

The Status of Commissioner's Advice

What is the Commissioner's duty?

The Commissioner has a statutory duty, under S37(5)(a) of the Social Security Act 1998, to "give [Inspectors] such advice and assistance as he thinks fit to improve the standard of their decisions."

How is this duty discharged?

The Quality Forum is a policy-making body on reviews, where Commissioner's advice and approaches to be adopted in the IRS are agreed. It is chaired by the Commissioner. The Peer Case Readers monitor Inspector' use of Commissioner's advice as part of their case reading.

The intention of the Commissioner's role

Trevor Buck gives an account of the Parliamentary debates leading to the creation of the post of Social Fund Commissioner (*The Social Fund- Law and Practice 2nd Edition*, p105-). The debates on the Social Security Bill (23 and 24 July 1986) indicate that the main aim of the Government, in devising the post of Commissioner, was to monitor the quality of Inspectors' decisions. Quotes include:

"The social fund commissioner should satisfy himself that the standards maintained by the inspectors are proper and fair, and that they operate in a reasonable manner. He will be concerned with the quality control of those working the system, and not with taking separate decisions himself." Rt Hon Tony Newton MP, Social Security Minister.

"Conservative members welcome the creation of a commissioner who will be responsible for ensuring that inspectors perform their job well." Rt Hon Mr Evennett MP.

"The objectives of his (the social fund commissioner's) appointment, are, first to ensure that social fund inspectors' decisions are of a consistently high standard; and secondly, to ensure that inspectors taking the decisions act, and are seen to act impartially." Baroness Trumpington.

The duty to give advice reflects this, as it is contained within the same paragraph of S37(5) as the duty to monitor quality.

What is the Inspector's duty towards the Commissioner's advice?

The Commissioner has a statutory duty to give Inspectors such advice and assistance as he thinks fit to improve the standard of their decisions.

The Commissioner, therefore, has a statutory duty to give advice for a specific purpose. In this case the specific purpose is to improve the standard of Inspectors' decisions. If the advice is not followed, then the purpose for which it is given is not achieved. The Inspector is not improving the standard of his decisions.

The Commissioner's duty to give advice would be meaningless unless it carried a duty on the Inspector to follow that advice.

The Commissioner's advice should be seen as setting out the approach that Inspectors should generally adopt. Furthermore, published advice may create a legitimate expectation on the part of customers that it will generally be followed, or at least that the Inspector will not depart from it without good reason (and perhaps without giving them a chance to comment on the proposed departure).

The IRS has always identified that there may be a very small number of cases where the application of Commissioner's Advice is not appropriate to the individual circumstances of the case. This is then for the Inspector to use their judgement in those cases, in consultation with the Peer Case Reader or a member of the R&D Team. The Inspector must ensure that they document why the Commissioner's advice was not appropriate in that particular case. These will be the minority of cases.

Are there any limits on the scope of Commissioner's advice?

Fettering discretion

It is a fundamental principle of administrative law that persons vested with discretion cannot fetter that discretion by an automatic application of guidance or policy.

As De Smith, Woolf and Jowell put it (*Principles of Judicial Review*, p398),

“a factor that may properly be taken into account in exercising a discretion may become an unlawful fetter upon discretion if it is elevated to the status of a general rule that results in the pursuit of consistency at the expense of the merits of individual cases.”

This applies to Inspectors applying the Commissioner's advice as much as it does to anyone else.

The fundamental discretion the Inspector has to exercise is in s139(1) of the Contributions and Benefits Act 1992:

“Whether a payment..... is to be awarded and how much it shall be”.

Therefore, as long as Commissioner's advice does not fetter this discretion, SFIs are under a duty to follow the advice. Again, there may be cases

where the application of Commissioner's Advice is not appropriate and it is for the inspector to use their judgement, in consultation with a Peer Case Reader or member of the R&D Team.

Examples of advice that would fetter this discretion are:

- All applicants receiving Disability Living Allowance are to be awarded a payment under Direction 4a(ii). This tells Inspectors to make an award.
- £250 should be paid for cookers. This tells Inspectors how much to award.

However, the following advice would not fetter this discretion:

- When applying Direction 4a(ii) ask yourself "is there a present or foreseeable risk of entry into institutional or residential accommodation in which care will be received?"
- When awarding a community care grant, Inspectors should look at what is a reasonable amount to meet the needs for cooking facilities in each individual case.

Commissioner's advice and the Secretary of State's guidance

The purpose of the Commissioner's advice is to improve the standard of Inspectors' decisions. Furthermore, the Commissioner may give such advice to this end "as he thinks fit". This indicates that the Commissioner's advice may cover any part of the Inspector's decision-making process.

This could include, for example, how the Inspector takes account of the Secretary of State's and ADM's guidance and the weight Inspectors should generally give to guidance. The Inspector must follow the Commissioner's advice, when deciding how to take account of guidance.

In practice, a direct conflict is likely to be rare and in those circumstances the issue would be taken up with the Department through our liaison channels. In most cases Commissioner's advice to date has been that the Secretary of State's guidance is one factor to be considered when reaching a decision, along with all the other circumstances of the case.

Individual cases

It is a basic principle of administrative law that a power may only be exercised for the purpose for which Parliament granted it. The purpose of the Commissioner's advice is "to improve the standard of [Inspectors'] decisions". The aim is improvement of quality (carried out by monitoring, and giving advice).

We believe this should be interpreted to mean both the standard of Inspectors' decisions generally as well as the standard of individual decisions made by individual Inspectors. Again, the Commissioner's duty to give advice

would be meaningless unless it carried a duty on the Inspector to follow that advice in each case the Inspector deals with.

The debates on the Social Security Act make it clear that the Commissioner does not have the power to carry out a review on individual cases himself. However, this does not remove his duty to give advice on individual cases.

Disregarding advice

If (as we believe) Inspectors are under an implied duty to follow Commissioner's advice, a Court could find that an Inspector had failed to comply with his/her legal duties, if s/he were to disregard a relevant piece of advice, without saying why. The *Connell* judgment stated that the way in which Inspectors carry out their duty to have regard to guidance should be "transparent". Such guidance need not be followed, but it cannot be ignored. The same principles would apply to the Commissioner's advice, given that we believe there is a legal duty to follow it in those cases where it is appropriate.

Implications for the Inspector

The Commissioner's duty to give advice is inextricably linked to his duty to monitor quality (both are contained in S37(5)(a)). A persistent disregarding of advice given to improve the standard of decision-making could legitimately lead the Commissioner (or his delegates) to conclude that an Inspector's decision-making was not up to standard, with appropriate consequences.

The structure of Commissioner's advice

We will be issuing Commissioner's advice in different ways:

Commissioner's Advice

Commissioner's Advice will be formal and structured and will cover legal principles that are fundamental to the Inspector's role in decision-making. They will include basic approaches and principles that are unlikely to change unless the law changes. Inspectors will follow this formal Advice, unless they have a good reason not to in an individual case.

Support Notes to Commissioner's Advice

These are intended to aid consistency and help Inspectors with the practical application of the Commissioner's Advice. They are to be used in conjunction with the formal Advice and will often address subjects that were issues for the IRS. Depending on the subject they may also contain more background information and examples to help Inspectors in their decision-making. There is not the same legal duty on the Inspector to follow Support Notes.

Quality Forum Recommended Approach

This is intended to provide support for Inspectors in areas where we have decided that it is not appropriate to issue formal Commissioner's Advice. This

could be, for example, because we are not satisfied we have seen enough cases to make a sound judgement or we may be in the position of developing our view on particular issues, for example after legislation changes. There is no legal duty on the Inspector to follow Recommended Approach.

All forms of advice from the Commissioner (formal Commissioner's Advice, Support Notes and Quality Forum Recommended Approach) will go through the normal quality process and will be discussed and agreed at Quality Forums.

Although there is no legal duty to follow Support Notes and Recommended Approaches these will have been through the quality process and will reflect what the Quality Forum believes is the right approach to decision-making. If Inspectors find that particular Support Notes or Recommended Approaches are not appropriate in a number of cases they should discuss this with a member of the R&D Team.

Publication of Commissioner's Advice

Commissioner's Advice is one of the factors in Inspector's decision-making.

Natural justice demands that we make that advice clear to customers. It is contrary to our own principles of openness for Inspectors to make decisions on the basis of "hidden advice". Also, if customers do not know what the Commissioner's advice is, they would not be able to argue that there were any special reasons for the Inspector not to use it in an individual case. They may therefore not have a proper chance to put their case.

We have already published some Commissioner's advice in the form of Best Practice. If we expect Inspectors to use Commissioner's Advice, (unless they have a good reason not to in an individual case) we will make that advice public. We will do this by publishing formal Commissioner's Advice on our Website as soon as it is agreed, and then publishing it in the next issue of the Journal and Digest.

We will not publish Support Notes or Quality Forum Recommended Approach as they are prone to change, do not have the same obligation on the Inspector to follow them and contain issues and examples relevant to the IRS.

Summary

This paper sets out the status of Commissioner's advice, both in law and in practice at the IRS and can be summarised as follows:

1. The Commissioner has a statutory duty, under S37(5)(a) of the Social Security Act 1998, to "give [Inspectors] such advice and assistance as he thinks fit to improve the standard of their decisions."

2. The Commissioner has a statutory duty to give advice for a specific purpose - to improve the standard of Inspectors' decisions. If the advice is not followed, then the purpose for which it is given is not achieved. The Commissioner's duty to give advice would be meaningless unless it carried a duty on the Inspector to follow that advice.
3. The Commissioner may give such advice to improve the standard of decisions "as he thinks fit". This indicates the Commissioner's advice may cover any part of the Inspector's decision-making.
4. The Inspectors' fundamental discretion, whether to make an award and how much the award shall be, cannot be fettered by Commissioner's advice. As long as Commissioner's advice does not fetter this discretion, SFIs are under a duty to follow the advice.
5. The IRS has always identified that there may be a small number of cases where the application of Commissioner's Advice is not appropriate to the individual circumstances of the case. This is then for the Inspector to use their judgement in those cases, in consultation with the Peer Case Reader or a member of the R&D Team. The Inspector must ensure that they document why the Commissioner's advice was not appropriate in that particular case. These will be the minority of cases.
6. In the interests of natural justice formal Commissioner's Advice will be published, both on the website and in the Journal.
7. The Commissioner's formal advice will be very structured and contain only the issues fundamental to the Inspector's role in decision-making. Support to aid consistency and help with the practical application of Commissioner's advice will be issued. In addition, support on the approach to decision-making in cases where Commissioner's advice is not appropriate will also be given in the form of Quality Forum Recommended Approach. All three will go through the Quality Forum process.