



Social Security
Appeals Tribunal

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Access to Justice Arrangements
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Access to Justice Arrangements: Productivity Commission Issues Paper

Thank you for the opportunity to provide submissions in response to the *Access to Justice Arrangements* issues paper.

The Social Security Appeals Tribunal (SSAT) wishes to respond to several questions posed in Part 10 of the paper. Before turning to those questions, it may be helpful for the SSAT to outline its jurisdiction, workload, statutory objective, and some features of a review by the SSAT.

Jurisdiction

The SSAT has jurisdiction to review decisions made under the *Social Security Act 1991*, the *Social Security (Administration) Act 1999*, *A New Tax System (Family Assistance) Act 1999*, *A New Tax System (Family Assistance) (Administration) Act 1999*, the *Child Support (Assessment) Act 1989*, the *Child Support (Registration and Collection) Act 1988*, the *Student Assistance Act 1973*, the *Farm Household Support Act 1992*, the *Paid Parental Leave Act 2010*, the *Health Insurance Act 1973* (regarding entitlement to health care cards), and the *Veterans' Entitlements Act 1986* (regarding arrears of service pension where the veteran's partner was receiving a social security payment).

The SSAT typically reviews decisions that:

- a social security benefit, pension or allowance is not payable;
- a social security benefit, pension or allowance is payable at a particular rate which is less than the maximum rate of that benefit, pension or allowance;
- a social security payment is suspended or cancelled;
- a social security recipient has been overpaid and the debt is to be recovered, including the rate at which the debt is to be recovered;
- family tax benefit is not payable or is payable at a particular rate or has been overpaid;
- child support of a particular amount is payable;
- fix variables in the statutory formula for child support (such as the income of a parent, or the percentage of care provided by each parent for the child/children); and
- an extension of time, in which to seek internal review of a child support decision, is refused. (As a time limit also applies to applications to the SSAT in respect of child support decisions, the SSAT must also decide whether to grant an extension for that purpose in some cases.)

The role of the SSAT is to make the correct decision and, if more than one decision would be legally correct, to make the preferable decision on the material before the SSAT.

The SSAT is the final tier of merits review of most decisions made under the *Child Support (Assessment) Act 1989* and the *Child Support (Registration and Collection) Act 1988*, and the first tier of merits review of the decisions made under the other Acts.

Workload

In 2012-2013, the SSAT received 12,283 applications for review and finalised 12,412 applications. Some of those applications covered multiple decisions so the SSAT reviewed 14,538 decisions. The average cost of a review was \$2,215 (calculated by dividing total expenditure of the SSAT of \$27,493,223 by the number of applications finalised).

Statutory objective

In carrying out its functions, the SSAT must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.¹

The statutes which confer jurisdiction on the SSAT permit an application for review to be made orally.² There is no application fee for a review by the SSAT.

Hearing by the SSAT

Subject to limited exceptions, the SSAT must hear the application for review.³ The hearing is private and permission must be sought for a person, who is not a party to the review, to be present at the hearing.⁴

The SSAT is not bound by legal technicalities, legal forms or rules of evidence and is required to act as speedily as a proper consideration of the review allows.⁵ The SSAT may inform itself on any matter relevant to a review of a decision in any manner it considers appropriate.⁶ The SSAT may take evidence on oath or affirmation for the purposes of a review of a decision.⁷

In reviews of one kind of decision about child support, a delegate of the Principal Member usually holds a directions hearing at which directions are given about information or documents which must be provided to the SSAT.⁸

The typical length of a hearing of a review of a decision made under the *Child Support (Assessment) Act 1989* or the *Child Support (Registration and Collection) Act 1988* is 1.5 to 2.5 hours. The typical length of a hearing of a review of a decision made under the other Acts is an hour.

The SSAT makes most decisions on the day of the hearing. The SSAT can give oral reasons for its decisions in some circumstances and is otherwise required to give a written statement of reasons for its decision within 14 days of making the decision (or of a person seeking a written statement of reasons given orally).⁹

¹ Subsection 141(1) of the *Social Security (Administration) Act 1999* which is mirrored in the *A New Tax System (Family Assistance) (Administration) Act 1999*; the *Paid Parental Leave Act 2010*; the *Child Support (Registration and Collection) Act 1988*; and the *Student Assistance Act 1973*.

² An employer must make an application for review of a decision under the *Paid Parental Leave Act 2010* on the form approved by the Principal Member.

³ Subsection 159(1) of the *Social Security (Administration) Act 1999* which is mirrored in the other Acts referred to in footnote 1 (the **other Acts**).

⁴ Section 103P of the *Child Support (Registration and Collection) Act 1988* which is mirrored in the other Acts.

⁵ Subsection 103N(1) of the *Child Support (Registration and Collection) Act 1988* which is mirrored in the other Acts.

⁶ Subsection 103N(2) of the *Child Support (Registration and Collection) Act 1988* which is mirrored in the other Acts.

⁷ Section 103G of the *Child Support (Registration and Collection) Act 1988* which is mirrored in the other Acts.

⁸ Section 103 of the *Child Support (Registration and Collection) Act 1988*.

⁹ Sections 177(1A) to 177(1) of the *Social Security (Administration) Act 1999* which are mirrored in the other Acts.

Questions posed about improving accessibility of tribunals

Should scope for having legal representation within the context of tribunals be more or less limited and why? What mechanisms could be used to help ensure that the benefits of simplicity and informality of tribunals are not undermined by lawyers acting as if they are appearing before a court?

The need for, or desirability of, legal representation before a tribunal undertaking merits review largely depends on the way in which the hearing by the tribunal is conducted.

The person whose decision is being reviewed by the SSAT has a right to make written submissions but must seek permission to make oral submissions at the hearing.¹⁰ The Principal Member (or delegate) can order the decision-maker to make written and/or oral submissions.¹¹

The right of the decision-maker to make written submissions or to request permission to make oral submissions is not exercised. The power of the Principal Member to order the decision-maker to make oral submissions is rarely exercised and, when it is exercised, the decision-maker's representative has attended the hearing (usually by electronic means) only for the period necessary to make the oral submissions and to answer questions of the SSAT.

Where there are two citizen parties to a review (such as a review about child support), a party must seek permission to be represented at a hearing. A lawyer representing a party is not permitted to cross-examine the other party or his or her witnesses. In a hearing, a party or his or her representative may ask the SSAT to put a particular question to another party or witness.¹²

The simplicity and informality of a hearing by the SSAT cannot be undermined by a lawyer representing a party to a review; nor is a party without legal representation disadvantaged as he or she is likely to be if the hearing were conducted in an adversarial manner.

As to whether a tribunal would be assisted if the parties were legally represented, the SSAT noted the observation of the Federal Magistrates Court about the "paucity" of relevant evidence after a five day hearing at which one party was legally represented.¹³ The inquisitorial hearing by the SSAT of an application for review of the same kind of decision involving the same parties (in respect of a different child support period) took 2.75 hours and neither party was legally represented. The SSAT's decision was not impugned on appeal.

However, parties and the SSAT have been assisted by advocates from community legal services who specialise in the social security law. Legal Aid NSW recently commenced providing a legal aid service to parties seeking review of decisions made under the social security law. Due to the very limited availability of this legal aid service, the SSAT notifies persons most in need of legal assistance of the service and then makes appointments for those persons wishing to avail of it. This practice is analogous to *pro bono* legal assistance schemes existing in the courts.

What principles should be used to determine the balance between generalist and specialist tribunals?

The following principles could assist in determining the balance between generalist and specialist tribunals, or whether a tribunal should be structured in divisions:

1. Does the subject matter necessitate the application of complex general law and/or statutory provisions which are difficult to interpret so that specialised legal knowledge or skills are needed?
2. Does the subject matter involve a field or body of expert knowledge so that tribunal members adjudicating the disputes require qualifications in a particular field?
3. Having regard to the number of disputes about particular subject matter, is it feasible to have a separate tribunal or a separate division of a tribunal to decide such disputes?

¹⁰ Subsection 163A(1) of the *Social Security (Administration) Act 1999* which is mirrored in the other Acts.

¹¹ Subsection 163A(2) of the *Social Security (Administration) Act 1999* which is mirrored in the other Acts.

¹² Subsection 26(3) of the *SSAT Child Support General Review Directions 2012*.

¹³ *Parkin & Sykes* [2011] FMCAfam 842 at [140].

In light of the repeated observations of the Federal Court of Australia about the complexity and difficulty in interpreting the *Social Security Act 1991*, the SSAT considers that the answer to the first question would be “yes” for a hearing of a review of a decision under the social security law.¹⁴ That is particularly the case for the hearing of such a decision in the present informal and inquisitorial way.

While the subject matter of reviews by the SSAT does not always involve a field or body of expert knowledge, the SSAT is assisted in deciding some reviews if the member (or one of the members) constituting the SSAT has qualifications in the field of medicine, accounting, health or social sciences. The workload of the SSAT is big enough to warrant it being a specialist tribunal or a specialist division within a generalist tribunal.

Yours sincerely,

Jane Macdonnell
Principal Member

¹⁴ *Blunn v Cleaver* [1993] FCA 567 at [43]-[49]; *Anstis v Secretary, Department of Social Security* [1999] FCA 1176; *Secretary, Department of Family and Community Services v Draper* [2003] FCA 1409 at [24]; *Secretary, Department of Family and Community Services v Geeves* [2004] FCAFC 166 at [37] (judgment of Weinberg J); *Fischer v Secretary, Department of Families, Housing, Community Services & Indigenous Affairs* [2010] FCA 441 at [64].