant to suffer detriment (or prevented the claimant from avoiding detriment)[43] by virtue of one of the following reasons:

- a specific and unreasonable lapse in complying with existing administrative procedures that would normally have applied to the claimant's circumstances; or

- an unreasonable failure to institute appropriate administrative procedures to cover a claimant's circumstances; or

- giving advice to (or for) a claimant that was, in all the circumstances, incorrect or ambiguous; or

- an unreasonable failure to give to (or for) a claimant, the proper advice that was within the official's power and knowledge to give (or was reasonably capable of being obtained by the official to give).

8.52 The guidelines on the scheme issued by the Department of Finance specifically state that the 'scheme is permissive'. That is, it does not obligate the decision maker to approve a payment in any particular case, but the decision -

[43] Under the terms of the scheme, detriment can be a financial and / or non-financial loss.

whether to approve **or refuse** a payment - must be publicly defensible having regard to all the circumstances of the matter.[44]

8.53 In addition, there are limitations on the scheme - for example, it cannot be used to make payments where it is reasonable to conclude the Commonwealth would be found liable (such claims must be settled under Finance Direction 21/3), or to offset the payment of a recoverable debt (there are separate provisions in other statutes for dealing with the waiver or write-off of debts).

8.54 This office was consulted on the establishment of the new scheme, and expected it would provide for a number of situations where there was a clear obligation on the Commonwealth to compensate (but there was no legal liability), and the individual's circumstances did not fall within the Department of Finance's rather restrictive definition of 'special circumstances' under the act of grace provisions.

8.55 Unfortunately, in the short time the new scheme has been in operation, it is apparent that some agencies are attempting to apply an extremely narrow and legalistic interpretation of the scheme, in which the totality of an individual's circumstances are not taken into account. The effect is to render it a 'de-facto' legal liability test, which appears inconsistent with the intent of the ex gratia scheme. The Department of Finance disagrees, pointing out that the new scheme was never intended to, or framed by the Government to, address a person's circumstances. The essence of the scheme is whether or not an agency's administration has been defective.

8.56 In our opinion, the total circumstances of each case need to be considered together for the payment of compensation under the scheme (that is, any elements of defective administration **and** the special circumstances of the individual). This is firstly because the scheme is 'ex gratia' in nature, and is therefore purely discretionary. Secondly, a failure to do so results in some individuals falling through the cracks of the Commonwealth's compensation arrangements for making such payments, even though that result is unreasonable. The following case study is a case in point.

Case Study 16 - Mr G: An octogenarian with terminal cancer

Mr G was granted an age pension. His mental faculties were affected by senility; in particular his short term memory was badly affected. He also had very poor sight, having undergone two operations on his eyes. Mrs G attended to all correspondence - Mr G never answered letters, and refused to answer the telephone. When Mrs G died, Mr G was unable to care for himself. Consequently, after his wife's death, he lived alternately with his daughter in England and his son in Australia, spending part of each year with each of them.

Until he left Australia in April 1992, his absences from Australia had been less than six months, and he was therefore unaffected by the departure certificate provisions of the Social Security Act. Those provisions provide that, if a pensioner leaves Australia without having obtained a departure certificate (for which there is no question Mr G would have been

[44] Department of Finance Estimates Memorandum 1995/42, page 5 of Attachment A refers.

eligible), then their pension is cancelled until such time as they return to Australia to reclaim it - there is no way to regain the pension while a person is overseas.

When Mr G left Australia to visit his daughter in April 1992, he intended to return to Australia in time for Christmas, and his daughter bought return tickets for herself and Mr G. Unfortunately, Mr G became ill, and was diagnosed with cancer. He underwent surgery, but his condition deteriorated. Consequently, his daughter placed him in a nursing home in England. She then came to Australia as planned, and notified the Department of Social Security that her father had remained behind and she was unsure when he would be able to return.

In November 1992, the Department suspended Mr G's pension because he had been overseas for more than six months without a departure certificate. His daughter endeavoured to have his pension restored, but was unsuccessful. Mr G never returned to Australia due to his ill health, and as a result he never regained his pension. He died in 1993, and his daughter (who bore the cost of his nursing home expenses) is now being sued for his funeral expenses.

Investigation of Mr G's case indicated a number of elements of defective administration in the Department's handling of his case. In addition, the investigation uncovered a series of significant systemic deficiencies in the Department's administration of the relevant legislation over a number of years, despite having information from a pilot study which could have prevented many of those problems occurring. These problems resulted in the legislation being substantially changed, and in the future, people in situations similar to Mr G will be able to have their pension restored with full arrears.

The Secretary of the Department initially agreed to make an act of grace payment to Mr G's estate to compensate for the loss of Mr G's pension. However, shortly afterwards, the devolution of the act of grace power to agency heads was revoked, and the Secretary of DSS therefore had no authority to exercise that option. I then advised the Secretary that I considered there was sufficient defective administration in this case to warrant a payment under the new scheme; especially if the defective administration was considered **in combination** with the special circumstances of the individual. He refused to make the payment, saying that Mr G's 'special circumstances' were

not relevant under the terms of the defective administration scheme, and that he did not consider the defective administration in Mr G's case was 'bad enough' to warrant payment.

I then referred Mr G's case to the Department of Finance to obtain that Department's view of whether Mr G could be compensated under the new scheme. The response was that, although it would be possible to reach an 'on balance' conclusion that there was sufficient defective administration to merit payment, the scheme could not be used because it is not available to counter the effects of legislative provisions which have been found to be flawed. The Department also declined to exercise the act of grace power because it said that it could not discern that the legislation was not operating as Parliament intended. Paragraph 53 sets out the Department's rationale.

In our view, the result is unjust and unreasonable. I have therefore referred this case, and those of another six similarly affected pensioners to the Prime Minister for his consideration.

8.57 A number of disturbing assumptions were made in this case:

- that any consideration of the 'defective administration' should be separate from the individual's circumstances. This means that the totality of the individual's situation and its consequences are not adequately considered (as should be the case for ex gratia payments);

- the notion that the level or type of defective administration has to be especially 'bad', and that if the defective administration was 'common practice' no payment would be made;[45] and

- that ex gratia payments cannot be made even though legislative changes have subsequently been made in recognition of the harshness of the previous arrangements.

8.58 The apparently arbitrary limitations being placed on the scheme's operation do not stop with an exclusion of an individual's circumstances. In its guidelines to staff, the Department of Social Security advises that:

> 'it is not generally appropriate to use CDDA[46] to compensate people for incorrect advice if the person does not obtain recompense under Finance Direction 21/3 ... If incorrect advice was given that was relied on by a social security client to the client's economic detriment, the client would generally obtain recompense under Finance Direction 21/3 and therefore a CDDA payment would not be appropriate.'

8.59 The DSS guidelines also state that if an authorised officer determines there was no negligent advice, then the case does not meet any of the criteria for a payment under the new scheme. However, we understand the scheme was (at least in part) expressly designed for cases where an agency's incorrect oral advice does not amount to negligence, but where their circumstances demand an equitable remedy. Similarly, our understanding was that the new scheme was designed to cover situations where the Department failed to provide advice it could reasonably have been expected to give (for example, where it has a policy of giving that advice).

8.60 However, DSS guidelines also state:

> 'The Department has a policy of inviting age pension claims when a Social Security recipient reaches age pension age. This policy is to assist recipients realise their best entitlements. However, the Department has never voluntarily assumed a strict duty to advise recipients that they may be entitled to another payment, however, because such a duty would be too onerous given the Department's limited resources. Given that the Department is not prepared to undertake a strict duty, the failure to invite a claim would not generally be considered an 'unreasonable lapse in complying with existing administrative procedures' nor 'an unreasonable failure to give a person advice' [under the terms of the CDDA scheme].

8.61 Payment of compensation under the CDDA scheme is based in part upon a finding of unreasonableness of an agency's actions. The Department argues that while this has some similarities with the law relating to negligence which is based

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[45] This perception is not limited to compensation payments. In one case before the AAT last year, a DSS representative argued that a debt should not be waived because 'the widespread giving of incorrect advice to students in a similar position to [the respondent] were not special ... these circumstances were, at or about 1991 and 1992 common and therefore not unique ... [and] were not so far out of the ordinary course of events to amount to being special.' AAT W96/121.

[46] Compensation for Detriment as a result of Defective Administration.

upon a reasonable person's perception of what a reasonable person would do, it is not identical and it is not necessarily useful to apply negligence-type concepts or standards to CDDA determinations. However, DSS appears to be importing tests relevant to Finance Direction 21/3 claims to the new scheme, despite the fact that the scheme is permissive. The effect is a 'merry-go-round' where the Ombudsman's office is forced to argue about the appropriate label for a compensation payment, and the client often misses out. The current artificial distinctions between the different ex-gratia schemes defy all common sense and undermine the purpose of the schemes. Like the introduction of the self assessment system, this effectively shifts the risk from the agency to the client.

Was the client eligible anyway?

8.62 DEETYA and DSS administer 'beneficial' legislation which aims to assist those usually in greatest need of assistance. Accordingly, we believe it is also valid when considering whether a payment should be made as opposed to whether a claimant should be believed to consider whether the applicant would have been eligible had they applied for an entitlement at the time they received the wrong or incomplete advice. The failure to do so can lead to unfair results, as the following case study suggests. In the decision as to whether an act of grace payment should have been made the Federal Court referred to eligibility as being a pertinent consideration.

Case study 17 - Is eligibility a relevant factor?

Ms C was a child under sixteen years of age with Down's Syndrome. In March 1987, a couple of weeks before she was due to turn sixteen, DSS sent her father a form for the purpose of reviewing her Family Allowance payment. Her father advised the Department that Ms C was in receipt of a Handicapped Child Allowance. The review form was treated as a fresh claim for the benefit, and DSS granted a renewal of the allowance. According to Departmental practice and policy, around the same time, Mr C should have received advice in writing that his daughter may be entitled to the more generous invalid pension once she had turned sixteen. However, neither Mr C nor his daughter received any such notification.

In early November 1987, Mr C was advised by a teacher at Ms C's school that Ms C should be entitled to the more generous pension. Mr C immediately submitted an application for an invalid pension on behalf of his daughter, and the pension was granted with effect from November 1987. However, the Department refused to pay arrears to the date of Ms C's birthday, arguing that it could only pay the more generous pension from the date of claim.

The Department disagreed with the AAT's view that the review form sent in March 1987 (and which was treated as a claim for renewal of the Handicapped Child Allowance) could be regarded as if it were a claim for the payment of invalid pension, because it was a claim for a benefit 'similar in character' under the relevant legislation. The Department appealed this decision to the Federal Court, and later the Full Federal Court, which dismissed the appeal. In its decision, the court said:

'**Attention should be drawn to one other aspect of the matter. It seems to have been conceded at all points that [Ms C] was entitled to an invalid pension, subject only to the technical problems raised by the Department.** The material in the appeal book reveals [Mr C] as a man who responded very promptly on a number of occasions when informed of action which seemed desirable in the interests of his daughter. Nothing at all

emerges to cast the slightest doubt on the proposition that the difficulty in this case stems from the Department's failure to follow the practice it had itself instituted for such cases, or possibly a failure on the part of the postal authorities, for whom the Commonwealth is responsible.

In those circumstances, the technicality pursued through a succession of appeals seems particularly sterile. It was pointed out in Formosa v. Secretary Department of Social Security (supra) at 700 ... that s.34A of the *Audit Act 1901*[47] was designed to remedy situations of the kind which, in the Department's argument, arose here. The use of that section in this case, if it
had turned out there was no other remedy, **would not have resulted in the Commonwealth being out of pocket beyond the amount which the relevant legislation contemplates should be expended for the relief of the need which has given rise to [Ms C's] entitlement to an invalid pension**. **In those circumstances, it is difficult to see the justification for the expenses which have been incurred in ascertaining the proper label to put upon the payment'** (emphasis added).

8.63 Apart from questions of what is fair, a holding that eligibility is relevant also involves a calculation of the overall 'transaction costs'. This means balancing the cost of the pension or benefit the person would have received if they had received correct advice, against the cost (which is often substantially higher) of dealing with a complaint, and the effort expended in considering at a legal level whether a sufficient standard of proof exists. In our view there are more savings to be gained in improved and streamlined practices than in denying liability.

Conclusion

8.64 Although all agencies can agree in principle to the need for mechanisms which allow for remedying financial losses as a result of incorrect or ambiguous advice, it seems that there are very few actual cases in which they are prepared to concede that a remedy should be available.

8.65 The evidentiary requirements to substantiate claims of poor advice have not kept pace with new service delivery arrangements. Even where a client can prove they got incorrect advice, there are statutory limits and other legal hurdles which mean that obtaining fair redress is impossible for many.

8.66 The interpretations of liability by AGS and the definition of 'unreasonableness' adopted by agencies (in relation to defective administration) seem too narrow, particularly in an environment where agencies encourage their clients to seek advice orally. There is clearly a need for further work on a common approach, particularly in the areas of:

- the way in which the Commonwealth's liability should be assessed;
- the application of the *Jones* case to oral advice cases;

[47] Section 34A of the Audit Act 1901 is the provision governing act of grace payments by the Commonwealth. The issue of compensation payments is discussed further in paragraphs 30 - 66.

- the application of the act of grace provisions (particularly in relation to what constitutes ‘special circumstances’);

- the application of the new scheme for compensation for defective administration; and

- the development of more comprehensive guidelines to agencies on the appropriate use of the Finance Direction 21/3 and other compensation avenues.

Recommendations

- If advice giving services are contracted out to the private sector, they must provide for a chain of accountability back to the 'principal agency' for financial losses as a result of incorrect or ambiguous advice.

- Legislation should be amended to require agencies to ensure that, when clients are provided with notice of a decision, they are given sufficient information to allow them to make an informed judgement on whether the decision (favourable or otherwise) is correct. This would include, for example, information on the component parts of any payment and how the rate has been determined.

- Statutory limits on arrears should not apply where:
  - an agency is solely or substantially responsible for an error; and/or
  - the client could not reasonably have been expected to know that an error had occurred; and/or
  - another (or higher) pension or benefit would have been available if the person had applied.

- There should be an agreed approach to assessing liability for incorrect or ambiguous oral advice which results in an economic loss to a client.

- The Department of Finance should develop improved guidelines for the payment of ex gratia compensation, in consultation with other agencies. Those guidelines should:
  - ensure that both the defective administration and the circumstances of the individual can be taken into account; and
  - address what other factors can be taken into account when considering whether to make an ex gratia compensation payment.

Summary of recommendations

Section 3: An alternative service charter

- Agencies should take all reasonable steps to advise clients of changes in circumstances, legislation and/or policy which may be beneficial to the client. (This would include, for example, advising pensioners paid under an agreement with another country when they become eligible for a pension under domestic legislation, or where some other reasonably foreseeable event suggests the person may be entitled to a more generous payment or benefit).

- Agency decision making should be transparent. That is, the client should be provided with sufficient information to understand the basis on which a decision is made (this includes, for example, details of the information taken into account in determining a rate of payment, the basis of any change to a rate of payment etc.)

Section 4: New practices and procedures

- There should be clear lines of accountability/responsibility where an agency is providing information which crosses agency, program, and/or legislative boundaries.

- Agencies must advise clients when oral advice should be tested in writing and/or with another agency.

- There should be 'knock for knock' agreements across the full range of beneficial legislation so clients are not penalised for incorrectly diagnosing which payment they are eligible for.

- Agencies implement procedures to ensure that clients are provided with correct and comprehensive information, even if that necessitates a 'ring back' approach.

- Where a client (or potential client) enquires about eligibility, they must be advised that the only sure way to test their eligibility is via a claim, and the consequences of failing to do so (ie. that payment is only made from the date of a successful claim). Clients with special needs should be given appropriate additional assistance to help them lodge a claim.

- That more user friendly claims forms are developed. DSS report on its trial of a generic claim form for clients with a significant incapacity, and the suitability of extending this approach to other benefit related categories.

- Agencies investigate further opportunities for more client friendly information products and strategies across the range of beneficial legislation.

Section 5: Accountability for oral advice

- The reference number system currently in place for existing DSS clients (which allows the client's call, and the operator to whom they spoke to be identified) should be extended to individuals who ring enquiring about potential eligibility.

- Minimum standards of data recording be set for all agencies administering beneficial legislation and/or with a significant role in giving advice to the public.

- Agencies implement strategies to ensure higher level recording of oral advice where there are indications that there is an increased risk (either to the client or the agency) of incorrect or ambiguous advice.

Section 6: Quality assurance

- Agencies develop service quality standards for oral advice in addition to quantitative measures. Clients should be advised what remedies are available when these standards are not met, and any limitations on remedies.

- Agencies implement quality assurance mechanisms to ensure:
  - clients are provided with correct and comprehensive advice suited to their needs;
  - advice is consistent across the agency's advice giving network; and
  - clients are advised to request confirmation in writing (or to test the advice given) when they should not be relying solely on the oral advice given to them.

- Agencies implement procedures which allow for a systematic and integrated review of complaints about oral advice. Those procedures must be accompanied by arrangements for dealing with occasions where an agency becomes aware that incorrect advice may have been given to a client, but the client may be unaware of the problem.

Section 7: Support for staff giving oral advice

- The development of 'expert systems' should be sustained to provide better support and advice to staff, clients and potential clients.

- Developments in information technology must be accompanied by appropriate updating, recording and accountability standards at the time new technologies are introduced.

- Agencies must ensure adequate resources for oral advice centres, so that the quality and comprehensiveness of advice to clients is not adversely affected by pressures from queues and call waiting times.

- Agencies must implement comprehensive training programs for staff providing oral advice. Those programs should emphasise the need to provide correct and comprehensive advice tailored to client's needs.

- Staff responsible for providing oral advice must be appropriately classified, and have access to adequate career enhancement and staff development opportunities.

Section 8: Legal issues

- If advice giving services are contracted out to the private sector, they must provide for a chain of accountability back to the 'principal agency' for financial losses as a result of incorrect or ambiguous advice.

- Legislation should be amended to require agencies to ensure that, when clients are provided with notice of a decision, they are given sufficient information to allow them to make an informed judgement on whether the decision (favourable or otherwise) is correct. This would include, for example, information on the component parts of any payment and how the rate has been determined.

- Statutory limits on arrears should not apply where:
  - an agency is solely or substantially responsible for an error; and/or
  - the client could not reasonably have been expected to know that an error had occurred; and/or
  - another (or higher) pension or benefit would have been available if the person had applied.

- There should be a transparent and predictable approach to assessing liability for incorrect or ambiguous oral advice which results in an economic loss to a client.

- The Department of Finance should develop improved guidelines for the payment of ex gratia compensation, in consultation with other agencies. Those guidelines should:
  - ensure that both the defective administration and the circumstances of the individual can be taken into account; and
  - address what other factors can be taken into account when considering whether to make an ex gratia compensation payment.

Complaints[48] about **quality of advice** during 95/96.*

Agency	Quality of Advice Issue	Number of complaints about advice received 95/96	Total number of complaint issues received by Agency 95/96	% of Complaint issues for Agency 95/96	Number of complaint issues received 96/97
ATO	Access	4			
	Clarity	52			
	Completeness	25			
	Failure to provide	76			
	Inconsis or conflict	48			
	Relevance	7			
	Wrong	50			
	Total	**262**	**2054**	**12.8%**	**203**
CSA	Access	6			
	Clarity	48			
	Completeness	37			
	Failure to provide	133			
	Inconsis or conflict	75			
	Relevance	6			
	Wrong	70			
	Total	**375**	**3417**	**11%**	**274**
DEET	Access	2			
(and	Clarity	17			
DEETYA)	Completeness	13			
	Failure to provide	56			
	Inconsis or conflict	56			
	Relevance	3			
	Wrong	62			
	Total	**209**	**1450**	**14.4%**	**194**
DSS	Access	43			
	Clarity	186			
	Completeness	84			
	Failure to provide	287			
	Inconsis or conflict	281			
	Relevance	29			
	Wrong	306			
	Total	**1216**	**7631**	**15.9%**	**1150**

[48] A complaint may have more than one issue. As a consequence, the numbers listed in this table may be higher than the number of complaints shown in the 95/96 annual report.

Agency	Quality of Advice Issue	Number of complaints about advice received 95/96	Total number of complaint issues received by Agency 95/96	% of Complaint issues for Agency 95/96	Number of complaint issues received to date 96/97#
All Agencies	Access	66			
	Clarity	369			
	Completeness	227			
	Failure to Provide	789			
	Inconsis or conflict	619			
	Relevance	58			
	Wrong	642			
	Total	**2770**	**19813**	**14%**	**2269**

** Ombudsman and Defence Force Ombudsman jurisdictions only.*

#Data relates to period 1 July 1996 to end March 1997.