



Australian Government

**Department of Families, Housing,
Community Services and Indigenous Affairs**

Ms Julie Dennett
Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms Dennett

Please find attached the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) submission to the Legal and Constitutional Affairs References Committee review of Government compensation payments.

The submission provides a brief discussion under each of the mechanisms included in the terms of reference for the inquiry and offers some perspective from FaHCSIA program areas based on their experiences with the current administration arrangements.

The contact officer for this submission is _____ Section Manager, Social Security Policy Branch, FaHCSIA.

Yours sincerely

Sean Innis
Group Manager
Social Policy

16 June 2010

Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA)

Submission to Legal and Constitutional Affairs References Committee Inquiry into Government Compensation Payments

Introduction

On 4 February 2010, the Senate referred the following matter to the Legal and Constitutional Affairs Committee for inquiry and report:

The administration and effectiveness of current mechanisms used by federal and state and territory governments to provide discretionary payments in special circumstances, or to provide financial relief from amounts owing to governments, namely:

- *state statutory schemes relating to children in care;*
- *payments made under 'defective administration' schemes, such as the Commonwealth Scheme for Compensation for Detriment caused by Defective Administration;*
- *act of grace and ex gratia payments; and*
- *waiver of debt schemes.*

The committee notes that several Senate committees have previously conducted inquiries in relation to Forgotten Australians, the Stolen Generation and Indigenous Stolen Wages. In light of previous opportunities for detailed consideration of these issues, the primary focus of the current inquiry will be a legal, principles-based comparison between relevant payment schemes relating to children in care and other government schemes providing for discretionary payments.

Within the social security system there are a number of ways payments are made to individuals – most commonly through Centrelink's business as usual service delivery model (that is, as welfare payments made under legislation). On occasion however, there are times when an individual has no legislative right to receive a payment they are (arguably) entitled to on the merits of their circumstances, or might think they should be entitled to. This can occur because of:

- unintended consequences of the legislative provisions;
- error by Centrelink or the policy department (where Centrelink is not the service delivery method);
- involvement by an agency resulting in an unintended outcome for the claimant;
- a customer, in good faith, providing Centrelink with wrong information;
- an identified need for assistance which cannot be met through existing legislative provisions (ex gratia payments).

In order to address these situations, there are mechanisms in place to make discretionary payments to individuals based on special circumstances. As a Commonwealth Department, FaHCSIA has involvement in the established processes

including payments made under the Commonwealth Scheme for Compensation for Detriment caused by Defective Administration (CDDA); act of grace and ex gratia payments; and waiver of debt schemes.

Use of these mechanisms helps Government to remedy anomalous outcomes. The extent to which these mechanisms are used may be one of the indicators for assessing the health of the social security system.

Discussion

State Statutory Schemes Relating to Children in Care

The Commonwealth Government considers that redress schemes for people who experienced abuse in care are a matter for individual states and past care providers. The governments of Tasmania, Queensland and Western Australia have implemented specific redress schemes, as have a number of churches and other care providers.

Commonwealth Scheme for Compensation for Detriment caused by Defective Administration (CDDA)

The CDDA scheme allows Government portfolio Ministers and authorised officials in *Financial Management and Accountability Act 1997* (FMA Act) agencies to compensate, on a discretionary basis, individuals or groups who have experienced loss as a result of defective administration. The scheme aims to restore claimants to the position they would have been in had there been no administrative error. Decisions to compensate under the scheme are approved on the basis that there is a moral as distinct from a legal obligation to pay compensation to a claimant.

For social security matters, a CDDA claim would normally originate from Centrelink customers; however, Centrelink can also instigate own motion payments. Generally, Centrelink only consults policy departments on important or complex matters relating to CDDA claims.

Centrelink receives direct funding appropriations for paying compensation claims. The Centrelink Annual Report for 2008-09 indicates Centrelink received 2722 claims for customer compensation under legal liability and the CDDA scheme, and made a further 641 own motion payments under the CDDA scheme. Note that this represents the number of claims received by Centrelink, not the number of claims paid.

FaHCSIA and Centrelink are parties to the *Bilateral Management Agreement* (BMA). The BMA sets out relevant relationship, governance and reporting requirements between FaHCSIA and Centrelink, which assists in connecting policy development with successful service delivery.

FaHCSIA program managers are required to meet with their Centrelink counterparts quarterly to discuss each of the Confidence and Bilateral Assurance Areas of the BMA including policy and service delivery integrity, payment assurance, relationship management, financial controls and responsiveness to Government. This provides an

opportunity for discussion of CDDA claims. Centrelink are also required to regularly provide CDDA data to FaHCSIA.

The Department of Finance and Deregulation website comprehensively outlines the CDDA mechanism in Finance Circular No. 2009/09 (Refer: <http://www.finance.gov.au/publications/finance-circulars/2009/09.html>). The finance circular includes information about the nature of the scheme and the authority of the decision maker. There is significant detail on the considerations that should be undertaken in reaching a decision to grant a CDDA payment.

FaHCSIA recognises the importance of the CDDA mechanism in allowing redress for poor administration of the Government's legislation and policy and considers current administration and guidance allows for a consistent approach to be achieved in granting payments under the CDDA scheme.

It is also noted that a number of previous reviews have been undertaken in regard to the CDDA scheme. In August 2009 the Commonwealth Ombudsman released a report *Putting Things Right: Compensating for Defective Administration – Administration of Decision-Making Under the Scheme for Compensation for Detriment Caused by Defective Administration*. The Ombudsman looked at the policies and practices of three sample service delivery agencies—the Australian Taxation Office, the Child Support Agency and Centrelink—to identify how it might be improved. His recommendations included:

- providing greater visibility of the scheme, so that the public knows they can ask to be compensated for government error;
- establishing an inter-departmental advisory or review panel to deal with disputed or exceptional CDDA claims and to play a 'best practice' leadership role;
- using the potential offered by information technology to improve case monitoring, provide support for decision-making and capture feedback; and
- dealing appropriately with 'administrative drift' (needless delays) in finalising cases.

The CDDA Scheme was also reviewed by the Ombudsman's office in 1999, by the Australian National Audit Office in 2003-04, and by the Department of Finance in 2004-05.

Act of Grace and Ex Gratia Payments

The Department of Finance and Deregulation website comprehensively outlines the Act of Grace and ex gratia mechanisms in Finance Circular No. 2009/09 (Refer: <http://www.finance.gov.au/publications/finance-circulars/2009/09.html>). The finance circular includes information about the nature of the powers and the authority of the decision maker. There is significant detail on the considerations that should be undertaken in reaching a decision to grant an Act of Grace or ex gratia payment.

FaHCSIA follows the guidance provided in the Finance Circular and supports this with internal procedures and Chief Executive Instructions. In FaHCSIA, Financial Rule 5.5-Discretionary Compensation Mechanisms and CEI 5.5-Discretionary Compensation Mechanisms provide operational guidance.

Act of Grace

The Act of Grace mechanism (under section 33 of the FMA Act) allows the Minister for Finance and Deregulation and his or her delegates to authorise one-off and periodic payments to individuals or other bodies (such as companies) in special circumstances. A claim for an Act of Grace payment may be made to the relevant portfolio agency, the Department of Finance and Deregulation or to the Minister for Finance and Deregulation. The Minister for Finance and Deregulation has delegated this power to officials within his Department. As the powers have not been delegated outside the Finance portfolio, agencies do not make Act of Grace decisions themselves.

Decision makers in the Department of Finance and Deregulation consider the expertise of agencies in providing advice on the merits of claims. However, ultimately, the sole responsibility for whether or not a claim is approved rests with the Finance Minister or delegate in the Department of Finance and Deregulation, who exercises the discretion in his or her own right.

Almost all Act of Grace claims relevant to FaHCSIA originate from Centrelink; however, as noted above, a customer may also lodge a claim directly with the Department of Finance and Deregulation (or the Minister). Centrelink may refer a matter to the relevant program area which would consider the merits of the matter. The program area may seek legal advice in formulating a position. Once the program area is satisfied that it is appropriate to recommend/not recommend that an Act of Grace payment should be made, the recommendation is then usually referred back to Centrelink, unless agreement has been made to respond directly to the Department of Finance and Deregulation. Centrelink provides the advice, including any of their own information, to the Department of Finance and Deregulation for a decision on whether the Act of Grace payment should be granted. Copies of documents are also sent to the customer who is given some time to make comments directly to the Department of Finance and Deregulation before a decision is made.

Outlays for Act of Grace payments for 2008-09 were \$410,292 which is 0.00065% of the funding for programs administered by FaHCSIA. This represents payments to 55 customers. Since July 2008, evidence suggests Act of Grace payments for FaHCSIA were most commonly granted in relation to the Baby Bonus, Family Tax Benefit and the Pension Bonus Scheme.

As with CDDA, regular data is provided to FaHCSIA, and FaHCSIA and Centrelink program managers have an opportunity to discuss issues relating to Act of Grace each quarter through the BMA meetings.

FaHCSIA consider Act of Grace payments to be a useful avenue in which to assist people who have a strong merits claim, but (perhaps due to a legislative anomaly) no strict legislative entitlement to assistance. The Act of Grace mechanism may be preferable to legislative amendment where a customer is unintentionally disadvantaged under the legislative scheme and the same circumstances are unlikely to arise again. There have been instances where administrative processes have resulted in FaHCSIA program areas not being consulted prior to the Finance delegate making a decision on an Act of Grace payment; however, these cases are rare and not a result of inadequate administrative processes being available.

Ex Gratia Payments

The ex gratia power provides flexibility to the Government in that it can be called upon at short notice to deliver financial relief quickly. For this reason, the power is necessarily flexible to produce workable outcomes and does not have criteria in the same way as other discretionary schemes.

Ex gratia payments are generally only considered after full consideration of all the other available schemes. Ex gratia payments can be made from either Departmental or Administered Appropriations. However, the appropriation must have an outcome that covers the payment.

The basis for ex gratia payments is not set out in any specific legislative provision, but emanates from the Government's executive powers under section 61 of the Constitution. In practice, the Prime Minister or Cabinet must approve ex-gratia payments.

In recent years, FaHCSIA has provided assistance through the ex gratia mechanism in response to a number of disasters including the Victorian Bushfires, Samoan Tsunami, Sumatran Earthquake, Mumbai Terrorist Attacks and North Queensland Floods. Assistance has included \$5,000 Funeral Memorial Assistance, the Newstart-style Income Recovery Subsidy and other tailored assistance measures.

Ex gratia payments provide an approach which can be tailored to each disaster event/circumstance where all existing assistance options have been exhausted.

The criteria for granting an ex gratia payment will generally be clear. However, on occasion payments are made to people who are not entitled to receive them. This may be through administrative error or a result of a fraudulent claim. Because ex gratia payments are not made under any specific legislation, there is no statutory debt recovery scheme. If a debt does arise, section 47(1) of FMA Act will be relevant. This provision states a Chief Executive is obliged to pursue recovery of debts falling within the Chief Executive's area of responsibility unless: (a) the debt has been written off as authorised by an Act; (b) the Chief Executive is satisfied that the debt is not legally recoverable; or (c) the Chief Executive considers that it is not economical to pursue recovery of the debt. As there is no special purpose debt recovery legislation for ex gratia payments, debt recovery can be difficult and time consuming to pursue because common law or equitable remedies would have to be sought.

The Department of Finance and Deregulation has, however, advised that it has the delegation to waive ex gratia debts under paragraph 34(1)(a) of the FMA Act. Approval for a waiver of a debt needs to be sought from the Department of Finance and Deregulation on a case by case basis.

Waiver of Debt Schemes

The administration of debts incurred under Social Security Law and Family Assistance Law is undertaken by Centrelink on behalf of the Secretaries to FaHCSIA and the Department of Education, Employment, and Workplace Relations (DEEWR).

Current mechanisms under the Social Security Law and Family Assistance Law make provision for the flexible management of debts, from temporary write off to waiver in part or in full, providing financial relief to customers. For example:

- debts may be written-off temporarily for periods of time to allow for customer circumstances to improve prior to debt recovery commencing, or where it is not cost effective for the Commonwealth to take action to recover the debt;
- debts may be waived where they are attributable solely to an administrative error made by the Commonwealth and the debtor received the payment or payments that gave rise to that proportion of the debt in good faith;
- debts may be waived under special circumstances.

While recovery of debt occurs at a standard rate of withholding, customers are invited to negotiate suitable repayment arrangements where the usual arrangements may cause financial difficulty.

FaHCSIA is of the view that the current debt waiver provisions provide an appropriate balance between recovering amounts that exceed a person's entitlement and avoiding onerous outcomes for customers.

Conclusion

FaHCSIA acknowledges the processes for the mechanisms included in this inquiry have been long established and are generally well documented by the Department of Finance and Deregulation, as well as being supported by internal procedures and documentation.

The discretionary payment mechanisms and waiver of debt schemes are seen as an important adjunct to the social security system, in that they may be used to flexibly and appropriately address anomalies in legislation or service delivery processes, and avoid unintended or undesirable consequences for individuals.

FaHCSIA is of the view that the current mechanisms work well and would not recommend any changes to their administration.

DEEWR has been consulted in the preparation of this submission. DEEWR is in agreement with the principal conclusion of FaHCSIA's submission; namely, that the existing mechanisms relating to discretionary payments provide a valuable avenue for flexibly responding to the unintended consequences of legislation upon individuals, as well as to unforeseen or anomalous events on moral or humanitarian grounds in a timely and effective manner.