SOCIAL JUSTICE

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The Social Security Appeals Tribunal: 20 years of evolution.

It is now more than 20 years since the name 'Social Security Appeals Tribunal' was first coined in Australia. It was applied to a collection of tribunals that were the forerunner of the current Social Security Appeals Tribunal (SSAT). If, as anticipated, the Administrative Review Council (ARC) in its review of Commonwealth Merits Review Tribunals recommends the abolition of the SSAT as a separate body, and if such recommendation is implemented, then it is a name that may have a limited ongoing currency.* It is therefore timely to reflect upon the evolution of the SSAT: an evolution primarily characterised by two distinct models. The first was a number of tribunals with solely recommendatory powers. The second, and current model, was the SSAT with a statutory base and with determinative powers.

The creation of the first SSATs (which preceded the Administrative Appeals Tribunal and the ARC) passed without comment or report in the pages of this journal's predecessor. The *Legal Service Bulletin* was, at the time, preoccupied with the celebration of its first year of existence and with the outcomes of discussion papers for the Commission of Inquiry into Poverty and the mooted High Court challenge to the legality of the Australian Legal Aid Office. The mid-1970s were, as old timers are wont to say, heady days. One of the lasting achievements of those days has been the creation of the SSAT.

Despite initial shortcomings in the constitution and power of the original Tribunals, they and their successor have made a significant contribution to the development of and acceptance of the process of administrative review. The current positive view taken of the SSAT by several areas of government, the strong support that it enjoys from both the Department of Social Security (DSS) and from welfare groups assisting applicants, stands as testimony to the fact that a thorough and professional review of decisions can be made despite an informal approach and can be done at a remarkably low cost, while at the same time enhancing the work of the primary decision makers.

For nearly all its life, the Tribunal has been under the watchful eye of the ARC, which has successively recommended the abolition of the SSATs, then recommended their retention in a stronger form and, finally, is expected again to recommend abolition of the current Tribunal, while retaining those features of its processes that have gained widespread respect.

A creature of Executive action

The SSATs, like their initial contemporary, the Australian Legal Aid Office, were not the products of Parliamentary debate and legislation but the creatures of Executive action. The then Minister for Social Security, Bill Hayden, after significant preparatory work within his Department in 1974, established the SSATs by Ministerial Instructions to operate from 10 February 1975. Within the context of the many steps

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*** Editors' note:** The ARC Report was in fact launched on 28 September 1995 and, indeed, contained such a recommendation.

taken to introduce an administrative law package in the 1970s, the SSATs were, therefore, one of the earlier steps that were taken. It was perhaps for this reason that they represented a very tentative approach to administrative review having, as they did, no statutory base and no power other than to make recommendations to the primary decision maker. It is possible, too, that the approach was influenced by the views of the 1973 Bland Committee Report, which recommended that social security grievances be dealt with by an ombudsman. It argued that a mechanism of appeals would lead to 'some qualifications of the benevolent attitude' of the Department and to 'some reduction of flexibility . . . and excess of caution' on the part of the officers.[1]

In December 1974, the Policy Branch of the Central Office of the DSS issued a document entitled 'Social Security Appeals System: Principles and Procedures'. The introduction stated, in part:

> The appeals will be considered by an independent appeals tribunal with the power to make recommendations to the Director-General. Appeals tribunals will operate in the six States and in the ACT and the Northern Territory. The Tribunals will consist of a full-time officer of the Department seconded from his normal duties in the Benefits Branch, and two part-time representatives from legal and welfare groups within the community.

Apart from reflecting the times with the use of its gender specific language, the curious aspect of this formulation was the notion that the part-time members were present in a representative capacity. Quite whom they represented or from which groups they came was neither spelt out nor obvious in the subsequent appointments.

Excluded from the administrative decisions about which the Tribunals could make recommendations were determinations based on medical assessments. Despite this significant exclusion, the Tribunal was soon very busy. The *Australian* (24.9.75) reported the then Minister, Senator Wheeldon, as saying that 8100 appeals were lodged in the first six months!

The original statement of procedures included some laudable sentiments. For example:

> An essential feature of an equitable appeals system is a recognition of equality between the client on the one hand, and the administration on the other. Consequently, a client of the Department has a right to know the reasons for a determination made in his case, and the avenues of redress open to him . . .[2]

In addition, an unusual but important feature was the recognition of the special difficulties faced by some potential applicants in meeting the formal requirements of lodging their appeals. The procedures provided for appeals to be lodged on an appeal form, or in writing, or by personal attendance or by telephone. The last of these methods remains unique to the SSAT today.

As subsequent events were to prove, one of the more significant statements in the procedures was that: 'The procedures of the appeals tribunals will be entirely at the discretion of the tribunals themselves'.[3] However, this discretion was constrained to the extent that the Tribunals had to note that legal representation was not allowed (unless a Member of Parliament appeared who happened to be a legal practitioner). Despite the declarations about equality, the statement of procedures did not fully enshrine the principles of procedural fairness. For example, material relevant to an applicant's case could be brought to their notice by the Tribunal but only 'if it so desires'.[4]

Discrepancies in practice between Tribunals

Given the absence of an effective statement of procedures and given the absence of any system designed to co-ordinate procedures on a national basis, it is hardly surprising that wide discrepancies in practice arose and that some Tribunals engaged in practices that shock modern sensibilities. For example, the making of findings adverse to an applicant without giving them an opportunity for a hearing and on the basis solely of the Department's papers was common. A very early conference of members, held in Canberra on 1 June 1975, considered a number of issues. One resolution in particular attracts attention. The conference agreed that: 'The standard of proof is the ordinary standard required in civil law, i.e. a balance of probabilities. When a basic entitlement has been established, the Department must prove beyond reasonable doubt non entitlement on other grounds.' To understand this erroneous mixture of civil and criminal standards it must be remembered that these were pioneering days in the history of administrative review. It would be nine years before Justice Woodward in *McDonald v Director-General of Social Security* (1984) 6 ALD 6 at 11 would carefully analyse the questions of onus of proof to be applied in social security matters.

Interestingly, the same first conference of members already decried the lack of statutory authority for the Tribunals and contemplated proposals then being considered for the creation of an Administrative Appeals Tribunal (AAT) which would exclude jurisdiction in social security appeals because of their volume and a desire to keep them as informal as possible.

The 1981 ARC Report

Problems of inconsistency and fairness of procedure continued to be raised in relation to the Tribunals. These were the subject of scrutiny by the ARC. In its first major project the ARC held seminars in Sydney in 1977 and Melbourne in 1979 as part of its research for the 1981 Report.[5] One issue identified in the report was that not only was there a separate Tribunal in each State and Territory but: 'There may be several SSATs in the State operating with different Chairmen'.[6] In most States there was a permanent division of members into Tribunals while in one or two States the composition of panels varied from time to time.

The report found that: 'Some Tribunals attempted to see or speak to the claimant in each case; others generally decide matters on documentation alone; others again use the combination of personal contact, file and telephone calls'.[7] The manner of questioning within hearings varied widely, as did the use that Tribunals made of the departmental manual. Some Tribunals regarded the manuals as the basis of their decisions; others applied them as a non-binding guide; while one Tribunal disregarded even the general thrust of the manuals.

On the positive side, the ARC reported that the SSATs had had a number of beneficial effects. They had altered a number of decisions; caused primary decision makers to change their approaches; brought to light practices and policies that might be unlawful or unjust; and contributed to an improvement of departmental work standards. The Council concluded, however, that the SSATs were part of the process of advising the Director-General; had no statutory basis; no power of decision; gave the appearance of lack of independence by including serving DSS officers in their constitution; lacked procedures and powers for effective fact finding; and offered

an inadequate level of justice. The Council recommended, in effect, the abolition of the SSATs and the vesting of a determinative jurisdiction in the AAT.

Another problem referred to by the ARC was that of delay. High volumes of lodgements in the first two years led to comment in the first edition of the *Legal Resources Book*[8] about delays and backlogs. While these delays were to remain a problem, it should be noted that only a small part of the processing time elapsed within the Tribunals themselves. Most of the time was spent by the Department: first in reviewing the decision before the Tribunals were provided with papers; and, subsequently, in deciding whether or not to implement their recommendation.

Appeals to the AAT

By the time the 1981 ARC Report was released, the role of the AAT in relation to social security matters had altered. As early as 1976, Senator Margaret Guilfoyle, then Minister for Social Security, stated in response to a proposal that appeals should proceed directly from departmental decisions to the AAT: 'Therefore I propose that the SSAT be retained but that we work towards this extension [to allow an appeal to the AAT] when there is a decision by an appeal tribunal and that appeal is not upheld by the Director-General'.[9] Finally, the AAT was given jurisdiction in these limited circumstances with effect from 1 April 1980.[10]

Later that year, on 9 September, Senator Guilfoyle issued a news release in which she noted the low incidence of appeals to the AAT to date. She therefore announced, with effect from that day, that applicants unsuccessful before the SSAT could appeal to the AAT. Furthermore, the SSAT could be by-passed if the applicant requested it and the Director-General agreed. (Four years later the ARC reported that only one such appeal had been agreed to by the Director-General).[11] In the same news release, it was announced that a substantial new area of jurisdiction would be given to the SSAT by removing the barrier on it reviewing decisions involving medical matters. These appeals would be heard 'with appropriately qualified medical officers' on the panel. Thus the Tribunals' membership was extended to include medical members.

Response to the 1981 ARC Report

The 1981 ARC Report was not enthusiastically received. A critical response by Terry Carney argued that the existing SSATs should be refurbished and strengthened with particular emphasis on the procedural protection of automatic hearings.[12] Stephen Skehill, then First Assistant Director-General (Legislation and Review) in the DSS, prepared a response in September 1981 which argued for the disbanding of the SSATs and the creation of a new statutory body, the Social Security Review Tribunal, with determinative powers. A number of detailed procedural features that he proposed were ultimately reflected in the 1988 legislation.

By 1983, the ARC had reconsidered its position. A letter from the Director of Research, Dr John Griffiths, on 14 November 1983 announced a new review on the basis of three significant developments. These were the operational changes to the SSATs; the wide appellate jurisdiction that had been exercised by the AAT; and the greater experience gained by the ARC in relation to the intermediate stage of review in jurisdictions involving large numbers of decisions. This second review by the ARC was presented in April 1984. In that report the Council continued to make adverse comments on 'the lack of uniformity and consistency between Tribunals on procedural questions and the absence of any system designed to co-ordinate procedures on a national basis'.[13]

One example given of procedural variations (which with the benefit of hindsight seems quite remarkable) was that in some Tribunals in some States the medical member (in the absence of the other members) conducted a medical examination of the applicant. On the other hand, the Council applauded the improvement in the rate of hearings of applicants in person. In some instances this had been quite dramatic. For example, in Queensland the percentage of hearings attended by applicants rose from 2% in the second half of 1981 to 82% a year later.

The 1984 ARC Report

The 1984 ARC Report recommended the establishment by legislation of one SSAT, organised on a national basis with determinative power. It now favoured a two-tier review process in the social security jurisdiction because of the high volume of appeals. These proposals were seen by the Council as 'being more in the nature of a progressive evolution and refinement of the existing system than a radical reform thereof'.[14] Some four and half years were to pass before these recommendations were implemented.

In the meantime, improvements occurred in the co-ordinating of procedural arrangements. In 1983, the Queensland Tribunal produced a comprehensive statement of procedures. In June 1984, a National Conference of SSATs appointed a National Standing Committee on Uniform Procedures. It produced a report later that year and in April 1985 the Minister approved the first detailed statement of procedures that were to apply to all of the SSATs.

What this meant in practice remains doubtful, as differences in procedures continued. For example, as late as 1986 and unlike their counterparts elsewhere, Tribunals in South Australia and Tasmania were still continuing to make tape recordings of the hearings. Furthermore, in April 1987, the South Australian Tribunal announced that it would be holding hearings on Friday mornings. Unlike the others, it had until then scheduled all hearings in the early evenings.

Initially, the recommendations of the 1984 ARC Report were not embraced in their entirety by all of the Tribunals. One obstacle was an apparently strong aversion to the introduction of a co-ordinated and hierarchical structure. The Tribunals' disparate practices reflected their self-governance. This, in turn, had extended to a democratic approach to co-ordination in which one member, variously called Convener or Chairman of Tribunals or with no title at all, was elected annually in each Tribunal. In the short term, elections within the States and Territories continued. One of the ARC recommendations was for the appointment of a National Chairman. Presumably reflecting the existing practice, the Victorian Tribunal wrote to the Minister stating that the proposal was 'totally inappropriate' and suggesting 'a federalist co-operative structure be developed with the National Co-ordinator being elected annually'.[15]

The 1985 statement of national procedures adopted a common title of Convener and included in the position's role 'such other functions as are allocated by the members'. In the following year, Brian Howe, the then Minister, proposed the positions of Principal Members, with a duty statement that included 'overseeing the quality of recommendations' and 'directing administrative operations'.[16] In March 1987, Prin-

cipal Members in each Tribunal were appointed for the first time.

Despite the resistance to the ARC's recommendations, support for a determinative tribunal with statutory independence from the Department was to prove irresistible. The view was not a new one. As early as 1977, the Myers Committee (The Inquiry into Unemployment Benefits Policy and Administration) observed that, in reality, the appeals were still 'adjudged by Caesar'. Such a view, although shared by academics, the Tribunals and the ARC, did not immediately sway the Government. In 1985, the Minister rejected the ARC recommendations.

The ground swell of support for change was reinforced by the intractability of the problem of delays. In mid-1986, the processing time for appeals was between 27 and 28 weeks (and 45 weeks for medical appeals in South Australia). However, 70% of this time was attributable to the Department, including the delay in deciding whether to accept the Tribunals' recommendations. Added to this problem was the blowout in the proportion of cases in which the Tribunals' recommendations were not followed. In the last quarter of 1986, 36% of recommendations were rejected. At the end of that year, a special meeting of members in Melbourne expressed its concern over these issues and what it saw as an increasing role being played by the Department in Tribunal procedures. Minutes of that meeting reveal that although members were still quite divided in 1985 on the issue of a tribunal with determinative powers, there was now nearly full support for it.

A creature of statute

Finally, in the May Economic Statement of 1988, the Minister announced that there would be a statutory tribunal, independent of the Department, operating as a first tier of review with power to determine applications and which would exercise (almost) all of the powers and discretions of the Secretary of Social Security. In the Second Reading Speech on the *Social Security (Review of Decisions) Bill* 1988, Brian Howe reflected on the previous 12 (sic) years of operations. He warned of retreating from the informal procedures and against duplicating the undesirable style of hearing then conducted by the AAT. To emphasise these concerns, the Bill stated the objectives to be the provision of a mechanism for review that is 'fair, just, economical, informal and quick'. The legislation created a position of National Convener (a title that possibly reflected the existing culture), which was to be responsible for the general management of the Tribunal and for ensuring uniformity and consistency. A new position of Senior Member in each State and Territory was, like the National Convener, to be appointed by the Governor-General. Furthermore, those members previously sometimes called departmental representatives would no longer be appointed by the Secretary but by the Minister, as was the case with all other members.

The new SSAT, substantially in the form in which it exists today, commenced operations on 1 November 1988. Its annual reports record that in the first year or so substantial effort was made to document and implement standards for procedures designed to achieve national consistency and proper compliance with the rules of procedural fairness. A standard format for decisions was developed and the Tribunal's new National Secretariat disseminated information about substantive and procedural issues with the goal of increasing consistency of decision making.

One of the recognised strengths of the SSAT is the use of multi-disciplinary and multi-member Tribunal panels. The present composition is usually a legal member, a welfare member and a member with experience in the administration of social security law. A medical member is included for hearings involving medical issues. Two critical developments ensured that all members fully participated in the hearings and decision-making process. The first involved the role of chairing or presiding at hearings. The practice had been that legal members always chaired. Following the establishment of the single Tribunal, this was gradually changed until, by 1990, the role of presiding member was rotated between all members. Allied to this was the responsibility for writing the statement of reasons. At the time of the SSAT's 1984 report on uniform procedures, it was noted that the task in most Tribunals was carried out by the departmental member; in three tribunals it was generally done by the legal member and only in two was the task shared. The responsibility for writing decisions is now spread among all members and contributes significantly to ensuring that each understands the elements of the decision-making process.[17]

The success of the SSAT

Acceptance of the Tribunal has been reflected in the gradual additions to its jurisdiction. From mid-1991, the creation of job search and newstart allowances involved DSS powers being delegated to staff with the Department of Employment, Education and Training (DEET) and, in turn, involved the SSAT in reviewing decisions made within a second government department. This was significantly increased from the start of 1995, when the former Student Assistance Review Tribunal (which had been established in 1974) was incorporated within the SSAT. It then acquired jurisdiction to review certain decisions under the *Student and Youth Assistance Act 1973* (notably relating to AUSTUDY). This last change not only raised the number of members to almost 300 (including 24 full-time members) but also raised to 18% the proportion of applications to the SSAT that related to decisions made within DEET.

A further example of the standing of the SSAT was its use as a model by the Victorian Government in late 1989, when creating a new administrative review tribunal in the workers compensation jurisdiction.[18] The Victorian legislation drew very directly on that applying to the SSAT.

Whereas the original SSATs were established to review decisions under what was then the *Social Services Act 1947*, the SSAT now has jurisdiction to review decisions under six statutes.[19] The principal of these Acts is the *Social Security Act 1991* which was a complete 'plain English' rewrite of social security legislation. One consequence of this drafting approach was to nearly treble the length of the Act. To add to what is now an extremely large Act, in the four and half years since the 1991 rewrite, there have been no less than 29 amending Acts, plus a further 18 Acts that have amended the Social Security Act. Many of these amendments reflect the policy of more accurately targeting the recipients of social security payments. This policy has limited the extent of discretions that can be exercised under the Act and increased the details with which eligibility criteria are drafted. The total effect of the extreme length of the legislation, the frequency of amendments and the extension of the SSAT jurisdiction to other legislation has been to make the Tribunal's task more complex.

At the same time, many of the less complex matters have been diverted from the SSAT as a consequence of the process of internal review. Although authorised review officers had been introduced in the DSS with the 1988 legislation, it has only been since the start of 1993 that an internal review has been compulsory before an application can be made to the SSAT. The combined effect of all these external influences on the Tribunal's jurisdiction has been to make the issues before it more varied and more technically difficult.

Despite these complexities, the SSAT has a remarkable record of performance in terms of its timeliness. In the context of the delays prior to 1988, Brian Howe announced the setting of time limits for certain stages of the review process. Some of these subsequently found their way into the legislation. Since then, the previous National Convener and the Senior Members have lead the development of a very strong culture and an internal acceptance of the need to provide an early listing of hearings and a very prompt production of written statements of reasons. For the last two years, the average time from registration of an application to the despatch of a written decision has been 8.7 weeks.

In similar contrast to the early years, there is an insistence on having oral hearings. Reflecting a determination to increase the equality with which applicants are treated, the Tribunal now offers opportunities to attend hearings in some 75 locations outside the capital cities. This determination to meet the goals of access and equity creates cost pressures that remain an ongoing issue for the Tribunal.

Conclusion

The SSAT's role in improving primary decision making and the administration of social security legislation generally has also been recognised. Its annual reports list a range of matters that have been raised directly by the Tribunal with either the Minister or the Secretary of the Department in relation to problems of legislation or practice that have come to its attention in the course of conducting its reviews.[20]

The second and current model of the SSAT has evolved to a mature adulthood. There were concerns early in its history that making it independent and giving it determinative powers would undermine the valuable informality, and therefore accessibility, of its approach. However, the SSAT has been able to retain that quality. It has done so while at the same time achieving a co-ordination of its activities as one national body, strengthening its procedures to provide greater procedural fairness, and increasing the coherence of its systems with the objective of achieving equal treatment of all applicants in similar circumstances.

The next stage of the SSAT will follow the 1995 ARC Report. Whether, in the words of the 1984 Report, the future decided on by government constitutes 'progressive evolution' or 'radical reform' remains to be seen. In any event, it is to be hoped that the maturity now achieved will enable the qualities for which the SSAT has been highly regarded to assert themselves within whatever system is to come.

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4. DSS, above, para. 5.
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6. ARC, above, p.96.
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8. Gardner, J., Neal, D. and Cashman, P., *Legal Resources Book*, Fitzroy Legal Service, April 1977, pp.8-13.
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10. Statutory Rule 1980 No. 62 made under the *Administrative Appeals Tribunal Act 1975.*
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15. Letter from L. Rodopoulos, Chairperson of Combined Tribunals to Senator Grimes, 24 August 1984.
16. As reported in the 'Opinion', (1986) 32 *Social Security Reporter* 401.
17. For an analysis of the role of the welfare members see Huck, J., Proceedings of AIAL Conference on 'Non-legal' Members on Review Bodies, 22 November 1992, p.19.
18. For a description of that tribunal see Gardner, J., 'The Victorian Work-Care Appeals Board — An Investigatory Model', (1993) 1 *TLJ* 154.
19. *Social Security Act 1991, Health Insurance Act 1973, Child Support (Assessment) Act 1989, Farm Household Support Act 1992, Employment Services Act 1994 and Student and Youth Assistance Act 1973.*
20. See also O'Neill, A., 'The Impact of Administrative Law in the Area of Social Security', in J. McMillan (ed.), *Administrative Law: Does the Public Benefit?* AIAL, Canberra, 1992, p.274.

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14. The National Consumer Affairs Advisory Council found that between 1985 and 1987 only 11% of private actions under Part V were initiated by individual consumers. The Committee concluded the major reason was that the amount of loss or damage suffered by consumers did not justify legal action (NCAAC, *Consumer Redress and Part V of the Trade Practices Act 1974*, AGPS, Canberra, 1987, ch. 2).
15. Fels, Allan, 'The Trade Practices Act 1974 — Twenty Years On', (1974) 2 *Competition and Consumer Law Journal* 89 at 91.
16. For example, the Commission may authorise conduct which appears to breach Part IV where there is an overriding public benefit. Section 87B, inserted in 1992, allows the TPC to obtain 'enforceable undertakings' from people in relation to both Part IV or V matters. Negotiated settlements may also have significant value as precedents.
17. Tala, J., 'Soft Law as a Method for Consumer Protection and Consumer Influence. A Review with Special Reference to Nordic Experiences', (1987) 10 *Journal of Consumer Policy* 341.
18. See Goldring, J., 'Privatising Regulation', (1990) 49 *Australian Journal of Public Administration* 419.
19. TPC, *Annual Report 1994-5*, p.11.
20. *Australian Financial Review*, 31.12.74, p.1. The taskforce was responsible for taking the first major Part V case, *Hartnell v Sharp Corporation of Australia* (1975) 5 ALR 493). The TPC itself, in its second *Annual Report*, said 'The Commission is now concentrating its activities on monitoring conduct and on carrying out industry-wide investigations... leaving the great multiplicity of consumer complaints to be handled locally' (p.2).
21. Australia, House of Representatives 1975, *Debates*, vol. HR97, p. 2074 (second reading speech by Minister for Consumer Affairs and Science, Clyde Cameron). There have been other suggestions for specialised consumer protection bodies; for example, the establishment of the Consumer Legal Advocacy Centre (NCAAC, above, pp.35-41).
22. Pengilley, Warren, 'Why one Commission?', (1995) 11 *Australian and New Zealand Trade Practices Law Bulletin* 25.