The Court decides if it should hear the complaint or if it should be referred back to the Tribunal. The procedure thus necessitates a Court hearing and could potentially undermine the authority of the Tribunal. It is also contrary to the original intention to create a costs-free jurisdiction. Some provision for costs has been made in relation to complaints against government agencies. However, other organisations will be able to seek transfer to the Court and ordinary costs may be awarded against complainants who lose the case. This new development could lead to complaints being dropped because complainants cannot risk a costs order. In any event, proceedings in the Court will be more difficult and expensive than in the Tribunal.

In conclusion, the new Act opens up a number of new grounds for anti-discrimination claims but defendants to such claims have also been provided with a significant set of grounds on which they can seek to support discriminatory conduct. Unfortunately, neither the Victorian Opposition nor the media raised these issues effectively and the Bill was pushed through with little public debate. A close watch must be kept on the impact of the new exceptions.

Miranda Stewart is a Melbourne lawyer.

SOCIAL SECURITY

90s relationships

CRAIG SEMPLE looks at the AAT's interpretation of the concept of 'marriage-like relationship'.

A recent decision of the Administrative Appeals Tribunal (AAT) has criticised the concept of 'marriage-like relationships' as employed in the *Social Security Act 1991* (the Act). The AAT, in deciding to exercise a discretion contained in s.24(2) of the Act, has proposed a way of making the Act more relevant to the changing nature of relationships in the 1990s.

Cancellation of family payments

The facts of the case, *Secretary of the Department of Social Security v Le Huray* (V94/667, 15 March 1995) involved the cancellation by the Department of Social Security (DSS) of the respondent's family payments. The payments were cancelled when the respondent began cohabiting with her male companion on the basis that the relationship was 'marriage-like'. Accordingly, the respondent and her companion were treated as 'members of a couple' under s.4(2) of the Act. Eligibility for the family payment was therefore assessed on the joint income of the respondent and her companion, which precluded the respondent from receiving the family payment.

The decision of the SSAT

After an unsuccessful internal review of the decision, the respondent was successful with her appeal to the Social Security Appeals Tribunal (SSAT). The decision of the SSAT (AMS 54521:KM, 16 June 1994) relied on the non-traditional nature of the relationship between the respondent and her companion. As is becoming more common in relationships in the 1990s, the respondent and her partner wished to retain their financial independence from each other. The respondent was responsible for the financial expenses of the household, and her companion paid her weekly board. In all other respects they were financially separate. The respondent's children maintained a good relationship with their father, and the respondent's companion assumed no parental role whatsoever.

The SSAT held that although the respondent and her partner were living in a 'marriage-like' relationship, the discretion contained in s.24(2) of the Act should be exercised. That discretion allows the Secretary to determine that a person in a marriage-like relationship should not be treated as a member of a couple for the purposes of the Act if there is a 'special reason' for doing so. The SSAT determined that this discretion be exercised because the respondent's companion assumed no responsibility for the children and that as a consequence, 'the only people to be affected by the Tribunal's decision are Ms Le Huray's children' (at 8).

The decision of the AAT

The DSS appealed the decision of the SSAT to the AAT. The AAT, like the SSAT, found that the relationship between the respondent and her companion was 'marriage-like', but that there was a 'special reason' to justify the exercise of the s.24(2) discretion.

The AAT exercised the discretion on a different basis to that relied on by the SSAT. The AAT rejected the SSAT's conclusion that the 'special reason' justifying the exercise of the discretion was that the respondent's children would be the people who would suffer because of the cancellation of benefits:

> We are satisfied that, in all cases concerning family payment, there would be at least a direct connection between the child's welfare and the family payment as there is in this matter. Thus we do not consider that the effect of a loss of family payment on the children of Ms Le Huray can be 'a special reason in the particular case'. [at 26]

Rather, the AAT focused on the role of the respondent's companion with respect to her children:

> [H]e does not in any way stand in the position of a father to her children, who are in frequent contact with, and supported by, their father. We think it would be inappropriate for the Tribunal or the Secretary of the Department of Social Security to interfere with the relationship between the boys and their father, by requiring another man to undertake financial responsibility for them. [at 27]

The Tribunal decided that although the relationship was 'marriage-like', the lack of responsibility assumed by the respondent's partner was a 'special reason in the particular case' justifying not treating the respondent as a member of a couple.

Analysis and implications of the decision

The AAT acknowledged that the notion of a 'marriage-like relationship' is an increasingly unsatisfactory standard to be applied to relationships:

> There is such variation in relationships between couples that it is very hard to say which relationships are 'marriage-like' and which are not. [at 17]

The AAT made an unambiguous call for reform of the Act in this area, suggesting that, 'some other formula should be developed' (at 27). This is not a new position. Similar sentiments can be located in *Re Stuart and Secretary, Department*

of Social Security (1985) 9 ALN 38 where the Tribunal stated that the test was 'extremely difficult to apply' and that:

> the time is fast approaching when changes of lifestyle will require either individually means tested assessments of rate of benefit for all individuals, whether married or not, or a hard and fast rule that those who are married are assessed on a joint basis and those who are not are assessed as individuals. We recognise that these are two extreme views. It may be that a more acceptable compromise can be formulated, but if it relies on 'marriage-type relationships' being 'recognisable' it will continue to be fraught with difficulties. [at N39-40]

The importance of the decision of the Tribunal in *Le Huray* is that it offers a means through which the application of the Act can be adapted to make it more relevant to the various types of relationships in Australia today — what the Tribunal in *Re Stuart* referred to as an 'acceptable compromise'.

The process of determining whether a relationship is 'marriage-like' or not necessarily involves the balancing of many different factors — particularly those identified in s.4(3) of the Act. When such a process is adopted, situations will arise where, although the balance struck will be such that the relationship should be regarded as 'marriage-like', it would be inappropriate to regard the parties to that relationship as 'members of a couple' for the purposes of the Act. It is unavoidable that, as relationships evolve away from more 'traditional' forms, the number of situations to which the 'marriage-like' classification will be inappropriate will increase.

In the absence of more substantial legislative reform, the Tribunal has employed the discretion contained in s.24(2) as the tool by which the changing nature of relationships can (at least partly) be accommodated.

The decision of the AAT does not mean that all members of a marriage-like relationship who retain their financial independence will be assessed for benefits on the basis of their income alone. The use of the s.24(2) discretion ensures that such a universal precedent is not established. However, the decision is important because it shows the willingness of the AAT to adapt the operation of the Act to relationships which move away from the traditional forms.

The increased uncertainty and greater administrative effort resulting from this approach would seem a small price to pay for a social security system that is more relevant to different forms of relationships. This is especially true when it is considered that a high proportion of the '90s' relationships to which we are referring would arise from the experience of failed relationships, and perhaps the individuals in those relationships will have a greater potential to receive benefits such as family and sole parent payments.

The future

The DSS has appealed the decision of the AAT in *Le Huray* to the Federal Court. The effect of the AAT's decision will, therefore, depend on the outcome of that appeal and the balance struck between the need to have a social security system relevant to Australian society, and the need for certainty and efficiency in the operation of that system. Even if the Federal Court affirms the decision of the AAT, the impact of the decision will depend on the use of the s.24(2) discretion by the DDS in respect to other relationships which do not fit the 'norm'.

Indeed, it may be that any formula that uses the notion of 'marriage-like' will be unworkable. In that case, there will need to be legislative reform of the *Social Security Act* to ensure that the provision of social security remains relevant to the needs of the community — and in this context, the decision of the Tribunal in *Le Huray* is important in adding a loud and influential voice to the calls for such reform.

Craig Semple is a solicitor at Mallesons Stephen Jaques on secondment to the Public Interest Law Clearing House. Mallesons Stephen Jaques will act pro bono for the respondent, Ms Le Huray, in the Federal Court appeal and its preparation.

The author thanks Caitlin English, Manager of the Public Interest Law Clearing House, and Sandra McCullough of the Consumer Law Centre, for their advice and assistance in the preparation of this article.