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The Rise and Rise of Tribunals

SESSION 8: ISSUES OF ACCESS AND EQUITY IN TRIBUNALS

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In volunteering to do this paper for the Conference I was not given any particular guidance as to the matters I should cover. For that I am grateful as it seems to me that Access and Equity in the tribunal context has many facets. For us in the Social Security Appeals Tribunal an appreciation of our 'client base', if I can use that rather clinical phrase, is fundamental to how we operate.

In short, access and equity for the SSAT includes

- Knowledge in the client base of the existence of the SSAT and what it does
- Provision of appropriate information to persons, once they have decided to appeal to the Tribunal, on how to go about it
- Relevant knowledge on behalf of SSAT staff on how best to cater for particular client needs, and
- Appropriate treatment of people at their hearing by the Tribunal's membership covering all aspects of the hearing including the provision of a written decision

These four basic elements have mainly an 'external' client focus. In the words of the "Charter of the Public Service in a Culturally Diverse Society" the SSAT would be seen in its "Provider Role".

Before I further explore what access and equity means to the SSAT and what it might mean for other tribunals and courts, perhaps I should restate what the Charter sets out by way of general principles; to guide us in meeting the needs of the community within a culturally and linguistically diverse society. In restating the principles I have contextualised it to the SSAT – I think by doing that I can more easily focus on how among other matters, the SSAT is performing against those principles:

- **ACCESS** The SSAT's services should be available to everyone who is entitled to them and should be free of any form of discrimination irrespective of a person's country of birth, language, culture, race or religion.
- **EQUITY** – The SSAT's services should be developed and delivered on the basis of fair treatment of clients who are eligible to receive them.
- **COMMUNICATION** – The SSAT should use strategies to inform eligible clients of services and their entitlements and how they can obtain them. The Tribunal should also consult with their clients regularly about the adequacy, design and standard of its services.
- **RESPONSIVENESS** – The Tribunal's services should be sensitive to the needs and requirements of clients from diverse linguistic and cultural backgrounds, and responsive as far as practicable to the particular circumstances of individuals.
- **EFFECTIVENESS** – The SSAT should be 'result orientated', focussed on meeting the needs of clients from all backgrounds.
- **EFFICIENCY** – The SSAT should optimise the use of available public resources through a use-responsive approach to service delivery which meets the needs of clients
- **ACCOUNTABILITY** – The SSAT should have a reporting mechanism in place which ensures it is accountable for implementing Charter objectives for clients.

I will deal with each principle in turn and at the end of the discussion on each principle, pose a number of questions which other tribunals might wish to consider in determining their approach to access and equity issues. Each

tribunal is of course different with different appellants, procedures, powers, etc., but I hope the check list will be of interest to most tribunals if they were to test their performance against the principles.

Access

In relation to the first principle I will not limit my remarks to sections of the community which might have particular difficulty in accessing the Tribunal's service. Our experience shows that the very great majority of people who come to our Tribunal do so in some trepidation irrespective of their language, culture or educational background. This may or may not be true of other tribunals but I suspect it is so, for many if not for all of them.

By appealing to the SSAT you are of course exercising your legal rights to contest a decision, in this context, usually a Centrelink decision. That right has been specifically provided for in the Social Security law for many years. Even so, many people are somewhat apprehensive about appealing – many feel they are not just seeking to have an external review of their case (and seeking to have a more advantageous decision made for them) – they are 'taking on the system'. So access in its very broadest meaning encompasses how a tribunal presents itself to the broader community and how can access to its services be delivered with least possible barriers?

So what can, and has, the SSAT done to provide easy access to its service?

The most common way a person learns of their right to appeal to the SSAT is via written communication from Centrelink. In fairness to Centrelink it is scrupulous in including in its correspondence which informs the recipient of an adverse decision, information about rights of appeal. One of the peculiarities of the social security appeals system is that the social security law mandates that an internal review by an "Authorised Review Officer" must be completed before a person can access, i.e., appeal to, the SSAT. That requirement was inserted for two main reasons – one to enable the original decision making body an opportunity to correct a mistake quickly, and secondly in recognition

of the enormous number of decisions that are required to be made by Centrelink under the social security law.

Does the requirement to first have an ARO review impede access to the SSAT? It probably does but the extent to which it does is not known. AROs handle between 30,000 – 40,000 reviews per year on average – about 1 in 4 of those cases continues on to the SSAT.

There are no direct costs incurred in appealing to the SSAT – there are no filing fees or other statutory or administrative charges. A person can appeal by sending a letter a fax to the Tribunal, or simply phoning a tribunal office and the staff will then take the appeal over the phone. In the first nine months of this financial year 2034 persons have appealed over the phone, which is about 33% of total lodgements. The phone call is a free-call 1-800 number.

The SSAT does of course have a pro forma appeal form. It is printed only in English however it does have a message in 14 other languages which says that if you need another language you can telephone the Translating and Interpreter Service (TIS) and ask for TIS to call the SSAT on their behalf – the TIS number is also included in our message.

In relation to more direct 'access' to the SSAT, the Tribunal encourages personal appearances before the Tribunal where that is practicable. We offer to reimburse applicants the cost of public transport to and from the hearing. For country people who attend hearings in person we also pay for overnight accommodation costs – last year about \$40,000 was expended on such travel and accommodation costs. The SSAT conducted about 5000 appeals on a face-to-face basis in 2003 – 2004. The combined appeals dealt with face-to-face, by telephone or video was approximately 6700 cases, or roughly 75% of all cases.

Access – remote servicing

In a tribunal that receives about 9000 appeals a year, a fair proportion are from the non-metropolitan area. The SSAT does visit country centres but we are constrained by competing factors;

- The cost of such trips, which can require an overnight stay
- The availability of members to travel
 - Especially when about 85% of the membership is comprised of part time members who often have other business to attend.
- The need to balance the number of cases to be heard (the Tribunal would not normally travel to hear less than 3 cases in a session) with time available.
 - It is generally unrealistic to expect members to hear more than 3 cases in a session.
- An assessment of the need for a face-to-face hearing as opposed to a telephone or video conference hearing, to assess, for example, credibility.

Last year SSAT heard 1540 cases by teleconference and 170 by video conference. Sixteen percent of face-to-face hearings were conducted in places outside the metropolitan area. Places visited included, Launceston, Toowoomba, Cairns, Broken Hill, Coffs Harbour, Wagga, Bendigo, Mt Gambia, Bunbury and Alice Springs.

As a basic access facility, the SSAT has long maintained an office in each State and Territory Capital City. In pure economic and/or efficiency terms, it could be suggested that we do not need offices in NT, the ACT or Tasmania and that with part-time membership available in those locations, the “back office” servicing could quite easily and efficiently be performed in Brisbane, Sydney and Melbourne respectively. We have, at least until this time, kept an office in Darwin with one full-time member, as well as sitting on NT cases, also sitting often as a member on Queensland cases via telephone or video conferencing. This enables us to have a full time presence in the Northern Territory and also utilise our human resources effectively.

Access questions:

- **What is the geographic presence of the tribunal?**
- **Can/does the tribunal need to travel to non-metropolitan areas?**
- **Does a tribunal have an obligation to assist applicants pre-hearing and to what extent, especially if unrepresented?**
- **What are the direct costs of an appeal and are they appropriate?**
- **Is information about tribunal available in other languages?**
- **Has the tribunal surveyed applicants on the readability of its correspondence?**

Equity

At this point I should mention that the social security law requires the SSAT to provide a mechanism of review that is “fair, just, economical, informal and quick”. I should also say, at least in my opinion, that there can be significant tension between these objectives. ‘Equity’ is a case in point. How can a tribunal demonstrate that it is delivering its services, in the words of the Charter I have referred to above, “on the basis of fair treatment”.

The vast majority of persons who appeal to the SSAT are not represented. That may well not be true for many of the tribunals which are attending this conference. Some SSAT applicants come with family or friends; very few come with professional assistance. In the first nine months of the current financial year about 6000 cases were finalised with 426 cases (or 6.5%) having formal legal representation. Family and friends have accompanied appellants in over 500 cases (7.8%) in the same time period [need total lodgements in 1st 9 months of this financial year. Included here]

In such circumstances what can a tribunal, in this context the SSAT, do to ensure fair treatment? The legislation does not give much guidance but realistically what could it say in such regard? Under sub-section 157(3) of the *Social Security (Administration) Act 1999* the decision-maker is required to provide to the Tribunal a statement about the decision (findings of fact, reference to evidence upon which those findings based and reasons for the decision). That sub-section also requires the decision-maker to supply to the Tribunal a copy of every document, or part thereof, that is in the possession of

the decision-maker, which relates to the applicant and is relevant to the review of the decision. The first requirement is usually satisfied by providing to the Tribunal a copy of the ARO's decision. The second requirement is quite problematic in some cases, essentially because the Social Security system is now essentially electronically 'based'. Most dealings between the population and Centrelink are conducted face-to-face and payment records and historical information are all stored electronically, including previous correspondence from Centrelink. In satisfying its obligation to the Tribunal under section 157 Centrelink often provides a vast amount of electronically stored information by way of screen dumps. These documents are often difficult to understand by the tribunal members, especially part time members. Interestingly the Tribunal is only required to give to the appellant the first requirement in section 157 (3), i.e., only the ARO letter, not the second requirement, being all the relevant documents relating to the decision.

In attempting to deliver equity to appellants, the SSAT currently goes beyond its statutory duty and does in fact give a copy of what it considers to be all the relevant documents to each appellant. On equity and social justice grounds, the Tribunal therefore gives appellants a better chance to understand the case against them. However, given the nature of such documents it is clear that the majority of such documents are highly unlikely to be understood by the 'average' applicant. In these circumstances, should the Tribunal give only what the legislation requires or continue with its current practice in giving far more; especially as the preparation of the documents for the appellant is time consuming and entails 'additional' cost.

What guides a tribunal in treating an applicant in an equitable manner? A slight complication in the equity context is that SSAT hearings are required to be held in private and the decision-maker or the decision-maker's representative, is not permitted to make oral submissions at the hearing (section 162). Is this consistent with the rules of natural justice? In these circumstances the SSAT must be careful in how it "assists" applicants in their quest to seek a review but not go over the line and assist them in the preparation of their case. Some procedural assistance is given to applicants

by the SSAT case managers. Each appellant is assigned a particular case-manager by name as soon as an appeal is lodged – that gives the appellant some continuity of service by the Tribunal by dealing with the one nominated case manager, and gives the case manager individual ‘ownership’ of the case. Case managers cannot advise an applicant on the chances of success or explain the Centrelink case against them. However, they can demystify the appeal process for anxious applicants by providing assistance, such as, giving helpful information about what will happen at the hearing, making arrangements to meet applicant needs, etc.

It is noted with interest the outcomes of an AIJA forum held last year on Self-Represented Litigants. Other tribunals and courts are obviously wrestling with the problem of striking the correct balance between assisting a self-represented applicant prepare for the hearing without compromising the independence and neutrality of the tribunal or court involved. Some suggestions which came out of that forum, which a number of both courts and tribunals contributed; included:

- A self-represented applicant kit or written guidelines
- A tribunal or court officer to personally meet with the applicant and go through the kit or guidelines with them
- Running information sessions
- Screening a video
- Having specific case managers for self-represented applicants
- Training programs run by teaching institutions for self-represented applicants.

Some or all of these suggestions might suit a particular court or tribunal. Before I leave mention of that AIJA report I certainly endorse an observation made towards the end of the report “for many jurisdictions, where an increasing number of [self-represented applicants] is a reality, the best approach may be to view the task of dealing efficiently and fairly with them as a challenge rather than a difficulty”.

Equity Questions

- **What can/should a tribunal do to inform an applicant of what is expected of them?**
 - **Especially early in the appeal process**
- **Should a tribunal/court assist a person to appreciate the issues in their particular case**
 - **Especially if unrepresented**
 - **If so, how?**

Communication

The SSAT, like other tribunals, faces a dilemma in attempting to inform persons of the service it provides, without appearing to 'tout' for business. Recently the Tribunal sent out over 200 posters to a large number of community organisations which we thought might be involved in social security issues which included indigenous support groups, welfare and community organisations, universities and disability groups.

We have tried very hard to produce our written material in plain english. We also recently completed a review of all our standard computer generated letters to check for accuracy and readability. The 'communication' principle suggests that service providers should consult with their clients regularly about the adequacy of the service. I confess we have not done this. We have consulted up to a point, but not regularly.

Last year what we did do was conduct a series of Value Creation Workshops (VCW) across the country to gauge the experiences of persons who had appealed to the SSAT. In essence a VCW is a forum which invites persons who have been through your tribunal or court, to express their opinions on a range of matters associated with that experience. Both members (full-time and part-time) and SSAT staff attended to listen to appellant feedback. The VCW outcomes, allowing for the relatively small sample of applicants, were nevertheless very illuminating. Of course some of the results were influenced by the success or otherwise of the particular appellants, but I am confident in saying that nevertheless the members and staff who attended the workshops

had their eyes opened well and truly about how the SSAT is seen as operating by those persons who have personally experienced it. The particular outcomes from the workshops are the subject of another discussion. Having said that I will mention two findings under the general heading “Responsiveness” below. Whilst some staff and members found the experience quite confronting, I do not regret having undertaken the exercise and for those tribunals or courts here today which might be interested in doing something similar, please feel free to contact me after the session if you wish to find out more details about the ‘customer’ feedback we received.

One of the difficulties in a communication strategy for tribunals is that we seldom have ‘repeat business’. We cannot therefore presume that we can ‘train’ people to be good applicants. Most applicants will see us once in their lives – all we can do is honestly try to give them a fair hearing with the resources we have available.

I have mentioned earlier that many appellants are under stress in a hearing context. Given so many of our appellants are unrepresented it will be they themselves who have to answer questions and make statements at the hearing.

One of the selection criteria for membership of the SSAT is that prospective members must indicate they have some empathy and appreciation of the types of persons who come before us as well as the technical issues we might have to decide. We have held some cultural awareness training for members and initially new members usually observe a few hearings before they actually sit.

We urge our members to try and use plain English, not only in their written decisions but also during the questioning at the hearing. The requirement for this sort of skill depends on the requirement of the particular jurisdiction you are dealing with but, common to all courts and tribunals, is the wish to get to the facts and the truth and how we achieve that can be quite challenging.

At the commencement of each hearing the presiding member has a list of preliminary matters to mention to our appellants – they are listed in the Members Handbook for 2 reasons – so presiding members do not miss any points and also that we achieve consistency in communicating those messages across country.

Given our constituency we have quite a few hearings with the assistance of interpreters and I will mention that again later in this paper.

The checklist of questions for this principle include:

- **Is your correspondence tailor made or pro forma?**
- **Is it tested for readability both internally and externally**
- **Is it technically accurate?**
- **How do you strike the appropriate balance between informing the general population, or parts of it, of the appeal service you provide, without being seen to be touting for business?**
- **Is your correspondence timely?**
- **Do you have ‘plain english’ writing skills within your training of members and training in how best to use interpreters in a hearing context.**

Responsiveness

I have already mentioned the Value Creation Workshops and the high level of unease felt by the average applicant who embarks upon an appeal. Two findings from the workshop helped the SSAT get a better feel for the appellant “experience”.

One of the clearest findings of the workshops, and a very gratifying one, was a finding that the SSAT was performing at the higher end of the scale on displaying courtesy, respect and understanding of applicants. Another clear finding which was less gratifying was that appellants placed a high value on the SSAT having power and influence to improve the social security system but that the Tribunal was not performing well in this regard. In pursuing this ‘gap’ between expectations of appellants and perceived performance, the

message we received was that we, the Tribunal, should be able to move away from the strict letter of the law to provide a more 'just' social security system. This is one finding that the tribunal has some trouble in addressing but at least we know about it and are on notice to explain as clearly as we can the constraints we are under in administering the social security law.

In this regard, even though we are unable to ignore the law to deliver what the applicant would see as a 'just' decision in their case, the SSAT does have in place both formal and informal mechanisms to inform relevant Commonwealth departments about unintended consequences and anomalies in the legislation and also, importantly, we give feedback to Centrelink on the 'mechanics' of the administration. In regard to the latter the Tribunal has been able to have some input into the content of Centrelink letters containing notice of an adverse decision.

In areas where we do have more flexibility in responding to applicant needs we have the following measures in place:

- In the early correspondence which the applicant we seek advice from them whether they have any particular requirements on
 - Need for an interpreter and in what language and
 - Any disability related need such as wheel chair access or sign interpreter.
 - We also nominate their case manager.

Sometimes the papers from Centrelink will put us on notice of a person's particular requirements to which we have regard; we don't just rely on the applicant to self identify their needs.

The most common direct assistance is by way of providing an interpreter – last financial year the SSAT provided interpreter services in about 600 cases at a cost of approximately \$100,000. We do not permit friends or family to interpret for applicants and we make this known up front.

Effectiveness and Efficiency

These are accepted as basic to sound administration in any business but in the tribunal context have some quite difficult judgments required to be made by tribunal managers.

Almost every appellant appreciates a quick decision; even if the decision goes against them. In my jurisdiction time really can be of the essence when a person has had their claim for an income support payment rejected and they have limited private resources to fall back on. Obviously we, as any tribunal, occasionally ascertain that a case requires priority and when that occurs an expedited hearing date is set. However, by doing so a copy of the relevant papers might only be ready for the applicant a day or two before the hearing. Remember very few appellants are legally represented – in such cases all we can do is set the early hearing date and send the papers as soon as is practicable. This is an example of the tension I mentioned earlier, in this instance between ‘fair and just’ and ‘just and quick’.

Timeliness is a strong driver in the social security appeals context as I am sure it is in other tribunals. At the moment the SSAT is taking less than nine weeks from initial registration of the appeal to despatch of the final written decision. I am not sure that we can materially improve on that performance.

Assessment against the Principles

In the most recent Access and Equity Annual Report of 2004 the SSAT was assessed as meeting well performance indicators one, three and four within the Provider Role which was mentioned early in this paper. The performance indicator we did not meet well was number two, in that we do not have a mechanism in place for regular ‘customer’ feedback. A further assessment of our tribunal’s performance can be found in the SSAT’s Access and Equity Report 2004.