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In this issue ....

TEOH - A PERSPECTIVE FROM THE BAR

*Neil Williams**

Text of an address to AIAL seminar, Teoh - International obligations and administrative decision-making, Canberra, 18 May 1995.

Soon after the High Court granted special leave in *Teoh*, I was contacted by the Director of the Environmental Defenders Office in Sydney. Pleadings had already closed in an action brought by the Tasmanian Conservation Trust. The Director had recently received the full Federal Court decision in *Teoh* and it occurred to him that perhaps he could get one or two students to comb through various treaties that might contain a statement of Australia's intention to give priority to the rights of the tree. He enquired whether we should amend our pleadings to take advantage of the Full Court decision. I replied that I thought we had a reasonable case anyway. I went on to say, and perhaps, with hindsight, I should not have, that I too had read the decision of the Full Court in *Teoh*, that I was aware the High Court had granted special leave to appeal, in my view the decision of the Full Court had quite limited merit (I am not sure that I used those precise words) and if we based our case around it, we might find by the hearing date that *Teoh* may be but a distant memory!

With that caveat to my qualification to speak on this topic in mind I will proceed with some observations on *Teoh*. I will start briefly with a reference to the context in which *Teoh* appeared in the cases, then give some examples of the potential way in which *Teoh* can be used by applicants in challenging government decisions.

Teoh seems to me to be part of a relatively short line of cases. The beginning can really be seen in *Attorney-General for Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629. That was a decision in which the Hong Kong Government had made a public statement that persons who had been resident illegally in Hong Kong for a substantial period would be given a certain procedure before being returned to the mainland. Mr Ng went in to the authorities within a couple of days of the announcement whereupon - without the procedure that had been foreshadowed - he was promptly deported to the People's Republic of China. He sought and obtained relief from the Privy Council, which held that the specific promise to people in his class was sufficient to give rise to an expectation that he would be afforded a fair procedure. There is an observation in the judgment to the effect that had he been asked "Is there anything that you would like to say as to whether you should be deported", that would have been sufficient to ensure him procedural fairness. So, the judgment had a limited scope, giving rise to a limited duty to be fair.

Next in line in Australia was *Attorney-General (NSW) v Quin* (1990) 93 ALR 1, in which Chief Justice Mason referred to the need to avoid confusion between the content of the expectation and the resulting right to

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procedural fairness. The right to procedural fairness is no more than a right to be heard, that is, a right to a fair procedure. The Chief Justice also warned of the danger that to afford substantive protection to a legitimate expectation would interfere with the merits of a decision. So in *Quin*, the right was to a fair procedure but there was no substantive right.

Haoucher v Minister for Immigration and Ethnic Affairs (1990) 169 CLR 648 - the next case in Australia - requires a consideration of the majority and the minority judgments. The majority, Justices Deane, Toohey and McHugh, all held in slightly different forms that a new and distinct issue had arisen when the file reached the Minister and this gave rise to a right to a further hearing. There had been a formal statement by the Minister for Immigration in the Parliament to the effect that decisions of the Administrative Appeals Tribunal in deportation matters would be given effect to unless there were exceptional circumstances to justify departure from the AAT recommendation to the Minister. The Court said that enumeration of exceptional circumstances in the Minister's statement gave rise to a distinct issue as to whether those particular circumstances applied to the case at hand. This issue had not previously been addressed in the administrative decision making process, and therefore there was an entitlement to be heard on that issue.

The minority, Justices Dawson and Gaudron, held in effect that there had been an ample opportunity to place matters before the Minister, and that fairness did not require a new hearing. There were no new matters that could be put, and a new hearing would result only in a repetition of the matters that had previously been put and would be pointless. Justice Gaudron commented that a hearing was required if additional facts were to be considered, that is, if the decision maker was determining a new and different case from that which was the subject of the recommendation.

So the difference in *Haoucher* between the majority and minority is not so much one of principle, but as to whether a new and distinct issue had arisen in the case.

The issue in *Teoh* was whether Mr Teoh should be deported. The statutory issue for determination was stated broadly, and was constrained, as *Peko-Wallsend* says, only by the general objects of the Act and any inferences to be drawn from them. The power was to be exercised, in other words, having regard to the interests of Australia as a whole (as the Federal Court had earlier held in *Minister for Immigration and Ethnic Affairs v Maitan* (1988) 28 ALR 419). Manifestly that involved the balancing of the interests of Australia in minimising the number of heroin importers who live here, against the interests of Mr Teoh and in particular the interests of his family. The issue for determination was quite well defined from the beginning. The decision maker clearly took account of the interests of the children and made quite strong statements of recognition of those interests and the bleak future they faced if Mr Teoh were to be deported. The decision maker was not, as the High Court held, obliged to give substantive effect to the treaty, or even to take the treaty into account in anything other than a procedural sense.

Since a balancing of the interests of the wife and the children against the national interest was carried out, it is difficult to see in *Teoh* what the fresh issue was to require a further hearing. The only conceivable matter was whether the decision maker should give primary consideration to the

interests of the children, that is, whether in terms Article 3.1 of the Treaty on the Rights of the Child should be applied. What this illustrates is that where the issues dealt with in the treaty have in fact been properly considered, there is no further obligation to draw attention to the treaty obligations and invite submissions on whether it should be followed. It would have been sufficient, the majority held, if the decision maker had made it plain that primacy was being given to the interests of the children in the decision. In that event, even though the treaty may not have been specifically referred to, the decision maker's obligation would have been discharged.

What this involves is a whole new natural justice process, or a loop in the decision making process. The first step is to identify the relevant treaty obligations. The second step is to draw the applicant's attention to them in specific terms if there is any intention to depart from them, and to invite submissions.

The shift in the cases that has occurred since *Ng's* case, is that there was a clear and specific promise to people in Ng's position, which was held to give rise to a limited procedural right to a limited hearing. In *Teoh*, a statement which was made only to foreign states - because treaties are entered into between Australia and foreign states - was held to give rise to an implied promise to Australian citizens. That promise was not satisfied by a procedure, which was otherwise fair, and could only be satisfied by a specific procedure, of a hearing on the issue of whether a treaty should be adhered to.

I have gone through that analysis to illustrate how broad *Teoh* is, and its great potential for applicants. The approach to the construction of a treaty is also to be noted. The treaty considered in Teoh referred to actions concerning children and applied both to executive agencies and to judicial bodies.

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

"Actions concerning children", the key opening phrase, is construed by the Court as including actions which have consequences for children. The scope of this particular treaty is enormous. One has only to reflect on the potential scope of actions that may affect children to realise the wide potential for this treaty provision to be invoked. For enforcement, there is no need to use the complaints procedure of the *Human Rights and Equal Opportunity Commission Act*, with its presently doubtful powers of enforcement. Following *Teoh*, an applicant can go straight to the Court and seek to have a decision set aside.

The decision, in my view, is a bonanza for applicants. A person who is aggrieved by a decision can seek, by a process of trawling through a range of treaties, to find some basis on which to have the decision set aside, and the chances of actually finding a relevant treaty will really be quite good. The implication is that community legal centres, interest groups, and private lawyers, should be obtaining access to treaty lists as a matter of urgency, and reviewing the treaties that have potential in their area.

Before describing a couple of brief examples, I should mention the limitations. The right that was created in *Teoh*, and there is no doubt it is a new right, is a procedural right only. While it gives a person aggrieved by a decision the potential to have the

decision set aside and reconsidered, it gives no more than that, and there is no obligation on a decision maker to give effect to a treaty, or to do anything more than invite submissions on whether the treaty should be applied. It is important with clients not to generate an expectation that the mere fact that a treaty obligation was not considered will lead to a positive decision. Justice McHugh in *Teoh* had formed the view that the decision maker had in fact given primacy to the interests of the child, so it is important not to overstate the substantive significance of the decision.

Nevertheless, what many clients want is to have a decision set aside and to have the matter reconsidered, possibly by a different decision maker, who may give a fairer hearing than they perceive they have had. In many cases the mere setting aside of the decision can lead to the introduction of new material which perhaps a previous adviser had not realised the significance of. In the migration context, it is common for migration agents not to put to the decision maker material which is of great probative significance, and for the lawyers who come into the case to have to try and unpick the decision that has been made in order to put forward the client's best points for consideration. So although the right is merely a procedural one, it can have substantial benefits for a client.

It is uncertain yet what effect the statement by the Attorney-General and the Minister for Foreign Affairs will have, but there is certainly an argument available that signature or ratification of a treaty is a formal act, the legal consequences of which cannot be undone by the mere issue of a press release. When a treaty is entered into by the Minister for Foreign Affairs or another duly authorised minister, it is entered into on behalf of Australia. Notwithstanding that the Minister for Foreign Affairs and the Attorney-General are the two Ministers of the Government with prime responsibilities in this area, it is at the least arguable that a press statement by those two Ministers has substantially less force than a formal act undertaken on behalf of the Government.

As to the legislation that is to be introduced to give effect to the press statement, it is a matter of waiting to see its form. It has been debated whether it is possible to give effect to a promise of the nature referred to in the press statement, but it seems to me to depend on form, and I will not go into the matter at this stage. In my view it is probably unlikely that the legislation will have a retrospective effect prior to the date on which the press statement was issued. What that means is that if the legislation is effective, there is at present a narrow window in which to replead cases, and bring challenges relying upon the *Teoh* decision, and the opportunity should not be overlooked.

I will now refer briefly to some potential applications of the *Teoh* decision. The real sting in the decision, it seems to me, is the observation of Chief Justice Mason and Justices Deane and Gaudron that Article 3.1 may represent the common law. If the best interests of the children are to be a primary consideration in courts of law, it may have implications, for example, for sentencing, as Justice McHugh observes. If it has implications for sentencing, why not for bail determinations? There could not be any doubt that a decision to jail a parent for a substantial period is a decision, in the sense in which the majority interpreted the treaty, that concerns or affects the children. It may not directly affect them, but the effect is nevertheless substantial.

These are issues that are well worth litigating in my view.

In environmental law there is a substantial potential - notwithstanding my earlier expression of views on this issue! I have heard it suggested that *Teoh* is confined to human rights treaties, but I see no reason why this should be so, provided there is a party with a right to be heard on the principal issue. A legitimate expectation according to *Teoh* (in this respect it is consistent with *Quin* and *Ng)* is objective. It is something that exists in the ether. It is something that no person need hold. Indeed, I think *Ng* was not personally aware of the statement, and in all the Australian decisions it has been observed that there is no need for a person to be aware of the statement for an expectation to arise. If no person need hold the expectation, why should a tree or even a swamp not have an expectation? If it is purely an objective matter, provided there is a person with an entitlement to be heard, it appears to me that there is a potential for the treaty provisions to be invoked.

The ILO Conventions are a rich source of treaty statements. Many of them are, like treaty provisions generally, very broad. They also often conflict with each other, but that is not a point that need worry a potential challenger. Take for example, ILO Recommendation 165 which has been adopted in a Schedule to the *Industrial Relations Act* and deals with workers with family responsibilities. Facing a transfer to somewhere uncongenial, why not invoke the treaty provision?

Even going as far as tax - again Justice McHugh refers to this - a decision, for example, to exercise recovery powers under the *Taxation Administration Act*, will have very harsh consequences for children in a situation where bankruptcy of the parents may be the result. Why should the interests of the child not receive primary consideration?

Those are but a few brief examples. In migration decisions the sky is the limit. Indeed, the present guidelines on deportation contain a list of matters to be taken into account. Those guidelines have the force of law, I believe, by virtue of their endorsement by the Minister, and one item on the list of matters to be taken into account is Australia's treaty obligations.

That is but a few examples of areas in which *Teoh* can be used. The potential for community legal centres and public interest lawyers is enormous. The treaties are also accessible, in a book published by the Department of Foreign Affairs. Some of the 900 or so treaties go back to the last century. These may not be of much use, but in more recent treaties there is a goldmine of potential challenges for persons disaffected by administrative decisions. To those who work on the applicant's side, my advice is to "get into it".

THE *TEOH* DECISION - A PERSPECTIVE FROM THE GOVERNMENT SERVICE

*Henry Burmester**

Text of an address to AIAL seminar, Teoh - International obligations and administrative decision-making, Canberra, 18 May 1995.

This paper gives a perspective from the Government's side on the High Court's *Teoh* decision and its ramifications and explains the actions that have already been taken in response to it.

First, I should briefly outline what the case was all about. Counsel for Mr Teoh commenced his address to the High Court, saying "This case is about seven little Australians" - and that, in a sense, was the problem for the Minister for Immigration. Mr Teoh himself, however, had been convicted of serious drug offences. Applying the Migration Act policy guidelines in relation to permanent residence, the decision-maker, exercising her discretion, decided that his serious convictions outweighed the considerations dealing with the welfare of the seven children - some of whom were his own, others to whom he was stepfather. The mother, Mrs Teoh, was in no position to care for any of the children. Having weighed up the interests of the children, and the fact that they would have a bleak future, the decision-maker nevertheless felt that the criminal record was the most important factor and decided that Mr Teoh should be deported.

At the stage of the full Federal Court, a creative lawyer suddenly seized on the Rights of the Child Convention and threw this into the ring. He pointed to Article 3 of that Convention which said that in all decisions concerning children, the best interests of the child should be a primary consideration. This is a very broad treaty provision, drafted as so many treaty provisions are, in fairly general language, but nevertheless a provision which put a specific obligation on decision-makers. The full Federal Court seized on the argument and by majority said, in effect, that there was an almost substantive entitlement to have decision-makers act consistently with the treaty provision. The Court ordered that the decision be re-made, as there had not been adequate information sought about the welfare of the children to enable that provision of the Rights of the Child Convention to be honoured.

The case then went on appeal to the High Court, the Minister for Immigration thinking that the case had major significance and contained undesirable principles which he hoped to overturn. The Minister's argument did not meet with much sympathy from the majority of the High Court, which, by four to one, held that the Rights of the Child Convention gave rise to a legitimate expectation which had not been adequately respected. Justice McHugh dissented.

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From the point of view of international law, the High Court re-affirmed the traditional rule that treaties are not part of Australian law in the absence of legislative incorporation. That point was made quite strongly, and is a well established rule. The Court also confirmed that treaties can be relevant in the interpretation of ambiguous statutes and the development of the common law, as we have seen in *Mabo v Queensland* (1992) 107 ALR 1, and *Dietrich v R* (1992) 109 ALR 385. But the majority introduced a new element, and said that the ratification of a treaty was a positive statement by the Executive that it would act in accordance with the treaty, so that the formal act of ratification gave rise to an expectation that all Commonwealth decision-makers would act in accordance with the treaty. The High Court was at pains to say that this is merely a procedural right. If a decision-maker wishes to displace it, it is necessary to give notice to a person affected and give them an opportunity to make a submission. In the absence of giving that notice, or of some other statutory or executive indication about what is proposed, the ratification of a treaty will give rise to this legitimate expectation.

The High Court attempted to explain that this legitimate expectation did not interfere with the fundamental constitutional principle that a treaty is not part of domestic law, and does not give rise to rights or obligations or benefits in the absence of legislation.

That was not how the decision was received by the government, which expressed two aspects of concern. The first was the concern that the decision undermined the fundamental principle on which governments had relied, that it did not need to consult Parliament before a treaty was ratified.

The Executive had always said that if the law was going to be changed, a treaty would be taken to Parliament, and the necessary legislation enacted. The *Teoh* decision seemed to destroy that principle, and there was a concern at the political level to reassert the principle.

The second concern was of a practical nature, and related to Commonwealth decision making. What decisions will be affected? Any decision that could be subject to judicial review, whether made under statutory provisions or the prerogative? Is it only Commonwealth decisions? That was not even clear. Certainly Justice McHugh referred to examples of State decision makers being bound by the principle, given that the treaty in question had been accepted on behalf of the whole of Australia and not just at the Commonwealth level.

To what treaties could this legitimate expectation attach? While there may not be many treaties with provisions like the Rights of the Child Convention, many treaties have an individual rights focus, including some major human rights treaties. There are concerns that some of the broad environment treaty provisions might enable challenges to be made in relation to environment decisions.

There are concerns about how the expectation can be excluded. What will amount to an adequate statutory indication to the contrary, or an executive indication to the contrary? Do you need to exclude the application of the expectation by express and clear language, or can it be said that a closely confined statutory discretion leaves no scope for an expectation?

There is this considerable uncertainty, and not a lot of indication in the judgments as to how the uncertainty

might be overcome. Certainly the reaction at the highest levels of many departments was of some consternation at the decision.

On the first weekend in May the Constitutional Centenary Foundation held a meeting in Canberra to talk about treaties and to talk about the proposal for a republic. At that meeting the Shadow Foreign Affairs Minister, Alexander Downer, in his speech about treaties recommended that Parliament should legislate to displace the *Teoh* decision. He also recommended that Parliament should legislate to displace the use of international law in the way in which it has been used in *Mabo* and *Dietrich* to develop the common law. He actually proposed a draft section for a Treaties Act, to displace the *Teoh* decision. Senator Evans, the Foreign Affairs Minister, was in the audience when this speech was made and I think that got him thinking. A few days later, on 10 May, a joint statement was issued by Senator Evans, and the Attorney-General, Mr Lavarch. It is a lengthy, two and a half page statement which seeks to explain what the Government thinks the *Teoh* decision meant, and to clarify its position.

In essence the statement sought to do two things. First, it sought to displace by a clear and express statement the legitimate expectation that had been found in *Teoh* to arise from the ratification of a treaty. The High Court was probably astonished that their decision could be overturned or displaced by a statement like this. When the Court referred to statutory or executive indications to the contrary they were probably thinking of a provision in a particular statute or in a set of guidelines. Nevertheless, if an expectation arises from the act of ministers ratifying a treaty, logically those ministers can displace that legitimate expectation.

In the statement the Ministers say the government now makes such a clear and express statement - that entering into an international treaty is not a reason for raising any expectation that government decision makers will act in accordance with that treaty. The statement emphasises that the government is fully committed to observing treaty obligations, but wishes to reassert the primacy of Parliament when it comes to the incorporation of treaties into Australian law.

In order to put the position beyond doubt, the statement foreshadows that Parliament will legislate to reinforce the statement.

Attention in government is now focussed on drafting an appropriate statute that would displace the effect of the *Teoh* decision.[1]

In recent weeks, human rights practitioners have expressed some criticisms and concerns about the joint statement. There is a concern in particular that in some way the statement signals that Australia is not taking its human rights obligations seriously. However, there is certainly no suggestion that the complaints mechanisms under the *Human Rights and Equal Opportunity Commission Act* will be displaced in any way. In a sense, that is the remedy the Government considers has been chosen by Parliament, if a person considers there has been a breach of Australia's international human rights obligations. The Government's position is that a person should not be able to come along and challenge a decision made in good faith and according to procedural fairness, alleging simply that there has been a breach of a treaty provision.

Endnotes

1 A Bill to this effect has since been introduced: see *Administrative Decisions (Effect of International Instruments) Bill 1995.*

TEOH, AND INVALIDITY IN ADMINISTRATIVE LAW

*John McMillan**

Text of an Address to AIAL seminar, Teoh - International obligations and administrative decision-making, Canberra, 18 May 1995

The joint judgment of Mason CJ and Deane J in *Minister for Immigration and Ethnic Affairs v Teoh* opens with the remark that "This appeal ... raises an important question concerning the relationship between international law and Australian law".[1] That was so, but of equal importance is that the judgments would define the criteria for the validity of administrative decision making in the domestic Australian sphere. My analysis focuses on the criteria for validity defined by the High Court, and whether the Court discharged the task of definition as well as it might have done. For the most part I am critical of the judgments.

I shall start by emphasising the importance of this judicial function, of defining the criteria for the validity of administrative decision making.

Questions of legal validity arise before courts in many contexts. In the constitutional arena, for example, courts must define the criteria for the validity of Commonwealth and State legislation. The judgments of courts on this issue are primarily addressed to the dozen or so specialist constitutional lawyers in Australia who advise Commonwealth, State and Territory governments on the validity of the few hundred Acts that are enacted each year.

Court judgments on the validity of administrative decisions are directed to a quite different audience, that includes many thousands of non-specialist decision makers around Australia who make several million decisions each year. For a decision maker to break the criteria defined by courts, and make an invalid decision, can be a serious matter. An invalid decision is deemed in most cases to be a non-existent decision, that cannot provide a lawful foundation for related administrative action.[2] To declare a decision invalid may have a ripple effect on a great many administrative steps, and may require that history be disentangled or rewritten.[3] There may even be a tortious right of action (for example, in assault, false imprisonment, or conversion) where a coercive administrative action is later found to be invalid.[4]

It is important therefore, for many reasons, that the criteria for lawful decision making should themselves meet certain standards. We could expect, for example, that -

- the criteria are sensible, and compliance is feasible;
- there is a coherent public law justification for the criteria; and
- the criteria are relatively clear, certain, and ascertainable.

Before I examine whether the High Court in *Teoh* met those standards, I would preface my analysis with the comparatively positive assessment that

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the High Court at least met the standards better than the Federal Court judgments in *Teoh* did![5] The joint judgment of Mason CJ and Deane J was rightly critical of some features of the Federal Court judgments. They criticised, for example, an assumption made by the Federal Court that an administrative decision must conform to the principles of an international convention. They rejected also the finding that procedural fairness required the decision maker to initiate inquiries and obtain reports on the future welfare of Mr Teoh's children. By implication too the High Court did not accept some sweeping statements made in the Federal Court, for example, that it is an error of law for the administration to fail to carry out its duty to effect good administration.[6]

I turn now to discuss whether the criteria for lawful decision making defined by the High Court met the standards which I defined earlier.

Standard 1: that the criteria are sensible, and compliance is feasible

I have no difficulty with the central proposition of the majority, that ratification of an international convention is a serious act, which signifies at base an intention to make that treaty a relevant consideration that can influence decision making in Australia. My criticism rather is of the leap forward from that proposition, to the conclusion that all Australians have a legitimate expectation that administrative decisions will thereafter be made in conformity to the convention, and that this imposes a correlative obligation upon each decision maker to notify a person whenever a decision will be inconsistent with a convention.

An obligation of that breadth will be demanding in its nature, and unpredictable in its effect. The history of the *Teoh* case illustrates that point in a compelling way. The history started, in a sense, with *Kioa v West*,[7] in which the High Court had itself rejected the proposition that natural justice imposed a general obligation upon administrators to consider human rights obligations that bound Australia. In *Teoh*, the UN *Convention on the Rights of the Child* had not been raised at the time of the initial decision, before the Immigration Review Panel, before the delegate of the Minister, during the trial before French J, or in the notice of appeal to the Full Federal Court. As Mr Justice Toohey commented, "It seems to have surfaced during the hearing of the appeal to the Full Court".[8]

That remark arguably dramatises the impracticability of a legal standard which says that an administrative official bears a legal onus of drawing to the attention of the citizen the substance of each international convention that is arguably relevant to the statutory discretion being exercised. Does that mean, for example, that every decision made in recent years by a judge to imprison a father or mother was invalid because the judge did not, during sentencing, draw to the attention of the accused that incarceration might separate parent and child in a way that would offend the *Convention on the Rights of the Child*? Would invalidity likewise attach to many taxation decisions that have depleted family assets?

Nor is it easy to see what practical purpose will be served by requiring a decision maker to convene a hearing on the possible relevance of a convention that the decision maker is not obliged to follow. As Justice McHugh concluded in dissent, "It seems a strange, almost comic, consequence if procedural fairness requires a decision-maker to inform the person affected that he or she does not intend to apply a rule that the decision-maker cannot be required to apply, has not been asked or given an undertaking to apply, and of which

the person affected by the decision has no knowledge".[9] To proceed along that path is to elevate form above substance.

The doctrine of natural justice did not hitherto impose such a demanding obligation. The traditional thrust of the doctrine was to require that a person be given an adequate opportunity to be heard on the issues on which a decision maker proposed to decide. It was not the responsibility of the adjudicator or decision maker to provide legal or administrative assistance to a person in shaping their argument, by drawing that person's attention to every relevant statutory criterion or common law presumption. Equally, it was enough that a decision maker disclosed in broad outline the case to be met by the person; it was not required in administrative inquiries - in the familiar words of Lord Denning - that the decision maker quote chapter and verse on every relevant issue of fact.[10]

The concept of legitimate expectation likewise served a limited purpose, of ensuring that a person would have the opportunity of being heard before an adverse decision was made inconsistently with the expectation. That is, the concept defined the circumstances in which a hearing would be conducted, rather than the nature or content of that hearing.

To adhere to the traditional formulation of natural justice would not undermine the persuasive relevance of international conventions. It is well-established that a decision maker should give realistic and genuine consideration to the merits of a person's case, including relevant issues raised in a submission by the person.[11] An international convention can thus be raised in argument by an aggrieved person. There is also scope, within existing boundaries, for requiring that a decision maker should consider human rights considerations that are relevant to a decision.[12] By that I mean that consideration should be given to broad values, like freedom of speech, liberty of the individual, and protection of the family unit. The *Human Rights and Equal Opportunity Commission Act 1986* (Cth), which contains a Schedule defining many of those fundamental freedoms, provides at the same time a justification for treating them as relevant matters that should be considered in broad terms in administrative decision making. Merit review tribunals can also be relied upon to draw attention to international conventions that have a special bearing on the merits of particular categories of decision.

Another aspect of *Teoh* is also pertinent to an evaluation of whether the legal standard enunciated by the Court is sensible and feasible. The statutory discretion that was being exercised in that case (to refuse resident status) was cast in broad statutory language.[13] Accordingly there was scope for the decision maker to consider and apply a Departmental Instruction Manual, stating that a person seeking Australian resident status should meet a test of good character, and that conviction in Australia of a serious criminal offence would normally defeat that condition. The Manual was a publicly-available expression of government policy, that had been endorsed and defended by Ministers. It is surprising, in those circumstances, that the Manual did not take precedence over the Convention, which could claim no higher status than being an alternative expression of government policy. Standard principles of construction would suggest that the specific policy, that had been integrated with the *Migration Act* and addressed to a domestic Australian audience, would take precedence over a general statement of policy that was adopted principally as a statement of intention communicated to foreign governments.

The diminished importance given by the Court to government policy has been a

feature of other recent cases as well. Two cases that stand out are *Mok* and *Phillips*,[14] which reflect a view that adherence to government policy by a decision maker may constitute a form of institutional bias that offends natural justice. That view fits oddly in a system of democratic political choice in which it is expected that an incoming government selected by the people has a set of policies that it will be biased in favour of implementing.

Standard 2: that there is a coherent public law justification for the criteria

Two aspects of this standard warrant discussion. First, *Teoh* concerned an action brought under the *Administrative Decisions (Judicial Review) Act*. Thus, in a technical and legalistic sense, any criterion of invalidity defined by the Court must expound one of the 18 statutory criteria of invalidity defined by Parliament in s 5 of the *ADJR Act*. And yet s 5 is not mentioned in any of the judgments in the context of defining the legal criteria to govern administrative decision making.

This may seem a pedantic or churlish criticism, but there is more to it. The foundation principle of public law is that decisions of government must have a lawful foundation. This principle has been at the heart of many recent decisions, including the *Gunns* woodchip decision,[15] in which Sackville J condemned the administration for not conforming to the environmental impact legislation; and the decisions in *Coco* and *Ridgeway*,[16] in which the High Court condemned law enforcement action that lacked explicit statutory support.

It would help to emphasise that point if in cases like *Teoh* the judgment of the Court was itself referable to the statutory framework under which the decision was being reviewed. It is in fact difficult to draw a cross-reference between many of the principles in the judgments and the grounds defined in s 5 of the *ADJR Act*. Some comments, indeed, seem to cut directly across that statutory framework. Justice Gaudron, for example, thought that the Convention was of subsidiary significance, and that the case could be decided on two alternative bases: firstly, that there is a common law right, springing from citizenship, to treat the interests of children as a primary consideration in decisions which affect their individual welfare, with a corresponding obligation on administrators to initiate appropriate inquiries into the effect of a decision on a child; and secondly, that any reasonable person would assume that the bests interests of a child would be taken into account as a matter of course and without any need for the issue to be raised with the decision maker.

In the context of this decision governed by three statutes - the *Migration Act*, the *Citizenship Act*, and the *ADJR Act* - it seems difficult to accept that the outcome is controlled rather by the common law and assumptions about human behaviour and the duties of decision makers.

A second issue to consider, in evaluating whether there is a coherent public law justification for the criteria of invalidity, is the administrative law context in which those criteria are defined and developed in Australia. What I have in mind is that Australia has a comprehensive administrative review system, in which there are alternative ways in which a person may review a decision - by judicial review, my merit review pursuant to a comprehensive framework of tribunals that includes an Immigration Review Tribunal, by administrative investigation conducted by an Ombudsman, or by investigation of anti-discrimination and human rights standards by the different commissioners who together constitute the Human Rights and Equal

Opportunity Commission. That administrative law framework, it is often emphasised, enshrines a distinction between the validity of a decision and the merits of a decision. That entails in turn a recognition of the distinction between administrative behaviour that is defective and administrative behaviour that is unlawful.

One should have no difficulty accepting the proposition that as a matter of good administration all decision makers should be aware of the impact of international conventions which Australia has ratified. If HREOC, the Ombudsman, the AAT, or the IRT were to criticise a department which failed to keep abreast of the national and international influences on decision making, the criticism would be rightly made. Moreover, s 47 of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) defines a mechanism by which a convention can be declared under that Act and be applied by the Human Rights Commissioner when investigating complaints against Commonwealth administrative behaviour. Those mechanisms together ensure that ratification of international conventions will not become "a merely platitudinous or ineffectual act", which was the danger warned against by Mason CJ and Deane J.[17]

But to go further and insist that all which is defective is also invalid - with all that a declaration of invalidity entails - is to extend the reach of judicial supervision further than it needs to be stretched in the Australian administrative law system. Arguably the *ratio* of *Teoh* blurs the distinction between matters of law and matters of administration. So too do some particular opinions in the judgment, such as the specific instruction given by Mr Justice Toohey that the decision maker could have made inquiries of the Parkerville Children's Home and the Department of Community Welfare.

Standard 3: that the criteria are relatively clear, certain, and ascertainable

The practical effect of *Teoh* is that the validity of decision making in Australia can be dependent hereafter on the knowledge which individual officials have of the opaque terms of international conventions that may be difficult to identify or locate.

Critics of the judgment have noted that as many as 920 international conventions have been ratified by Australia. The difficulty of deciding whether a particular convention is relevant to a decision will frequently be compounded by the ambiguous language in which some conventions are expressed. In *Teoh*, for example, the issue arising was whether deportation of Mr Teoh fitted the description of Article 3 of the *U N Convention on the Rights of the Child*, that "*In all actions concerning children*, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". A skilled lawyer could be excused for having decided that deportation of Mr Teoh was not an action concerning his children. (This conclusion would be reinforced by Article 9(4), which specifically addresses the situation in which parents and children are separated by detention, imprisonment and deportation.)

Teoh similarly illustrates that the relevance of a convention will often be an issue of mixed law and fact, to be resolved anew in each individual case. It may not be possible to give straightforward guidance in decision making manuals, which will exacerbate the difficulty faced by administrators who lack legal training. Perpetual uncertainty about how decisions should

be made, or whether they are valid, does little to advance the rule of law.

Important issues of principle are also left unresolved by *Teoh*. When the Commonwealth Executive ratifies an international treaty, is the legitimate expectation which is thereby created confined to Commonwealth decision making, or does it embrace State decision making as well? And, in relation to Commonwealth decision makers, does the expectation apply only to officials in departments who are obliged to implement government policy, or does the expectation apply as well to those who have legal independence from the directions of government ministers, principally the staff of courts, tribunals, and statutory authorities?

Conclusion

The thrust of my criticism can be summed up in a few words. *Teoh* raised difficult questions about international law and behaviour which the High Court had to address. At the same time the Court also had to address questions of Australian administrative law. The focus on one set of questions should not obscure a proper handling of the other set. My argument is that this balance was not maintained.

Endnotes

1 (1995) 128 ALR 353, 355.

2 *Eg Wattmaster Alco Pty Ltd v Button* (1986) 70 ALR 330.

3 *Eg Our Town FM Pty Ltd v Australian Broadcasting Tribunal (No 1)* (1987) 13 ALD 740, *(No 2)* (1987) 77 ALR 601, and *(No 3)* (1987) 77 ALR 609; and K Wheelwright, "Controlling Pathology Expenditure under Medicare - A Failure of Regulation?" (1994) 22 *F L Rev* 92, 110-113.

4 *Eg Cooper v The Board of Works for the Wandsworth District* (1983) 14 CB(NS) 180, 143 ER 414; and *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1989) 167 CLR 637.

5 *Teoh v Minister for Immigration and Ethnic Affairs* (1994) 121 ALR 436.

6 *Id*, p 452 (*per* Lee J).

7 (1985) 159 CLR 550.

8 (1995) 128 ALR 353, 371.

9 (1995) 128 ALR 353, 383.

10 *R v Gaming Board of Great Britain; ex p Benaim and Kaida* [1970] 2 QB 417, 430.

11 *Eg Hindi v Minister for Immigration and Ethnic Affairs* (1988) 91 ALR 586, 597. See also *Singh v Minister for Immigration and Ethnic Affairs* (1985) 9 ALN 13: an official is obliged "to take into consideration all matters relevant to the decision to be made which, at the time the decision is to be made, are before him or her, whether actually ... or constructively".

12 *Eg Chaudhary v Minister for Immigration and Ethnic Affairs* (1994) 121 ALR 315. See also *Barbaro v Minister for Immigration and Ethnic Affairs* (1982) 46 ALR 123 (obligation to consider the impact of a deportation decision on a deportee's family). The decision in *Teoh* complied with an obligation defined in these terms. The decision of the Immigration Review Panel referred to the "very bleak and difficult future" facing Mr Teoh's wife and children.

13 Ss 6(2) and 6A of the *Migration Act* 1958 (Cth).

14 *Mok v Minister for Immigration and Ethnic Affairs (No 1)* (1993) 47 FCR 1, and *Phillips v Department of Immigration and Ethnic Affairs*, (1994) 48 FCR 57.

15 *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 127 ALR 580.

16 *Coco v R* (1994) 120 ALR 415, and *Ridgeway v R* (1995) 129 ALR 41.

17 (1995) 128 ALR 353, 365.

HANDLING MEDICAL CONTENTIONS IN THE REPATRIATION SYSTEM

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Preamble

I don't think any of us are in any doubt about the immense impact of administrative law on the lives of a vast number of Australians. It also impacts on the day to day business of government through the review of decisions made in the administration of government programs and the interpretation and application of legislation implementing government policy.

Purpose

In the recent past there has been considerable debate about the provisions of the *Veterans' Entitlements Act 1986* (VEA). In particular, the December 1992 report by the Auditor-General into the Department of Veterans' Affairs (DVA's) compensation sub-program and the March 1994 Baume Committee report entitled *A Fair Go* both argued for changes to the "reasonable hypothesis" standard of proof. The major problem perceived was that elderly veterans were being granted pensions for conditions that were the normal consequence of the ageing process. Each report argued for radical changes to the eligibility criteria for disability pensions and war widows' pensions.

The Government rejected most of the recommendations because they would have led to major reductions in entitlements for veterans and widows. The Government did, however, decide that there should be some action to ensure that cases with no real merit should not succeed simply because of the very generous standard of proof applied in the repatriation jurisdiction. I shall deal with these changes in more detail a little later.

At this point, a brief history of the repatriation system may be useful.

Historical Background

The repatriation compensation system, or the "Repat" as it is more familiarly known among ex-service men and women, has a very special place in the Australian psyche. Set up during World War I, it has been the mechanism through which a grateful nation has endeavoured to meet its obligations to its veterans and their families. The Repatriation Commission was the body charged with administering the repatriation system.

It came to be agreed that repatriation the nation's moral debt - should include positive measures to assist returnees to re-establish themselves in civil life; ample pensions, re-training and medical care for the disabled; and monetary allowances for dependants (chiefly wives and children).

The Australian interpretation was, from the outset, significantly more generous than that adopted by other allied countries.

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In essence, the Australian repatriation system has been based on the following principles:

- national indebtedness to those who served;
- a duty to look after the dependants of those who died as a result of war;
- compensation and other benefits should be a right and not a welfare handout; and
- in cases of doubt, the doubt should be resolved in favour of the veteran.

The Commission was empowered to issue regulations and also sat as an entitlement and assessment determining body to adjudicate on claims by ex-service personnel. Exercising this quasi-judicial function made it a pioneer in the development of Australian administrative law.

While the structure was intended to ensure a sympathetic appraisal, the Repat's decisions and approach have not been without controversy. For example, in earlier years, pensions and medical treatment were withheld from those whose disability and illness were ruled to be caused by venereal disease contracted while on active service. In more recent times, Vietnam veterans claimed to have suffered severe, but unrecognised, impairment of health through exposure to Agent Orange and other chemicals. A further difficulty has flowed from the fact that the administrative law evolved by the Repat did not sit comfortably with administrative case law which evolved under Administrative Appeals Tribunal (AAT), Federal Court and High Court decisions. An expansive definition of the onus of proof as it related to claimed pensionable disabilities (*O'Brien's case 1985*) and much readier provision of legal aid to claimants raised the spectre of a nightmare escalation of costs in some minds.

The Repatriation Commission's role, functions and powers are set out in the VEA and it discharges its responsibilities through the Department.

DVA is, of course, bound by the terms of the VEA as interpreted by the relevant appeal bodies. This might seem to be a trite, almost trivial, observation, but it is an issue which has bedevilled the administration of the repatriation system almost since its inception. The complexity of the legislation and the flow-on effects from the interpretation and application of beneficial legislation to individual cases have created many problems. The emotion which naturally underpins the whole nature of the commitment and sacrifice by veterans often makes "fine" and sometimes legalistic decisions about pension matters seem inexplicable. Further complications arise in accommodating advances in medical knowledge and dealing with differences of opinion among medical experts.

These are not new issues. They have been at the very core of reviews and enquiries into the administration of the repatriation scheme over the past two decades - by the Toose Enquiry (1975), the Administrative Review Council (1983), the ANAO (in 1984 and 1992), the Veteran's Entitlements Act Monitoring Committee (May 1988) and various internal departmental reviews.

Legislative Setting

Before going further, an understanding of the basic legal tenets in the repatriation jurisdiction is necessary. As with most complex issues, there is a danger in endeavouring to simplify the concepts because this necessarily tends to gloss over the subtleties and nuances which can be critical to that understanding.

As mentioned earlier, claims for compensation for war or defence service-related disabilities are made on the Repatriation Commission. DVA is the administrative arm of the Commission and is controlled by the Secretary who is also President of the Repatriation Commission. The Commission has two other members, one of whom must be appointed from a list of nominees put forward by organisations representing veterans.

Veterans may apply to the Commission to have an injury or disease determined as being related to their service. Widow(er)s are entitled to a war widow(er)s pension when a veteran's death is related to their service. (There are some special categories of veterans whose widow(er)s automatically receive a war widow(er)s pension.) In considering a claim, the Commission must look at whether there is a causal link between the injury, disease or death and the particular circumstances of the veteran. In this context, the two important elements are the facts relating to the veteran's service and the contention which seeks to link those facts to the injury, disease or death.

The repatriation determining system consists of the primary level - where delegates of the Repatriation Commission consider and decide claims - the Veterans' Review Board (VRB) - a specialist independent review board - and the AAT.

Two standards of proof are provided under the VEA - one for veterans with operational service (eg service in "war like" circumstances) and one for veterans with non-operational service (eg service within Australia during World War II and peace time service post-1972).

The **standard of proof** required for a veteran with **non-operational service** is that the Commission must be **reasonably satisfied** of the connection between disability and service (that is, the civil standard of proof).

The **standard of proof** for a veteran with **operational service** is that the Commission must determine a claim in favour of the veteran unless it is satisfied **beyond reasonable doubt** that there is **no** sufficient ground for making that determination. Introduced into the VEA in 1977, this standard was interpreted between 1977 and 1982 as meaning no more in a compensation context than that the benefit of any ultimate doubt should be given to the veteran.

In 1981 (the *Law case*), however, the High Court found that the "beyond reasonable doubt" standard meant the same in repatriation law as it did in criminal law - that is, the reverse of the criminal standard of proof was to be applied. This standard of proof is unique to Australia's repatriation jurisdiction.

In the 1985 *O'Brien case*, the High Court went further, finding that a mere possibility was enough for a claim to succeed unless the Commission could be satisfied beyond reasonable doubt that the condition was not related to service. Even if there was no evidence, or if the evidence was neutral, the claim was to succeed. Hence, the onus of disproof was effectively placed on the Commission.

In response to the *O'Brien* decision, the Government amended the standard of proof to provide, in effect, that a claim should not be accepted unless the material raised a reasonable hypothesis, connecting the injury, disease or death to the veteran's service. (Annex A provides more detail on the "reasonable hypothesis".) Further significant amendments occurred in 1986, so that the Commission could be satisfied at the beyond reasonable doubt standard if no reasonable hypothesis of connection between

disability and service was raised after an analysis of all the material.

In *Bushell* (1992) and *Bymes* (1993), the High Court ruled on the meaning of the term "reasonable hypothesis". In effect, these decisions meant that a single responsible medical practitioner, speaking within the ambit of his or her expertise, (or a single expert eminent in the field) who supported a claim automatically satisfied the reasonable hypothesis standard of proof.

In the 1950s and 1960s the entitlement rate averaged about 54% over all levels of the determining system. For example, the acceptance rate was 46% in 1957-58, 57% in 1963-64 and 52% in 1966-67.

By the late 1970s, prior to the *Law* case, primary level acceptance rates were about 30%. Acceptance rates doubled and commenced to rise again after the *Bushell* case in 1992.

Changes in entitlement intake lag approximately one to two years behind changes in the acceptance rates, that is, when the acceptance rate rises, the claim intake rises soon afterwards. The intake increased significantly after the *Law* case.

Reasons for the Change in Acceptance Rates

As you might imagine, many claims lodged in the immediate post-war period were readily identifiable as being related to service. The nature of the diseases and injuries claimed and the proximity to service in terms of the time and onset of the conditions naturally assisted in the determination of those claims.

In a sense, the period in the mid-1970s might be characterised as marking a change from acceptance of the direct consequences of war to include the more indirect consequences. The best example of this involves smoking related conditions. Up until the *Law* and *O'Brien* decisions, claims for smoking related conditions were not generally accepted. But those decisions, together with developments in medical research led to smoking being linked to a wide range of conditions. The threshold question therefore became not so much the link between smoking and the condition claimed, but whether or not the commencement of, or increase in, smoking could be linked to service.

One does not need a "reasonable hypothesis" standard of proof to establish a causal link between smoking and a wide range of conditions like lung cancer and respiratory and heart disease. There have been numerous cases in the general law where that position has been accepted under the civil standard of proof. The significance of smoking-related conditions in the community and the fact that many of those conditions do not manifest themselves for many decades underlie the rise in acceptance rates. Given that many of these conditions are directly or closely associated with the cause of death of many veterans, the number of successful war widow claims has also increased.

While the "reasonable hypothesis" standard of proof has not really affected claims for those conditions which fall within what might be described as conventional medical and scientific opinion, it does have a significant impact on those which are at the margins. Currently, acceptance rates are around 70% at the primary level, rising to 76% after all rights of appeal have been exhausted. Over 95% of these acceptances relate to conditions which would be covered by mainstream medical and scientific opinion.

The Australian National Audit Office (ANAO) Report

The Australian National Audit Office Audit *Report No 8* of December 1992, (referred to above), found that:

- there was a lack of consistency in decision making at primary level and above;
- decisions of the AAT and the courts had rendered earlier amendments to the legislation in 1985 and 1986 largely ineffective;
- veterans were being compensated for disabilities suffered at no greater rate than the community generally; and
- far fetched claims were succeeding.

The Baume Report

As a result of the ANAO report, the Government set up the Veterans' Compensation Review Committee consisting of Professor Peter Baume (a Minister in a previous Government and Professor of Community Medicine at the University of NSW), Air Vice Marshall Richard Bomball and Ms Robyn Layton QC (a former Deputy President of the AAT with considerable experience in VEA matters) to look into the repatriation compensation system.

In its March 1994 report, the Baume Committee identified problems with the standard of proof and causation provisions in the VEA. It recommended:

- there should be a single standard of proof - the civil standard of balance of probabilities (or reasonable satisfaction) - for both operational and non-operational service;
- there should be an "equipoise" provision for veterans with operational service whereby they were given the benefit of any ultimate doubt. This is the reverse of the normal civil standard position where if the matter is in equipoise at the end of the day, the claimant loses. (Or, putting the positive equipoise provision in cricket parlance, "the batsman gets the benefit of the doubt"); and
- an expert medical committee should decide on generalised medical contentions. (An example might be whether malaria can lead to some generalised suppression of the immune system which leads to cancer in later life.)

Other problems

Departmental research conducted around the time the Government was considering the Baume Committee recommendations found inconsistency in primary level decision making between and within States.

The time taken to determine claims was also considered unsatisfactory. In 1984-85, primary level entitlement decisions took an average of 347 days while VRB decisions took a further 751 days.

These times are now 154 days and 414 days respectively. Despite these reductions we are still not satisfied with the time taken to process claims. They imply, for the 4,900 applications expected by the VRB this year, an average delay of 568 days (1 year 7 months) between lodgement of the initial claim and the outcome of the first appeal.

About 4% of entitlement cases are subsequently taken to the AAT. These take an average of 12 months to resolve while appeals to the Federal Court add a further 9 months. From initial receipt of a claim to a decision from the Federal Court, 3½ to 4 years may elapse.

Solutions

The Government's response was to:

- establish a Repatriation Medical Authority through legislative amendment;
- establish a Specialist Medical Review Council through legislative amendment; and
- introduce an "expert system" - the Compensation Claims Processing System.

Repatriation Medical Authority

The *Veterans' Affairs (1994-95 Budget Measures) Legislation Amendment Act 1994*, which received Royal Assent on 30 June 1994, introduced a number of new concepts and procedures into the VEA. In summary these are:

- in its approach to the concept of "reasonable hypothesis" the Government has sought to amplify the requirements before an hypothesis can be found to be reasonable so that an opinion held by a single medical practitioner that does not have sound medical-scientific support, will no longer be sufficient as the basis of a reasonable hypothesis;
- as part of the requirement that hypotheses have medical-scientific credibility and to ensure consistency in the determining of claims, decisions on the reasonableness of medical hypotheses are decided by an independent body of eminent medical practitioners and medical scientists known as the Repatriation Medical Authority (RMA). Purely medical causation issues are no longer decided by departmental delegates or, at review stages, by lawyers or laymen;
- the members of the RMA were appointed by the Minister for Veterans' Affairs in July 1994 after extensive consultation with the ex-service community. The Minister gave an undertaking that he would only appoint members of the RMA who were seen by all parties as entirely independent of the Repatriation Determining System. The five members of the Authority, Professors Donald, Raphael, Duggan, Heller and Kearsley are acknowledged as leaders in their respective professions;
- the legislation requires at least one member of the RMA to be a person who has at least 5 years experience in the field of epidemiology. Professor Donald, the Chairman of the Authority, is a specialist in pathology, Professor Raphael is a psychiatrist, Professor Duggan, a general physician, Professor Heller, an epidemiologist and Professor Kearsley, an oncologist. The Authority is able to call on a list of ministerially appointed consultants for further expert advice concerning any disease under their consideration;
- the RMA was given the power to determine from time to time those medical contentions that are based on sound medical-scientific evidence and that provide a relevant relationship between service and the disabilities claimed by applicants for pension and hence can form the basis for "reasonable hypotheses" and claims at the "reasonable satisfaction" standard;
- these changes are consistent with the decision in *Bushell* in which the High Court required the validity of the reasoning of all medical and scientific material to be examined;

- in effect, it is now necessary, before an hypothesis can be found to be reasonable or a claim determined at the reasonable satisfaction standard, for it to be based on sound evidence from the field of medical science: that is, for the medical contention to be accepted it needs to be based on medical-scientific acceptability;

- as an example, an hypothesis would not be able to be found reasonable if it were espoused by a medical practitioner whose views on the medical-scientific issues involved were speculative, fanciful, unsound, or undermined by the views of peers;

- on the other hand, full scientific proof will not be required for an hypothesis to be reasonable and more than a single hypothesis of causation in relation to a disease, injury or death can be reasonable;

- the RMA's determinations are issued in the form of a "Statement of Principle" based on sound medical-scientific evidence that will exclusively state what factors, when related to service, must exist to establish a causal connection between diseases, injuries or death and service. Statements of Principles (SOPs) prepared by the RMA will be disallowable legislative instruments;

- provision has been made to enable the RMA, where necessary, to consult with veterans and their organisations during the process of formulation of SOPs and for the SOPs to be open to review in light of subsequent research findings. Veterans and their representative organisations are able to initiate action by the Authority to formulate or review the contents of SOPs and may make written submissions to the RMA;

- so far the RMA has determined 60 SOPs. We estimate 400 SOPs will be determined by July 1995 and that this will cover some 80% of claims. A further 200 SOPs will be required to cover 95% of all conditions claimed. The RMA has also decided to carry out an investigation into the causes of cancer of the prostate. This will examine whether there is a causal link between smoking and the development of cancer of the prostate; and

- instead of waiting for the RMA to issue a SOP for every condition, we have decided to process and accept claims under the present Repatriation Commission guidelines, except where the RMA has announced an investigation (as is the case with cancer of the prostate).

We expect these changes to reduce the acceptance rate for entitlement claims over the whole determining system by one or two percentage points from 76% to 74% or 75%.

Specialist Medical Review Council

In the same Bill that established the RMA, a Specialist Medical Review Council (SMRC) was established to review the determinations of the RMA if so requested. This provision was added, with the Government's agreement, following debate about who would review the RMA's determinations even though these determinations were to be disallowable instruments. (A disallowable instrument is an instrument of delegated legislation such as regulations or other rules not made by Parliament itself, but which determine general principles of law. It must be tabled before both Houses of Parliament and can be disallowed by either House.)

The members of the SMRC will be appointed by the Minister for Veterans' Affairs on a part-time basis. One of the members will be appointed as Convenor. For the purposes of a review the SMRC must be constituted by at least three, but not more than five, members selected by the Convenor. The members will be selected from lists of nominees submitted by professional medical colleges or similar bodies.

When so requested, by a veteran, a widow, an ex-service organisation or the Repatriation Commission, the SMRC must carry out a review of all of the material that was available to the RMA when it made its determination on a SOP. The SMRC does not conduct a totally *de novo* review. It has regard to the material that was before the RMA, but it can also take into account new submissions in relation to that material. (If a person, having been unsuccessful at the primary level, decides to seek a review by the RMA or the SMRC of a SOP, it will also be necessary for him (or her) to lodge an appeal to the VRB in order to ensure that the maximum arrears of pension can be paid if the claim ultimately succeeds.)

It is important to recognise that the RMA and SMRC are legislative bodies - not administrative tribunals. They do not deal with individual cases, but make rules of general application. They do, however, permit veterans and their organisations to have a direct role in influencing this legislative process where that process may have a direct impact on their or their constituents' pension rights. This is certainly a novel approach to consultation in rule-making.

If the SMRC is of the view that there is sound medical-scientific evidence that was available to the RMA when it made its determination or decision that would justify the RMA in amending or determining a SOP, then the SMRC must make a written declaration. That declaration must state the SMRC's views and set out the supporting evidence and must either direct the RMA to amend or determine a SOP or otherwise remit the matter for consideration in accordance with any directions or recommendations of the SMRC.

On the other hand, if the SMRC considers that the RMA made its decision on other than sound medical-scientific evidence, then the SMRC must make a written declaration to that effect, giving reasons. The SMRC may include in the declaration any recommendation that it may wish to make about any future investigation that the RMA may carry out.

The RMA and SMRC approaches to deciding medical issues have been seen in some quarters as establishing a new system to replace the traditional mechanisms of tribunals and courts.

In this regard, it is worth noting the trend in the Workers' Compensation area for medical issues to be decided, not by courts and tribunals, but by specialist medical committees and for the findings of those committees to be conclusive and binding on courts and tribunals. This leaves only non-medical issues to be decided by the courts and tribunals.

Compensation Claims Processing System

The Compensation Claims Processing System (CCPS) initiative is intended to improve the consistency and speed of primary level decision making. It is a computer based "expert system" incorporating an extensive rule base (covering the SOPs) and requiring research and input by departmental claims assessors.

Claims assessors working in the CCPS environment draw on medical officers and senior assessors to assist them in exercising judgment and discretion in determining the course of action.

Where a claims assessor makes a decision to over ride the rule base, the case is automatically referred to a senior officer for validation of the decision made.

CCPS went live in March 1994 and was applied to a quarter of the intake of claims in Queensland Branch Office. It was progressively introduced in all other States and expanded to apply to all claims intake and became fully operational in September 1994. CCPS should:

- address the problems of ensuring inter-and intra-State consistency in decision-making in a large and dispersed department;
- reduce waiting lists of claims awaiting determination; and
- reduce the average time taken in determining claims.

Early indications are that delays in processing claims have been reduced as a result of the introduction of CCPS. During the September 1994 quarter about 2,400 entitlement claims were processed using CCPS, with an average time taken of about 86 days. This processing time was 168 days in the June quarter under the old system. It needs to be borne in mind that these 2,400 CCPS claims were mainly claims which can be easily accepted and there may be an increase in the CCPS times taken as the system starts to process a more normal flow of cases. Nevertheless, there are definite signs that CCPS is providing a better service in terms of consistency and the speed of decision-making.

As part of the introduction of both CCPS and the recent amendments setting up the RMA and SMRC, DVA has set up teams to determine the backlog of claims made under the previous system for determining claims. We are aiming within the next 3-4 months to reduce the outstanding number of claims to the lowest level they have been for more than ten years.

With the introduction of CCPS, the Department has put in place a completely new administrative support structure. The Repatriation Commission delegation to determine claims has been devolved to a lower classification level - from Senior Officer Grade C to Administrative Service Officer (ASO) Grade 5. The ASO 5 level met the Public Service work level standards for that type of activity. As part of the devolution, the new structure introduced the responsibility based processing concept with the ASO 5 claims assessor responsible for managing the claim from receipt to decision and advice to the claimant.

Once the new system is bedded-down we will be reviewing the consistency of decision-making throughout the country. My aim is to ensure equity of outcomes for claims by all veterans and war widows, wherever they may live in Australia.

As part of our ongoing process of upgrading our systems technology, we will be introducing better software and hardware platforms for the CCPS system. This will be an important element in my drive to introduce a new and strong quality-of-service culture in the Department of Veterans' Affairs.

Additionally, early in 1995 we will be carrying out reviews of cases at all levels in the system by using the powers in section 31 of the VEA where further evidence has come forward since the claim was last considered.

It is of interest that CCPS was named in a paper at a recent conference on innovative applications of artificial intelligence held by the American Association for Artificial Intelligence (AAAI). The paper was submitted by

Softlaw, the Australian firm which has written the CCPS software.

(Annex B deals in more detail with the ways in which the RMA, the SMRC and CCPS will deal with the expectations of clients.)

Other initiatives

In conjunction with these initiatives, we are taking other steps to assist the veteran community in preparing, presenting and arguing claims. A training and information program helps ex-service community advocates and welfare officers with the investigation and presentation of claims. A Veterans' Advice Network (VAN) is being established to assist veterans in suburban, rural and remote locations with information and access to health care and support services. Finally, in the 1994 budget the Government approved funding for medical opinions obtained by applicants in VRB appeals.

Problems Remaining

Although the amendments to the VEA introducing the RMA and SMRC should address some problems in the repatriation area, not all problems will be solved. Problems obviously remain in:

- the standard of proof to be applied in determining matters of fact other than medical contentions; and
- determining causation issues.

The majority of appeals are based on questions of fact, such as whether a veteran served in a particular area or whether certain events occurred during the time of his or her service rather than on questions of medical causation. All these rights of appeal remain and the existing standard of proof remains as the test for establishing whether a particular disease or injury is war caused.

A further problem is the excessive number of levels of *de novo* decision making. This is related to, but not the same as, the "proliferation of tribunals" which is part of the subject matter in the Administrative Review Council discussion paper entitled "Review of Commonwealth Merits Review Tribunals".

In the repatriation area there are now up to five levels of *de novo* decision making. These are:

- primary level decision making by DVA's delegates;
- internal review by DVA (in certain cases);
- VRB review;
- further pre-hearing review by DVA and "mediation" procedures by the AAT; and
- formal AAT review by way of hearing.

In addition to these appeal arrangements, veterans and war widow(er)s do, of course, have access to the Ombudsman. We have in place a system that facilitates ready access to case files by the Ombudsman. Where there is an active appeal under the above review arrangements the Ombudsman generally does not get involved.

The Minister has commissioned a review of the appeals process. The Commission will also be reviewing its policy on appeals and putting more effort into getting the decision right the first time - through training and the like.

Other critics have:

- commented on the erosion of the power of the Parliament by the judiciary which has no responsibility

for the fiscal implications of its decisions;

- questioned whether a bereaved widow of a veteran who subsequently died from smoking induced lung cancer is as much a war widow as the widow of someone killed during the war;
- said that the rort-ridden world of veterans' affairs history is one of political opportunism, popularism, political incompetence and inequity;
- argued that veterans have been conned and that the VEA amendments have effectively downgraded benefits (rather than redressed dodgy claims);
- claimed that the VEA amendments will impose the greatest administrative fiasco since inception of the Repat system, the net result of which will be that only some 17% of claims will succeed.

Some critics also believe it inappropriate that there is nothing to stop an applicant recommencing the process even without new evidence.

Financial Implications

The ANAO report was critical of the efficiency of DVA's approach to claims processing and the administrative cost of the appeals system.

The 1993-94 cost of administering the repatriation determining system is about $28m, comprising:

- $13.1m for the primary determining level
- $5.3m for the VRB
- $5.2m for the AAT
- $4.7m for Legal Aid for AAT cases

Introduction of the RMA is expected to save about $32m over the four year forward estimate period 1994-95 to 1997-98. These estimated savings enabled the Government to direct other assistance to veterans in the 1994-95 Budget, for example, the $20m package of assistance for Vietnam veterans.

Conclusion

The RMA and the SMRC will provide more certainty as to the reasonableness of medical hypotheses so that there will be much greater consistency on medical-scientific issues at all levels of the determining system.

Brennan J, in *Drake (1979)* stated:

> Inconsistency is not merely inelegant: it brings the process of deciding into disrepute, suggesting arbitrariness which is incompatible with commonly accepted notions of justice.

The thrust of these reforms is to achieve what has eluded us in the past. To provide a system which deals with claims from all veterans in a consistent and timely manner and to do this in a way which appropriately honours and recognises that these people are indeed special. They are our living national treasures.

ANNEX A

The "Reasonable Hypothesis"

This annex sets out a brief history of the "reasonable hypothesis" standard of proof.

The Full Federal Court case of *East* (1987) found that a reasonable hypothesis requires more than a possibility, not fanciful or unreal, consistent with the known facts even though not proved on the balance of probabilities.

In legislation such as the VEA, which is clearly intended to be generously beneficial, the *East* decision might be considered to represent a fair interpretation of the standard, so that proof is required at something less than the civil standard.

In *Bushell* (1992), however, the High Court gave a fresh interpretation to the reasonable hypothesis in saying that

> It would be an exceptional case in which it would be right for the AAT, forming its own view of competing medical theories, to hold an hypothesis of connection favouring entitlement to be unreasonable, when the hypothesis is supported by "a responsible medical practitioner, speaking within the ambit of his expertise.

The High Court added in *Bymes* (1993) that:

> It was not open to the [Administrative Appeals] Tribunal ... to say that the hypothesis relied on by the appellant was not reasonable because there was only a 20 to 1 chance of it being valid. A hypothesis within that degree of probability cannot as a matter of law be regarded as unreasonable ... .

(The medical expert's opinion in this case was that the possibility of connection between disability and service was "extremely unlikely" - "a twenty to one outsider". Hence the "20 to 1 chance" of the High Court's decision.)

The High Court went on to say that

> In some cases, the hypotheses may assume the occurrence of existence of a "fact". That itself does not make the hypothesis unreasonable.

ANNEX B

Client Expectations

DVA considers that appellants and citizens have legitimate expectations that, in bureaucratic decision-making there will be:

- procedural fairness;
- timeliness;
- consistency;
- "once and for all" resolution of the issues;
- guidance to decision-makers;
- economy (both for the individual and the taxpayer); and
- conformity with government policy.

It has been argued that in the repatriation jurisdiction only the first of these is being achieved on an ongoing and consistent basis, although the problems with the second are also due to delay by the applicant themselves.

The question arises whether a structure based on the court norms of hearings and representation, leading as it has to a more adversarial approach in a two tier system at the final level, is the best way to achieve the objectives of merits review. More of an inquisitorial or an administrative approach to decision-making and the law would seem to be required as part of addressing the major problems remaining. The Explanatory Memorandum to the recent VEA amendments pointed out that a major cause of difficulties with the previous determining system was that medical decisions were required to be taken by non-medical bodies. In *McIntyre* the AAT, in commenting on the nature of medical evidence and hypotheses put before it said:

> Such fanciful views, while bordering on an insult to the intelligence, do not advance the positions of ex-servicemen. Whilst recognising that our findings of the fact are final, whether right or wrong, ... the Tribunal is concerned that so much money is consumed in repeated and persistent attempts to persuade it that there is factual support for the hypotheses advanced in this matter. If weak minded Tribunals accept such material, this will only lead to increased money being spent on computer searches for papers and witnesses' expenses, while avoiding a review of the present legislation with its fictionalised method of determining war pension for veterans and their widows, who probably deserve them, for the service rendered, rather than for fanciful hypotheses advanced.

As I understand it, this hypothesis is based on the following, which I have tried to put in non-technical terms:

> Nitrates and nitrites are contained in canned food such as was eaten in quantity by troops in WW2. They were actually added to such foods (and others) as part of the preserving process. Nitrates/ nitrites ' are converted in the gut to nitrosamines some of which have been shown in animal studies to be carcinogenic. Various cancers (generally) of the stomach, bowel etc are then hypothesised to have resulted in humans from nitrates/nitrites. The counter argument is that nitrates/ nitrites occur naturally in a wide range of non-preserved foods (including fresh fruit and vegetables). As well, there are many different nitrosamines produced when the gut acts on nitrates/nitrites. It is not clear which of these are harmful. It is undeniable, however that manufacturers have reduced nitrates/nitrites in processed foods since concern has been expressed about the possibility that certain nitrosamines are carcinogens.

The particular hypothesis referred to in the *McIntyre* case was later accepted by the AAT in *McKnight* and *Taylor* but rejected in *Gorman* and *O'Brien*. In *Anderson* the two lay members of the Tribunal found that the hypothesis was reasonable, but the medical member did not.

In *Bushell's* case in the High Court, Mason CJ, Deane and McHugh JJ stated that the Commission is "bound" to have regard to "medical or scientific material opposing the material that supports the veterans' claim ... for the purpose of examining the validity of the reasoning which supports the claim that there is a connection between the incapacity or death and the service of a veteran".

The introduction of the Compensation Claims Processing system, together with the setting up of the RMA and SMRC, is expected to provide clients with a fairer and more consistent system for determining their claims.

FACTS OF CASES REFERRED TO IN PAPER

"Beyond Reasonable Doubt" Cases

Repatriation Commission v Law

(High Court decision 16 October 1981 against Commission)

The respondent was the widow of an ex-serviceman whose death was caused by carcinoma of the lung and myocardial infarction. She claimed a pension under the Repatriation Act 1920 on the basis that her husband had become a heavy smoker while a prisoner of war and this had caused the carcinoma. During the period in which he was a prisoner of war he underwent severe hardship and suffered from enteritis, bacterial dysentery, malaria, otitis externa, beriberi and hookworm. When he joined the Army he had not smoked cigarettes but by the time he was repatriated to Australia from a prisoner of war camp he had begun to smoke heavily. When discharged from the forces he was in a wretched physical condition and remained in poor health for the rest of his life. The AAT rejected her claim.

The *Law* case was a landmark decision which held that changes to legislation in 1977 had inserted a reverse criminal standard into the Act.

Repatriation Commission v O'Brien

(High Court decision 27 February 1985 against Commission - Brennan and Murphy JJ dissenting)

The respondent served in Australia with the RAAF between 1942 and 1946. During this period he suffered from essential hypertension which developed into anxiety neurosis as a result of stress suffered because he was separated from his wife due to his training and because he served only within Australia, contrary to his strong desire to serve overseas. The condition persisted after discharge. The AAT rejected the claim that the hypertension or anxiety neurosis were related to war service.

East v Repatriation Commission

(Full Federal Court decision 22 July 1987 for Commission)

The appellant was the widow of a former member of the RAAF who died from carcinomatosis and toxaemia due to hypernephroma of the left kidney. Mr East's service included overseas service in the Middle East. The veteran's hypernephroma, a condition of unknown aetiology, was first apparent in 1979. He died on 16 January 1983. In October 1982 he had made a claim for "medical treatment and pension". At the AAT, medical evidence was received from two witnesses. One of the medical experts identified three factors upon which he based an hypothesis of a causal connection between service and death: use of the anti malarial agent, stress and change of lifestyle and diet. This witness gave reasons for postulating a link between these factors and the development of the hypernephroma many years later.

The second medical witness disputed this hypothesis. He said that, despite extensive studies, the only established formal association between an environmental factor and the development of renal cancer was in the connection with smoking. For these, and other reasons, the second medical witness found that, upon present knowledge, there did not appear to be any environmental factor during Mr East's war service or later life which would predispose him to the development of any malignancy. In particular he saw no association with the later development of renal cancer.

The AAT affirmed the decision of the Veterans' Review Board to reject the claim.

Byrnes v Repatriation Commission

(High Court decision 15 September 1993 against Commission)

My Byrnes served in the Australian Army and the Royal Australian Navy. He claimed that his cervical and thorasic spondylosis were war-caused diseases and were the consequences of three incidents during his naval service.

The three incidents upon which Mr Byrnes based his claim were:

- ricked neck caused by diving into a shallow pool; later admitted to hospital with "cervical myositis",
- hit on back of the head by a piece of coal when ship rolled; and
- fell and hit head and shoulders on riveted bulkhead when on deck to get fresh air.

The first incident is the one most relied on. It appears that Mr Byrnes did not report it immediately and although he was kept in hospital for observation he was only treated with linament.

The medical witnesses for both the applicant and the Commission agreed with the medical hypothesis that a severe injury was necessary to lead to the development of spondylosis. The applicant's medical witness contended that the diving injury was sufficiently severe, whereas the Commission's specialist considered that there was no evidence to support this view and that the condition would have emerged at an earlier time had it been so. As the condition did not emerge for many years after war-service and appeared consistent with the effects of aging he considered that there was no material pointing to the hypothesis.

The AAT found that there was no evidence to show that any of the occurrences caused severe injury and that in the circumstances there was no more than a possibility of a relevant cause or connection. Hence a reasonable hypothesis had not been raised.

Bushell v Repatriation Commission

(High Court decision 7 October 1992 against Commission)

Mr Bushell was discharged from the RAAF in January 1946 because of "temperamental instability". In 1982 he applied for a service pension claiming 100% of the general rate of pension for incapacity in respect of anxiety state as being service related. The AAT rejected Mr Bushell's claim that he had an anxiety state, attributable to war service, which contributed to hypertension.

(Note: Both *O'Brien* and *Bushell* were, broadly speaking, stress and hypertension cases. Given that the legislation was changed to overcome the *O'Brien* decision, the AAT decision in *Bushell* should have been unremarkable and able to withstand challenge.)

As a comparison to the above "beyond reasonable doubt cases", particularly in comparison to the veterans' circumstances in *Law's* case which began it all, below is outlined a case that was determined on the civil standard of proof.

The case of Mr T

T was in the Citizen Military Forces (CMF) (not the AIF) for 7 months in 1940-41 during the second World War. During that time he was on one full camp of less than two and a half months. T did not leave Australia at any time. At the time T was in the CMF the Japanese had not entered the war and

the legislation in place did not allow the CMF to be sent overseas. T lodged a disability claim in 1990 when he was 74 years old. He claimed that the apprehension caused by his military service, the cheapness and the availability of cigarettes and peer pressure had caused him to commence smoking in 1940 during his full time military service and various diseases had resulted from his smoking. The AAT rejected his claim, which was however upheld by the Federal Court. This case emphasises how far the law has moved from the High Court decision in the *Law* case involving the beyond reasonable doubt standard.

MEDIATION IN ADMINISTRATIVE LAW - THE COMMONWEALTH AAT EXPERIENCE

*John Handley**

Paper presented to AIAL seminar, Mediation in Administrative Law Dispute Resolution, Canberra, 22 June 1994

Mediation commenced in the Commonwealth Administrative Appeals Tribunal (AAT) in September 1991 following a report prepared by Professor Jennifer David, who was commissioned by the former President, Justice Deirdre O'Connor, to investigate the feasibility of developing a mediation stream for the Tribunal. Mediation was ultimately introduced on a graduated basis throughout AAT Registries, after the recommendation of Professor David to introduce mediation was accepted by O'Connor J. From March 1993 it has been available in all jurisdictions and all Registries.

The AAT has not had its own definition of mediation nor has it been defined by recent amendments to the *Administrative Appeals Tribunal Act*. We have, however, practised mediation as being the voluntary participation by all parties, in an atmosphere of confidentiality, of persons in conflict agreeing to be assisted by a neutral third party mediator who will encourage them to find their own solutions to the dispute by focussing on their issues, interests and needs. The solution must necessarily be lawful. Relationships should be restored and the process should be satisfactory to the parties. It must be a credible alternative to litigation and adjudication.

Mediation in effect gives parties before the AAT a choice of the manner in which the dispute may be resolved. The concept of parties being given this choice is, I believe, unique and in the event that a matter does not resolve by mediation, the opportunity to proceed to a hearing is preserved.

I emphasise that mediation has not been introduced to the Tribunal as a case management tool only. Its primary purpose has been to offer disputants a satisfying process of dispute resolution. The right to proceed to a hearing is no longer the only option available to parties if they are incapable of or unable to resolve their dispute.

The Tribunal is familiar with a sufficient number of examples of mediation being implemented as a case management tool to be satisfied that the ethic and philosophy of mediation has been corrupted where courts, tribunals and agencies strive for reduction in delays between commencement of litigation and conclusion or the elimination of court backlogs which exist primarily as the result of a failure to properly administer case loads. We are disappointed by the frequently

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occurring headlines which, unfortunately, continue to be published by courts and tribunals extolling the virtue of mediation because backlogs have been eliminated "overnight" by mediation. To the extent that mediation is primarily focused on resolution of disputes and the creation of peaceful harmonious relationships between parties, the elimination of a court backlog or using mediation as a case management tool satisfies the needs of the courts and the parties' representatives only and fails to focus on the needs of the parties themselves.

Mediation is conducted within the Tribunal by its own members who are accredited as mediators. The decision not to use outside agencies, despite a considerable body of informed opinion that courts and tribunals should not mediate but should use outside agencies, has been taken with regard to the issue of costs, confidentiality, maintenance of files and control over listing.

Results to date

That mediation has been accepted within the Tribunal and by its users is evidenced by the fact that at 30 June 1994, 621 cases had been referred to a mediation conference. Eighty-one percent of cases mediated have been resolved. Broken down into individual jurisdictions, the rate of resolution has been 79% in Social Security, 84% in Veterans and 83% in Compensation.

Some agencies have stated that mediation is now their preferred option of resolution over and above litigation. Some parties in fact request mediation in lieu of a preliminary conference, although our procedures dictate that parties will participate in at least one preliminary conference prior to mediation to ensure that they understand the process and are ready to mediate on the allocated date.

Accredited members also conduct preliminary conferences within the Tribunal so that the ideals of mediation may be practised in those conferences. Wherever possible, if a matter can be resolved in the time permitted for the conference, it ought to be. There is no logical reason to refer an application to a mediation conference if the dispute is capable of being resolved, to the satisfaction of the parties, within a preliminary conference. Mediation does not stand alone nor is it separate as a process outside the mainstream of pre-hearing and case management of the Tribunal. It is a process which the parties may choose to adopt if a matter, for whatever reason, is incapable of being resolved within a preliminary conference or between the parties themselves.

Our experience has been that a mediation conference, on average, has a duration of 99 minutes in Social Security, 87 minutes in Veterans and 132 minutes in Compensation. In most cases, preliminary conferences are convened every half hour. Mediation therefore offers the opportunity for parties to explore thoroughly opportunities to resolve a dispute, without having multiple preliminary conferences or without having their attempts to resolve interrupted by the effluxion of the time permitted for the preliminary conference.

Participation in mediation conferences in the Tribunal is voluntary and is not mandated. This is now ensured as a result of an amendment to the *AAT Act*, which says -

> S 34A.(1) Where an application is made to the Tribunal for a review of a decision, the President may, if he or she thinks it desirable to do so and the parties consent, direct that the proceeding, or any part of the proceeding or any matter arising out of

the proceeding, be referred to a mediator for mediation.

(2) A mediator is to be a member or officer of the Tribunal directed by the President to mediate in the particular case.

(3) A direction may be given under subsection (1) whether or not a conference under section 34 has also been held in relation to the proceeding.

(4) If, in the course of a mediation:

(a) agreement is reached between the parties or their representatives as to the terms of a decision of the Tribunal in the proceeding or in relation to the part of the proceeding or the matter arising out of the proceeding that would be acceptable to the parties; and

(b) the terms of the agreement are reduced to writing, signed by or on behalf of the parties and lodged with the Tribunal; and

(c) the Tribunal is satisfied that a decision in those terms or consistent with those terms would be within the powers of the Tribunal;

the Tribunal may, if it appears to it to be appropriate to do so, act in accordance with whichever of subsection (5) or (6) is relevant in the particular case.

(5) if the agreement reached is to the terms of a decision of the Tribunal in the proceeding, the Tribunal may, without holding a hearing of the proceeding, make a decision in accordance with those terms.

(6) If the agreement relates to a part of the proceeding or a matter arising out of the proceeding, the Tribunal may, in its decision in the proceeding, give effect to the terms of the agreement without dealing at the hearing of the proceeding with the part of the proceeding or the matter arising out of the proceeding, as the case may be, to which the agreement relates.

(7) Except at the hearing of a proceeding before the Tribunal where the parties otherwise agree, evidence of anything said or act done at a mediation is not admissible in any court or in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory, or by the consent of the parties, to hear evidence.

(8) A person who mediates in respect of a proceeding may not be a member of the Tribunal as constituted for the purposes of the proceeding other than for the purpose of the Tribunal making a decision in accordance with subsection (5) or (6) or dismissing under subsection 42(A)(1) or (2) the application giving rise to the proceeding.

It is our belief that both parties will not enter mediation in good faith nor will they be willing to work towards resolving conflict if they enter the process by an order or a direction of the Tribunal. Voluntary participation further ensures that mediation will not be used as a case management tool or used by the Tribunal to ensure the speedy resolution of applications for the sake of case management only.

Does mediation complement or offend administrative review?

In my view, one of the failings of administrative review in Australia is the absence of face-to-face communication between decision makers and citizens prior to participation in either a preliminary conference or a mediation conference before the AAT. This is despite perhaps 12 to 18 months elapsing between the initial claim being made upon an agency and a preliminary conference or mediation conference being convened at the Tribunal. Within this period of time, there will also have been a number of internal and external reviews conducted by both the agency and by other tribunals.

The "claim" made by the citizen upon the agency or department is usually done at a counter in some office but thereafter any face-to-face contact ceases to exist until presence at the

Tribunal. The investigation of the claim and the calling for any additional information is usually done by letter or telephone and the external review by other tribunals is often convened in the absence of the decision maker or the decision maker's representative.

Arguably, the conflict between the parties is the consequence of absent or poor communication between them. Mediation has therefore lent itself as an ideal vehicle to resolve disputes because it necessarily brings the parties together and thereby, with the assistance of the mediator, more effective communication and the opportunity to be heard occurs.

The Tribunal readily acknowledge that cases can "settle" between parties when communication occurs either by correspondence or between legal or other representatives on behalf of parties. The Tribunal however has created an opportunity for the parties to "eye ball" each other and verbally communicate by virtue of a mediation conference. Whilst the opportunity exists for parties to come together in preliminary conferences in the Tribunal, more often than not only the parties' legal representatives attend.

It has been our experience that communication between parties is much more effective when the parties attend personally. With the assistance of a mediator and the use of audio-visual equipment made available to mediators by the Tribunal, both parties, even if they withdraw or concede, are at least given the opportunity to present their case and be heard.

It is acknowledged that some of the cases that are resolved in mediation may well have resolved in any event. The fact remains however that they had not resolved prior to the convening of a mediation conference despite many of the parties being represented by senior competent legal representatives.

Some persons argue that mediation offends the concept of public and open review of administrative decisions because the process is confidential. Some have commented that it is "secret". The notion that administrative review should be open and publicly adjudicated is sound to the extent that other citizens might benefit or be aware of the decisions of government. Likewise, the decision making process itself should be accountable and be open to the scrutiny that adjudication provides.

However, the opportunity to resolve conflict, interpersonally, is the essence of mediation. The process is distinct totally from adjudication. Mediation of an application may publicly deny review of the decision in that particular application and will necessarily prevent publication or creation of any precedent from which others may benefit. However, the conflict and its consequent tension is interpersonal and is likely to be resolved by mediation, as opposed to adjudication which will rule or decide on the legal or factual events only.

Likewise, citizens who challenge decisions of government hold no duty or obligation to the community at large to have their applications adjudicated, and thereby ensure public scrutiny of decision making. In my view, it was never the intention of those responsible for administrative review that every case must be heard, adjudicated and reported. The *Administrative Appeals Tribunal Act* itself has a number of sections which deal with the procedure to be followed when parties do resolve their dispute, such as the recognition that applicants are permitted to "settle" without Tribunal intervention.

In our experience, mediation is a process that many applicants and agencies now prefer. Few applicants want to have their cases adjudicated, and welcome the opportunity to discuss their applications informally. Agencies sometimes welcome confidentiality and the opportunity, by mediation, to reduce the costs associated with a hearing.

The future

As more and more legal representatives and agency advocates participate in mediation conferences, they became aware of the value and ideal of identifying as early as possible clients' needs and interests.

With the Tribunal practice of requiring parties to file a statement of issues prior to the first preliminary conference and a statement of facts and contentions prior to a matter being set down for a hearing, the legal representatives in turn have started to obtain instructions of a quality and type different to what they did previously. It follows that the negotiations which have occurred within preliminary conferences have shifted from a positional demand for a payment in dollar terms by way of settlement, in a compensation case, to an offer of return to work and/or rehabilitation by way of settlement. These latter offers are in recognition that many workers, particularly having regard to the state of the Australian economy and its labour market, have preferred to return to work or be retrained for a job within their capacity rather than settle for or accept a lump sum settlement of compensation.

In veterans' applications, mediation offers the opportunity to clarify, explain and sometimes demonstrate matters referred to in a lifestyle questionnaire which partially provides a basis for assessment of some types of pension. Veterans frequently, particularly because of their age and frailty, are motivated to secure a pension of a type which ensures a pension qualification to their wives upon their demise. This would not have been apparent from the file and is not raised as an issue in the earlier stages of review.

In social security appeals, it is not unusual for a person who receives a pension as the spouse of a pensioner to claim a pension in their own right. Whilst this will not result in any greater monetary sum payable, it is frequently sought to achieve income security and independence.

The above examples represent a small cross section of the myriad of parties' needs which emerge by the mediation process. In the context of dispute resolution generally it is unfortunate that relations between citizens and government fall victim to a system of administrative review which does not have an effective earlier stage of intervention dedicated to identifying needs and thereby eliminating, or at least reducing, the conflict which inevitably occurs.

Conclusion

As reform initiates change, so also does mediation and the experience of it.

In the relatively short time that mediation has been available in the AAT, signs are emerging of changes in work practices and disciplines amongst our own members and our clients.

Mediation would not have been as successfully practised, as it has been, in the absence of overall reform of the Tribunal's procedures. In the absence of reform of our case management policies, mediation would have been at risk of institutional influences.

Whilst a more realistic evaluation will be made at a future time, we can do no more, now, than ensure, wherever possible, that mediation continues to be practised competently, remains available and free of the risk of institutional influence. The reform of the Tribunal's pre-hearing practices and compliance by parties with a number of practice directions should ensure that mediation will not only, or principally, be a case management tool.

That stated, mediation has significantly reduced the duration of applications. Consequently, there has been considerable saving to clients - and the Tribunal - by not having to convene hearings.

Signs are emerging of a broader acceptance of mediation as a credible and legitimate process of resolving disputes. One of my colleagues has mediated a dispute concerning access to documents under the *Freedom of Information Act* and another mediated an environmental dispute concerning the Great Barrier Reef Marine Park Authority.

Practitioners and agencies who were initially dismissive of or reluctant to enter into mediation are now recommending it to their clients. It would appear also that practitioners are comfortable with early resolution by mediation and do not interpret "settlement" as a sign of weakness.

The Tribunal has made a significant investment in dispute resolution and has chosen mediation as the appropriate process. I have every confidence that mediation will increase its acceptance amongst our clients. Should the opportunity occur on some future occasion to report on the implementation of mediation into the AAT, I am sure, with the foundation now well and truly set, that I can report mediation continued to provide a credible dispute resolution technique and the decision to implement it was more than justified.

MEDIATION - THE DSS EXPERIENCE

*Pat Carson**

Paper presented to AIAL seminar, Mediation in Administrative Law Dispute Resolution, Canberra, 22 June 1994.

This paper provides an overview of the Department of Social Security's (DSS) experience of mediation as offered by the Administrative Appeals Tribunal (AAT). The majority of DSS mediations have been conducted in Victoria.

The purpose of the paper is to relate the background and lead-up to the introduction of mediation, its implementation and DSS experiences with its introduction and implementation. Against those experiences, the paper offers some observations and comments against the questions that were raised in the seminar in which the paper was delivered. It is not intended to argue for or against mediation but, as will be seen, the experience with the introduction of mediation has been a positive one for the Department and for others who participated in some early evaluation work.

Prior to any discussion about the concept of mediation it is, in my view, important to clarify what is understood by the concept. Some see mediation as conciliation, some see it as arbitration, some as negotiation and some ascribe other labels and definitions. In practice there may be some negotiation, some attempts at arbitration and some conciliation.

I understand mediation as offered and practised in the AAT as an opportunity for disputant parties to come together in an informal, non-threatening environment and, with the benefit of a skilled facilitator/mediator and an average of one to three hours of time, work towards a mutually agreed outcome.

In 1990 I first heard talk about mediation. In the early part of 1991 I was approached about the prospect of piloting a batch of cases for mediation. I was then the Manager of the External Appeals Section in Victoria, was responsible for between 200-300 AAT cases, and had pressures from the clients behind those files and my superiors in Canberra to ensure that cases were managed and finalised as expeditiously as possible.

Also at that time it was not uncommon for a DSS case in the AAT to take up to 12 months to be finalised from the date of application to the date of decision following a formal hearing. (Earlier stages in the internal and first tier external review process could add up to a further twelve months to this 'waiting period').

At about the same time the public sector generally and the DSS in particular started seriously addressing the government call for a more efficient delivery of quality client service. As Manager, one of the challenges I needed to confront was how to manage cases for which I was

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responsible in a climate of high appeal numbers and no prospect of increased resources. I was expected as well to contribute to the thrust and expectation that clients of government and the DSS receive a quality service.

My view at the time was that a 12 month wait for justice did not equate to a good service, bearing in mind that many clients had already been in a review/appeal process for periods averaging up to 6 months and longer in some cases. If I were a DSS client I would not want to wait for one-and-a-half to two years from lodging a claim to receiving an AAT outcome.

Another important development in Victoria was the significantly reduced availability of legal aid funding that had traditionally been available for DSS clients in AAT appeals.

It was against this background that the AAT convened mediation awareness seminars and included agency representatives as participants, along with DSS client representatives and tribunal members and staff. We were informed that mediation offered an informal mechanism of dispute resolution and aimed to resolve cases as expeditiously and cheaply as possible.

I formed the view that mediation could assist in managing my cases and at the same time provide a better service for DSS clients by offering a quicker but acceptable means of resolution as an *option*. I developed a positive attitude to the possibilities that mediation offered.

And so it was in this context and these circumstances that I readily agreed to a formal pilot program in the latter part of 1991 as:

- I could see possibilities to assist me in my role as Manager;
- Whilst mediation represented change and something quite different to what we were used to, as an organisation DSS was quite used to change and we were in the process of adapting to significant policy and legislative change; and
- I also saw genuine possibilities for *clients*, many of whom, without legal aid, faced the prospect of dealing with a formal hearing many months after an application for review had been lodged.

Mediation was subsequently introduced into the DSS jurisdiction of the AAT. Our experience has been that as at 21 June 1994 over 250 cases have gone to mediation. The majority have been in Victoria and 80% have been resolved at mediation.

In Victoria a detailed analysis of the first 100 mediations was conducted in 1993. Of those 100 cases, representing 89 applications for review some of which were departmental appeals, 75 were resolved (85%) with the balance going on to hearing. Of those that went to hearing, some went with agreed statements of fact which contributed to shorter hearing times.

A broad range of cases were listed for mediation having regard to parties' wishes and presumably the discretion and judgement of the mediation co-ordinator. Typically, many cases involved the disputed exercise of a discretionary power, such as debt recovery, and special circumstances. A number of other cases which on the surface may not have appeared amenable to mediation were resolved anyway. Disability support pension and invalid pension cases tended to resolve during a process of further exchange or elaboration of medical evidence and/or a fuller explanation of the many issues involved in disability support pension qualification.

The view of staff involved in mediation conferences was that resolution was reached in those cases because all parties were thoroughly prepared (the mediator, applicant and respondent), there was sufficient time to go through and explain and explore all issues, and there was a commitment to an outcome or resolution.

Some may wonder what percentage of cases were wins or losses. I do not think it is appropriate to categorise mediation outcomes - or any other AAT outcome for that matter - as wins or losses. The result, in my view, should be seen as the correct or preferable decision so if anything, a resolution at mediation is a win/win situation.

I indicated above that most of the mediation activity in the DSS jurisdiction has occurred in Victoria. I think there are several possible explanations for this, which include that the Mediation Co-ordinator is located in Melbourne, a majority of other accredited mediators are based in Melbourne, and there is a willingness to give it a try and to experiment with change. There may be other reasons and explanations too.

Of DSS cases finalised by the AAT this financial year 20% have been finalised by a hearing in Victoria. The figures for other states are 26% in New South Wales, 35% in South Australia, and 46% in Queensland. The same figure for the AAT across all jurisdictions and all states in the veterans/general division was 25% for the financial year ending 30 June 1992 (and I understand that this figure is similar for the financial year ended 30 June 1993).

Questions raised by this seminar

How successful is mediation in administrative law matters?

From the perspective of DSS in Victoria, mediation has been quite successful, in that (i) 80% of cases are resolved at mediation and (ii) along with NSW, Victoria has the lowest average finalisation times. Average finalisation times are a useful indicator of a tribunal's performance and a guide to how users of the tribunal are serviced. More objective indicators are discussed below.

Is mediation cost effective?

It would seem that, from a purely common sense perspective, fewer substantive hearings result in cost savings and earlier resolution, and thereby contribute to client and community satisfaction.

Is mediation an appropriate method of resolving disputes?

I consider it is an appropriate *option* and should be seen and accepted as complementary to and not a replacement for other options of dispute resolution offered by the AAT - preliminary conference, directions hearing, consent agreement and substantive hearing. From my personal and fairly substantial experience in the review and appeals process in DSS, a significant number of DSS clients look to and express a preference for early resolution of the dispute. Many express concern about the court-like structure of the AAT.

At what stage of the review hierarchy should it be employed?

At the earliest possible level. In the DSS context and in an ideal world this would be at the primary decision stage. As the review and appeal

process is currently structured and resourced this is impractical.

Does mediation need safeguards?

Safeguards already in place include that the process is voluntary, parties do not lose their place in the hearings queue, confidentiality is agreed and guaranteed, and parties own the outcome.

My office and staff's experience with mediation is very positive, but that is only one indicator. Other more objective indicators appear to be that mediation assists in containing finalisation times and cuts down on the number of hearings that would otherwise be necessary.

My view is that many if not most DSS clients are comfortable with and positive about mediation, because so many in Victoria explore it as an option, so few criticise or complain about it, and people who I talk to - legal practitioners, mediators and Departmental clients - say so.

At the conclusion of the seminar in which this paper was given there was an open forum which gave participants and speakers an opportunity to raise questions and discuss issues relating to the introduction and practice of mediation in the AAT. I think it is fair to say that of the range of views expressed there was a good deal of suspicion, doubt and, in some cases, outright rejection of and opposition to the concept of mediation. I am not sure whether the participants expressing those doubts, suspicion, rejection and opposition have had any experience with mediation or have a similar understanding of the definition of mediation as mine.

As I indicated at the outset, for the purposes of this paper, I do not intend to argue for or against mediation but rather to put the DSS experience. The most accurate assessment must surely only be possible after thorough and independent evaluation including the reactions and feelings of not only tribunal and agency participants but also members of the community and their representatives.

In this regard I note that an early and independent progress evaluation of the pilot phase of mediation was reported in the *Law Society Journal* published in November 1992 and reveals that applicants (clients) "...report satisfaction with the conduct of proceedings and express satisfaction at being able to have their say... were also satisfied with the clarification of issues, compromise and an expeditious outcome. Applicants reported high levels of satisfaction with mediation outcomes in the sense that they were pleased with the final decision and would use mediation again".

In a paper delivered to the First International Conference in Australia on Alternative Dispute Resolution in Sydney on 29 August 1992, the then President of the AAT advised that feedback (on the process of mediation) to date indicated a high level of satisfaction. Her Honour expressed confidence that "high quality mediation provided on a voluntary basis has enormous potential". The President also advised that "The Tribunal's experience with mediation to date has been a positive one and there is every indication that mediation will become an increasingly significant additional dispute resolution process available in appropriate cases".

ACCESS TO THE SOCIAL SECURITY REVIEW AND APPEAL PROCESS THROUGH THE DEPARTMENT OF SOCIAL SECURITY

*Sue Nevin-Taylor**

1 The Social Security Appeal System

The Welfare Rights Centre is a community legal centre specialising in social security law. Its particular focus and concern is with client rights. We are very anxious that people should be aware of their rights in relation to the social security system and should be given every opportunity to exercise their rights.

The review and appeal system that operates in regard to the Department of Social Security (DSS) is in theory an excellent one. It recognises the particular needs of DSS clients and operates in a way that allows them access to justice without hindrance. Specifically, it does not involve the clients in expense for legal representation and does not assume any legal expertise on their part.

Given the exemplary nature of the system itself, it is a very great concern to this Centre that a combination of faulty administrative processes and high level policy decisions can effectively deny some clients access to the system. The exemplary qualities of the SSAT and AAT are meaningless if a client is denied access at the most basic entry level of the system.

The purpose of this paper is to detail our concerns, give some disturbing examples, and suggest some solutions.

2 The Role of Original Decision Makers (ODMs)

On 1 January 1993 the legislation governing the social security appeals system changed. Whereas it had previously been possible for applicants to go directly to the Social Security Appeals Tribunal (SSAT) with a disputed decision. at that date it became obligatory for all DSS decisions subject to SSAT review to be reviewed first by an Authorised Review Officer (ARO).

It was at this time, or shortly afterwards, that we perceived a change in the role of the original decision maker (ODM) in the regional offices of DSS. We are not sure if there was a formal change in approach to disputed decisions or not but certainly the problem of the role of the ODM become more apparent after 1 January 1993. ***The result has been a greater informal restriction on the access of DSS clients to formal and legally based administrative review and appeal which is counter to the spirit of the system.***

It now appears to be DSS policy to refer all disputed decisions to the ODM, usually in a regional office of DSS, before the matter is allowed to reach the ARO. The DSS *Review and Appeal Handbook* says that a client "should first be invited to discuss the matter" with the ODM (paragraph

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2.200). However, later paragraphs (2.201, 2.402) require particular forms to be filled out by the ODM before relevant papers are forwarded to the ARO. The ODM stage appears to be compulsory rather than optional according to the wishes of the client.

It should be emphasised that there is no problem at all with the **decision** being referred to the ODM for reconsideration. It is rather the referral of the **client** to the ODM which in certain cases can be detrimental. The "Review and Appeal Handbook" does nothing to clarify this distinction between referral of the decision and referral of the client. It is clear from the actions of officers in the DSS regional office that they believe that it is the client who is to be referred rather than the decision. Clients are told they cannot contact the ARO until they have discussed the matter with the ODM.

There are very sound administrative reasons for DSS wanting disputed decisions to go first to the ODM. It forces primary decision makers to "own their own decisions" and look at them critically, taking into account any new evidence or information provided by the client. There are no figures available on how frequently ODMs change their decisions in these circumstances but anecdotal information as well as common sense would suggest it would not be a frequent occurrence. While good administrative practice may be served by using ODMs first to review decisions, there are real dangers for the use of the appeal system when clients are forced to return to the ODM.

It might be argued by DSS that it is impossible for an ODM to review a decision properly without speaking to the client involved. The answer is that there is a world of difference between requiring the client to take the complaint to the ODM and requiring the ODM to collect all relevant data needed to check the decision already made.

It should be stressed that this practice has no basis in law. The practice can also be a grave hindrance to a client pursuing an appeal. The Welfare Rights Centre comes across case after case where the fact that a client (rather than a decision) is forced to return to the ODM as the first avenue of appeal discourages the person from pursuing more appropriate and legally-based review mechanisms. In certain instances, where the original decision is based too narrowly on DSS guidelines, a client is also denied just review of a decision under the provisions of the *Social Security Act*.

Before going on to look at specific hindrances to appeal and review, it should be mentioned that there is a procedure which could obviate the need for some particularly traumatic situations developing. When a decision is made that a person is not qualified for any form of DSS income support, or that the hardship provisions do not benefit them, we would suggest that ODMs be instructed to refer their decision not to pay to the Policy Administration Unit. It is our understanding that this was once DSS policy. In this way a more senior officer would get the opportunity to check the basis for the potentially most damaging decisions.

2.1 Reluctance to approach the ODM

There are many instances where a client has had a personality clash or a dispute with an ODM and is reluctant to approach that person again in order to have the issues re-examined. The thought of doing so, after being told strongly by DSS personnel that this is the only avenue of appeal, is enough to stop the client at that point. It needs

to be remembered that some clients can be very loathe to be in dispute with a DSS officer and, if the ODM is the only gateway to appeal, appeal is practically precluded. The stress involved in such a process, in conjunction with the person's mental or physical health problems, may mean that review is not seen as an option.

The situation for people from a non-English speaking background (NESB) can also be difficult. They may not share with "older" Australians an acquaintance with democratic government structures. They may perceive a request for review as a form of "trouble-making" which only draws attention to them and may single them out for negative treatment by DSS officers. Because it is their income support which is at stake, their only source of sustenance, they may be reluctant to voice their dissatisfaction and doubt about the decision made in their case. A less personal review, as by the ARO or SSAT, would not be such a personal threat and is less likely to be perceived as a request for leniency by a particular bureaucratic decision maker. In other words, ARO and SSAT review are seen as much less of a threat because they are more formal and less personal.

The Welfare Rights Centre has had considerable contact with the Vietnamese community as a result of outreach in the Canterbury/Dankstown area of Sydney. A frequent comment by Vietnamese clients and workers is that they do not have faith in the "rule of law" and have an ingrained distrust of government officials, believing that they will make decisions based on political expediency or personal bias. It is unfortunate, given some concerns expressed later in this paper, that one cannot actively put their minds to rest on this issue.

2.2 The use of the term "review officer"

Even where clients are aware of how the review system works in general terms, they can still be confused and ultimately blocked by DSS's use of the term "review officer". A client may go into an office and ask for a matter to go to the "Review Officer" or even the "Authorised Review Officer". They are then directed to the ODM who may tell the client that the original decision was correct and cannot be changed.

At this stage the client may feel convinced that the decision has indeed been reviewed and that there is no possibility of change. In fact there has been no independent *review* at all, simply a reconsideration (if that) by a person who has preconceived ideas on the issue, may have a vested interest in maintaining that decision, and has not gone beyond DSS policy guidelines in arriving at the decision. In addition, there is no written decision given in most cases of ODM review so the client will not be made aware that review by an ARO is still an available option.

It is necessary for DSS to make the distinction between ODM and ARO clear to the complainant in their initial letter so that the client is not prevented from reaching even the first rung on the ladder of appeal.

2.3 Discouragement to seeking review

It is not uncommon in the experience of the Centre for clients to be discouraged by DSS staff from taking an appeal further, even when the client is aware that an ARO review can still be sought. This attitude of DSS staff can at times be attributed to ill-will but is more often a result of ignorance. A likely cause is a lack of understanding of the distinction

between law and policy (an issue covered in the next section of this paper).

The worst instances known to the Centre are where an ODM or Field Assessor has done a deal with a client to the effect that - We won't prosecute if you don't appeal.

2.4 The distinction between law and policy

It is the opinion of workers at the Centre, based on a good deal of first hand experience (including experience as DSS employees), that many DSS officers are not fully aware of the provisions of the *Social Security Act* and the difference between the law it expresses and the policy guidelines that have developed as a necessary administrative tool in applying the law on a day-by-day and case-by-case basis. For this reason ODMs may inform clients vigorously, and with great and genuine regret, that there is nothing to be achieved by further review. Sometimes this is caused by ignorance of recent AAT decisions which override DSS policy guidelines. This is particularly unfortunate where a person is thereby deprived of any form of income support when the decision would likely be overturned by the SSAT. One instance that causes particular concern involves non-payment of Special Benefit to New Zealanders in Australia during their first six months.

More will be said on the issue of policy versus law later in this paper.

2.5 Use of interpreters

Welfare Rights Centre has been told many times by NESB workers and clients that failure to provide DSS interpreters can be a barrier to accessing the appeal system. This can happen because an interpreter is not provided to the NESB client by DSS when the assistance of an interpreter is in fact required. Because of this, a client may not receive adequate information on their situation, the reasons for a decision, or the availability of appeal.

Other problems can arise even if an interpreter is available. An interpreter may be used in an advice-giving role rather than strictly as an interpreter, simply interpreting the words of an experienced DSS worker. The training of interpreters is much narrower than that for other DSS workers. Interpreters are far less likely than even an inexperienced DSS officer to appreciate the complexities of the social security system, the difference between the operation of policy versus law, and the operation and benefits of the appeal system. Therefore interpreters may stand in the way of clients exercising their rights through sheer ignorance, not recognising the potential for a DSS worker to make a mistake. The interpreter may thereby help to convince the dissatisfied client of the uselessness of disputing a decision.

The Centre has been told by senior DSS personnel that some regional office personnel direct more experienced interpreters to take on an advice giving role. Other DSS officers maintain that this should not happen.

2.6 Recommendations

2.6.1 DSS letters sent at the time of a negative decision or the raising of a debt should describe in greater detail how the whole of the review and appeal system works and actively dispel common doubts about using the system. The letter should include statements on the following issues:

- It is a person's *right* to appeal a DSS decision.
- There is a distinction between office-based review and ARO

review, and it is *not* necessary, but may be useful to talk to the ODM.

- How to contact the ARO.
- No money is involved in appealing at any stage.
- No knowledge of the law is needed.
- There is a difference between policy and law and the SSAT interpretation of a situation may be more liberal.
- The SSAT is the first level of independent review and is not like a court.

This information could either be included as part of the letter, or a brochure on the appeal system could be enclosed with the decision letter.

In addition, a review and appeal hotline could be set up which would give clients information on their legal rights of appeal, including the fact that ODM review is not compulsory. The hotline would not discuss the disputed decision itself.

2.6.2 Special notice should be taken of access and equity issues in regard to use of the appeal system. A person from NESB should be interviewed through an interpreter by an officer whose responsibility is to ensure access and equity to all clients. That person should explain the appeal system and assess whether an interview with the ODM should go ahead or not.

2.6.3 Regional office staff should be instructed to refer to ODMs by that term rather than misleadingly refer to them as review officers.

2.6.4 If ODMs are to continue to be greatly utilised in reviews, the ODM should be required to give a new decision in writing which either affirms or sets aside the original decision. Material in the written decision should include the information given in 2.6.1 above. An alternative to this suggestion is 2.6.5 below.

2.6.5 Standard ARO review request forms should be made available at all regional offices and the form should be filled out for every request for review. The papers related to the matter could then go to the ODM, if appropriate, but would always be referred to the ARO for formal review once the ODM had reconsidered. The only time this would not happen would be if the disputed decision was changed entirely in line with the client's objection. A varied decision, even if partially in line with the client's objection, would still need to be referred to the ARO to examine whether the client would be advantaged by further appeal.

2.6.6 DSS training should be improved so that all DSS officers are aware of the distinction between policy and law. ODMs should be instructed not to advise clients against taking an appeal to an ARO. DSS should also train officers to be aware of the various difficulties clients have in accessing the appeal system and to facilitate client access to appeals in all appropriate ways.

2.6.7 The DSS *Review and Appeal Handbook* should be revised to show clearly that a client need not go to an ODM before having an ARO review. This should happen even if DSS wishes all decisions to return to the ODM for review on the papers.

2.6.8 The role of interpreters should be strictly monitored and abuses curtailed:

- Interpreters must be made aware that they perform an interpreting role only and are never to give advice independently. Interpreters should always therefore be under

the supervision of a fully trained DSS officer.

- Interpreters should be required to read out to each client a standard statement which makes it clear that they are not able to give any independent advice but only to interpret word-for-word for the DSS officer.
- Even for this limited role, interpreters should be fully informed of the benefits of seeking review, prior to taking up duties in the Department of Social Security.

3 The Role of the ARO

If a DSS client has managed to overcome the obstacles of seeking formal review at the regional office level, there are still difficulties involved in getting a just review. There are two major areas of concern at the ARO level:

- One concern arises from the previously raised issue of DSS policy versus the application of the law (paragraphs 3.1 and 3.2 below).
- The second concern is related to internal DSS procedures, specifically the return by AROs of cases to the regional office (paragraphs 3.3 and 3.4 below).

3.1 Policy versus law

A wide range of examples could be given of the restrictive use of DSS policy. The client has no way of knowing that it is indeed on the basis of policy that a decision affecting them has been made. The person therefore does not know that a review based on the law could well be less rigid. Most clients are totally unaware of the distinction between policy and law and think that a decision based on policy is the end of the matter. Often there is no meaningful distinction between the two but in certain significant examples this distinction can make the difference between payment and non-payment to the client.

Two examples may give a flavour of the kind of issue that frequently arises in a regional office. In the first example, a client may be told that they are not eligible for Job Search Allowance (JSA) because they are running a business. The "business" may in fact be a minor activity for the person, who meets the activity guidelines in every other way. The decision may have been based on a rigid and narrow reading of the DSS guideline that denies payment to a person who runs a business. However, the validity of the guideline depends on the fact that running a business may prevent a person from making a genuine effort to find work. If the business commitment does not prevent them from meeting this "activity test" then the person meets the eligibility criterion.

In the second example, a person is told they cannot be paid JSA because they are a full-time student, yet the course they are doing is only eight hours per week with all course commitments limited to the evenings and weekends. Their supposed ineligibility, based again on their inability to meet the work test, may not be factually or realistically correct.

3.2 Discretionary payments

The difficulty described above is more disturbing in regard to discretionary payments. The section of the *Social Security Act* relating to special benefit begins with these words:

> The Secretary may, in his or her discretion, determine that a Special Benefit should be granted to a person

This discretion is then exercised according to policy guidelines that

vary in certain types of situations. There is great uncertainty currently in DSS about the role of AROs in such a situation. We are told that AROs are to make "the correct and preferable decision" and that they may decide not to stick to DSS guidelines in some cases. It is uncertain however which way an ARO will decide.

The problem for the client seeking review is that an ARO rejection may be the second received by that person; the decision may be seen as unchallengeable in reality and an appeal to the SSAT a waste of time. The person will not realise that the SSAT may overturn the previous decision made on DSS guidelines.

This dilemma is illustrated by an issue that arose concerning the payment of Special Benefit to a New Zealand woman who came to Australia with her young son after being assured by what she perceived to be a reliable source in that country that she would be eligible to receive Sole Parent Pension in Australia. The law does not allow payment of Australian Sole Parent Pension, but DSS considered her eligibility for Special Benefit.

The Act requires in s729 that a person must be "unable to earn a sufficient livelihood". This is interpreted for New Zealanders in DSS policy guidelines 21.1900 and 21.1901.

21.1900 states that Special Benefit should only be considered in cases of "extreme and unforeseen hardship".

Guideline 21.1901 goes on to say.

> Extreme and unforeseen hardship will not be accepted where a New Zealand citizen arrives in Australia with limited funds because the client expected to receive a Social Security entitlement or who is in Australia only temporarily. Persons in this situation should be referred to the nearest New Zealand consulate ...

So both the original decision maker and the ARO rejected payment of Special Benefit to this woman. The SSAT on the other hand found that the DSS guideline had unduly and inappropriately narrowed the scope of the Act. To quote from the decision.

> The tribunal noted that the basis of the Department's case was *not* that Ms X was not in hardship or was able to earn a sufficient livelihood for herself and her child, but that this hardship was due to circumstances within her own control. The review officer's letter to Ms X notes: "Basically, 'unable' (to earn a sufficient livelihood) is taken to mean factors beyond the person's control". This criterion is not mentioned in section 729 of the Act and there is no legal basis for its application. The tribunal did not therefore consider that Ms X's voluntary migration to Australia constituted grounds to refuse her income support.

The SSAT decision was not appealed by DSS.

3.3 Incorporation of Administrative Appeals Tribunal (AAT) decisions in DSS guidelines

There are instances where the AAT will make a significant determination that impacts on the decision-making process at regional office and ARO level but the significance of the decision is not incorporated into DSS guidelines.

An example is the recent AAT decision in *Hamal and Secretary DSS* (P92/474) which effectively changes the usual DSS interpretation of "continuing inability to work" related to eligibility for Disability Support Pension (DSP). DSS has not appealed this decision to the Federal Court but on the other hand has not acknowledged the significance of the decision in its own guidelines. Experience suggests that AROs are not taking notice of *Hamal* in their DSP decisions.

The result is exactly similar to that described in 3.2 above, that is clients are effectively discouraged from appeal to the SSAT not realising the likelihood of success at that level. Clients are effectively denied a more liberal and legally correct decision.

3.4 Return of review requests to the regional office

Some AROs will determine, upon receiving a request for review, that there was insufficient information gathered by the regional office to make the decision. The ARO will often send the matter back to the regional office so that further enquiries can be made, instead of deciding that the regional office decision should be overturned due to insufficient evidence. We maintain that at this point the ARO should overturn the regional office decision. Because of the action of the ARO, the regional office will be free to take as long as they consider necessary to collect relevant information and the complainant will be left in limbo. When the regional office decides to either stick to its original decision or vary it (without actually overturning the decision) that may be the end of the matter as far as the client is concerned. The client believes they have had an ARO review when in fact they have not and so have been deprived of a fundamental and essential right. The client will not have the benefit of a full written response by the ARO and will not therefore be advised of their right of appeal to the SSAT.

3.5 Recommendations

3.5.1 AROs should be clearly and unequivocally told of their ability to make decisions that are not necessarily in line with DSS policy guidelines but rather based on the *Social Security Act*.

The independence of AROs should not be compromised by moving them back into regional offices where they are placed under increased pressure by ODMs who have previously made decisions based strictly on DSS guidelines.

3.5.2 All ARO letters should make it clear that the SSAT might see the matter more sympathetically and *encourage* further appeal to the SSAT if the client is still dissatisfied.

3.5.3 Decision letters by AROs, in all circumstances, should give more information on SSAT appeals and dispel misconceptions held by possible applicants. For instance, clients should be told that there is no cost involved, that no legal representation is required, nor is a knowledge of the law essential. In addition, people should be given clear information on how to initiate an SSAT appeal and an appeal form should be enclosed (see 2.6.3 above).

3.5.4 DSS policy guidelines should make it clear to all DSS officers where the guidelines amount to a significant narrowing of provisions so that all workers can be aware of the grounds on which they are making a decision and can explain their grounds realistically to the client. This will necessitate changes to the "Guide to the Administration of the Act".

3.5.5 DSS must make every effort to keep DSS policy guidelines up to date on the basis of AAT decisions which DSS has not appealed and which the AAT regards as having precedent status.

Note: The comments made above apply at least equally to decisions made by the Department of Employment, Education and Training. The Welfare Rights Centre has less experience with DEET and has fewer

examples at its disposal, but our experiences suggest that, due to DEET's extensive use of guidelines, the problems described above are even more marked for DEET clients.