THE SOCIAL SECURITY APPEALS TRIBUNAL: ACHIEVING CONSISTENCY AND COPING WITH CHANGE

*Anne Coghlan**

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Specialist tribunal

The impact of administrative review and its role in improving decision making within the social security field has been well traced in a number of areas. I have myself looked at several areas in detail and traced the Government's and the Department of Social Security's response to issues raised in the course of administrative review.[1] We can see how manual instructions have changed or legislation has been amended to clarify matters in response to matters raised.

The specialist tribunal is particularly well placed to quickly identify areas of difficulty and to bring those matters to the attention of decision makers so that any adjustments can be quickly made and so that the system operates fairly and justly for all concerned. In the Social Security Appeals Tribunal (SSAT), during the course of a review, some matter may come to notice where there is a problem with forms, or Departmental instructions or procedures, or where the legislation operates harshly; in these cases, members are asked to bring those to attention. The matter is then taken up by the National Secretariat and sent to the Minister or Department for their information and as they see fit for any appropriate action.

In the social security portfolio, processing times for appeals now are such that the area of responsibility will get feedback from us via the SSAT Liaison Section of the Department quite promptly. It is quite possible, though I am not familiar with any details, that they will also have had feedback through the Department's own internal review system. There is the opportunity then for the matters raised to be addressed quickly so that future clients can be assisted.

You may be interested in the sorts of matters that we have recently brought to the Government's and the Department's attention.

The matters that are brought to the Minister's attention generally relate to any anomalies in the legislation that are highlighted or where a particular class of cases might indicate that the law is operating harshly or unfairly. They would only relate to particular cases the Tribunal has dealt with, as it is not the Tribunal's role to comment generally on policy. These matters would generally be referred to in my Annual Report to the Minister.

For example, we have recently raised concerns about the limited scope for granting double orphan's pension. We have raised the anomaly of payment of additional benefit for a new born child only from date of notification whereas family allowance is paid from date nearest birth if the claim is lodged within 28 days. We have expressed concern about the harsh effect of short-term work on eligibility for resumption of rent assistance and its effect as a disincentive to work. We have continued to draw attention to the lack of discretion to pay family allowance unless a claim has been lodged within 4 weeks of a child's birth.

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* *Anne Coghlan is the National Convener of the Social Security Appeals Tribunal.*

We have brought to the Minister's attention the continuing large number of illegal entrants applying for refugee status who cannot be paid special benefit or any pension or benefit and yet have been given permission to work in this country, but can be left destitute.

Liaison with the Department on matters that arise in the course of review is far more frequent. These can range from simply bringing to their attention mistakes or omissions on forms to, say, highlighting what in our view are major problems in processing certain matters. Again, the issues arise because someone has applied to us for review.

As I said, the issues we raise might be quite simple, and yet the solutions can be quite difficult. We have had quite a few appeals from parents concerning payment of family allowance arrears where, following notification of the rejection of a claim for Austudy, the Department is notified of the rejection within 28 days, therefore preventing payment of arrears. The problem here is that family allowance is paid to a parent, and the Austudy claim is made by the family allowance child. The child, then, is the only one who is notified of the rejection, which can cause problems for the parent. Apparently the Department of Employment, Education and Training does not have the capability to record parents' details but has arranged for details of the 28 day restriction to be included in the rejection advice which is sent to the student.

We would quite often come across situations where the Department's advices to their clients have not been sufficiently clear, or where they have failed to give advice and have therefore created problems. As we would all appreciate, it is very difficult to express something that might be quite complicated in a simple and straightforward manner, especially where the audience may have difficulty with the language anyway.

Situations we have quickly highlighted were, for example, the failure to advise on the Unemployment Benefit First Income Statement of the potential effect of moving residence on future payment of benefit. As you could imagine. this would have had a devastating effect on some clients. I was advised in due course that all 'continuation forms' had been amended to advise clients of the need to contact the Commonwealth Employment Service (CES) before considering a change of location, and to the possibility of a non-payment period being imposed. Another situation is the case where there is lack of clear advice. For example, advice that both members of a couple have to notify, for example, changes in the income of one member. To the elderly pensioner who carefully notifies a change of circumstances it is hard to understand that the Department needs to be separately notified by the their spouse, particularly if it is a wife's pension that is involved.

There are those classes of cases too where, in our view, the procedures or processes adopted by the Department have not been in accordance with the legislation. We raise our concerns with the Department. The Department of course may take a different view of the law from us. The problem here is what has been done has been done and the cases come to us for review. The Department will then quite rightly appeal the matter to the Administrative Appeals Tribunal (AAT) and await for the outcome of such an application. It is unfortunate that this may all take some considerable time and the area of doubt not be resolved perhaps as speedily as it should be.

Whilst it is never pleasant to have difficulties or problems brought to one's attention, it is helpful to no one, particularly not to clients of the Department, to insist that the SSAT has got it wrong and to persist with a particular course of action. The SSAT is not infallible but it does have the

advantage of seeing matters afresh and will often read words as they are written and not as they were meant to be written.

You may be wondering whether the Minister or the Department raises with the Tribunal any matters arising out of our review of decisions. Neither the current nor the previous Minister has ever done so. The Department, if it disagrees with our decisions, would simply appeal the matter to the AAT. The Department may occasionally let me know what their view of some interpretation of the law may be, but this would be rare and from memory only in a situation where they had chosen not to appeal the matter. Then, of course, we may still not agree with their view.

If we look at the most recent statistics, over the latter 6 months of 1990, approximately 3,400 appeals were lodged with the Tribunal. During that period 465 AAT applications about or on SSAT decisions were finalised, although these finalised matters of course are not related to those lodged with us. Of those finalised by the AAT, the Department had appealed approximately 6% of our decisions and our clients had appealed approximately 9%. However,only one third actually went to a hearing, the balance being withdrawn, conceded or dismissed prior to the hearing. Of those heard, approximately half our decisions were affirmed. These rates of hearing and determination do not markedly vary.

The *Social Security Act 1991*

I am not aware how many of you here will have had the opportunity to look at the new style Plain English *Social Security Act 1991*. If you have, what first strikes you is its size, and this can be quite daunting. For the professional, used to using legislation, this is something completely new and many no doubt may take one look at it and just say it's terrible. We need to remember that it has been preparod with the non-professional in mind. The legislation has been set up in modules, one for each pension, benefit and allowance. One will be able, for instance, to go straight to the module of interest, and find out in that part all one needs to know. It is full of 'notes', 'sign posts' and 'examples' to make it easy to use.

The Tribunal will be the first external body to look closely at the legislation and, of course, to apply it and for us it is an exciting challenge.

With 180 part-time members and 20 full-time members, how have we gone about tackling this new legislation? We tackled it in a very practical way, and ran workshops in 5 locations throughout Australia. Background papers were prepared and sent ahead. These covered the background and structure of the new Act, how the transitional provisions worked, and some basic material on interpreting legislation.

Actual case situations were then used and workshopped in groups, so that members had actual practice working their way around the Act. The general feeling was that now that members had had a go using the legislation it was not as daunting as it first looked. It was important that members shared their concerns and realised it was new to everyone. Professor Pearce's book *Statutory interpretation in Australia*[2] has proved very useful in assisting with interpretation of the transitional provisions and was also used extensively In one workshop case, where we covered a situation where the new legislation said something different from the old and our example went through the process of how one should present such a case.

On the question of interpretation of the law, of course I do not have the power to direct members how to interpret the law. However, in relation to the operation of the transitional provisions, if any member wishes to take a different view from the one that has been expressed to be our preferred view, they have been asked to

argue their view fully and address all the issues raised in the very detailed and comprehensive background paper prepared by one of our legal members, and on which my general instruction has been based.

A recent example of very successful co-operation with the Department has been with the transitional provisions for the new 1991 Social Security Act. When we started to look at this legislation which would operate from 1 July 1991, it became clear that our view on which legislation would apply when a matter was reviewed by us where the delegate's decision was made before 1 July 1991, differed from the Department's. In our view, the legislation was clear and agreement was reached with the Department, so that we all took the same view. We were happy to provide the Department with the background papers that had been prepared for our use. However, the legislation was not so clear in relation to an undetermined claim as at 1 July 1991. Given that the new legislation should not have changed anyone's rights, and mindful of s15AB(3) of the *Acts Interpretation Act 1901* and 'the need to avoid prolonging legal or other proceedings without compensating advantage' we are taking the same view as the Department and determining these matters under the new Act.

Consistency

My last comments lead me to talk briefly about how we endeavour to achieve consistency.

As I said, I cannot direct members on how to interpret the law nor of course on questions of fact.

If a new issue arises that involves an interpretation of the law, that case is generally circulated. In the initial stages, the views on interpretation may vary, but they generally settle quickly. If a member does wish to take a different view, it is expected that they will fully address all the arguments. In this way we strive to be consistent in our approach and deliver the same level of justice and fairness wherever one may be in Australia.

One must remember that our cases involve legal merits review, with different facts in each case. It is of course a nonsense to talk about consistency when facts are different. However, one might hear it said that 'the SSAT does not make consistent decisions in *de facto* marriage cases'. I often think that this comment arises from a misunderstanding. Of course the facts in each case are different, but it is also important to remember that, in deciding such a case, the legislation requires that five factors be considered. The legislation, however, does not say what weight is to be given to particular factors and still requires the decision maker to have regard to all the circumstances of the relationship. It would be most inappropriate to fetter the discretion of decision makers by directing what particular views should be taken on, or weight given to, any of the factors considered.

The Tribunal has also introduced its own internal issues folders. These are on separate topics and enable members to consider any background material, AAT or Federal Court cases and, of course, other SSAT decisions. This helps with consistency and also relieves members from continually reinventing the wheel.

Newstart program

This program involves a further change for the Tribunal. We will now be reviewing decisions made by CES officers who have certain delegations under the Social Security Act.

CES is part of the Department of Employment, Education and Training and there is no history of external review of decisions that may have been made in the past.

We are particularly keen to see that things go smoothly, and have assisted in some of the training of their review officers. We hope we give some context to the process of administrative review and to impress the need to refer to the legislation and to explain to an applicant why a particular decision was made.

We will be looking forward to giving CES as much feedback as we can, particularly as it is all so very new for them.

If we do strike problems with their procedures or their instructions, again we trust we will be in a position to raise this quickly so that such matters can be addressed as early as possible which is of benefit to all concerned.

Many of the matters under Job Search Allowance and Newstart Allowance will of course be fairly familiar to us. We will still be looking at matters to decide, for example, if someone has failed the work test, or reduced their prospects of employment by moving, in the same manner as we did with the previous legislation. What will be new to us will be reviewing the Newstart Activity Agreements. I imagine the cases that come to us will generally be whether or not someone has complied with the terms; on those questions we have power to make decisions. When it comes to actually reviewing the terms of a Newstart Activity Agreement we are only able to affirm the decision or set it aside and send it back for reconsideration in accordance with any recommendations we may make. Whether this will cause uncertainty or confusion for applicants we will only know as the program is implemented. If we become aware of particular difficulties we will of course be bringing those to attention as appropriate.

Disability and sickness support

There is legislation currently before Parliament that will introduce major reforms to income support for people who are disabled or sick.[3] Invalid pension will be replaced by disability support pension (DSP), which will have revised qualification criteria.

Sickness benefit will be replaced by sickness allowance (SA) with the idea that it will clearly not be payable on an indefinite basis. There will be a greater emphasis on rehabilitation and assistance to return to the labour market.

The challenge for the Tribunal then will be applying this new legislation. The Tribunal will be the first external body to review the legislation. There will be Tables for the Assessment of Impairment that will form part of the legislation, and all members equally will be expected to be able to use and apply these.

We will of course be ensuring that our members are given training in the use of the new legislation and in how to use the Tables, to ensure that they can take on this task in a confident and fair manner.

The new impairment tables will operate on diagnosed conditions and I imagine that in many ways the cases that will come to us may not be too different from many we already hear, where an applicant is saying that they have various symptoms, but for which there is no diagnosis. Looking at the tables, if one has diagnosed conditions it will not be difficult to actually cross the 20% threshold. The new challenge will probably be in other areas, for example, in deciding whether someone is severely disabled in portability cases or whether a person has a continuing ability to work.

Conclusion

What I have referred to in this paper is only a small part of our functioning. Yet it highlights for the specialist tribunal just how much there is to cover and thus how difficult it is to ensure that all Australians receive the same standard of review wherever they live. It is a challenge that I am confident that all members take on

with enthusiasm and with a sense of striving to achieve our objective, which is to conduct review of decisions in a 'fair, just, economical, informal and quick' manner.

Endnotes

1 A Coghlan 'Can review bodies lead to better decision making?', paper delivered at 'Fair and open decision making: 1991 administrative law forum', 30 April 1991, Canberra.

2 D C Pearce and R S Geddes *Statutory interpretation in Australia* (3rd ed 1988).

3 The *Social Security (Disability and Sickness Support) Amendment Act 1991* was passed by both Houses of the Parliament on 12 September 1991 and received the Royal Assent on 10 October 1991.