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

* *Sue Nevin-Taylor worked at the Welfare Rights Centre, Sydney, at the time this article was prepared.*

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/Bankstown 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.