SOCIAL SECURITY REVIEWS AND APPEALS IN AUSTRALIA: ATROPHY OR GROWTH?

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In his article Terry Carney locates the issue of Australian social security appeals within the ambit of the so called "new administrative law". He provides a useful chronology of action by Australian federal governments and commissions of inquiry. He details the problems of the present system, one of some complexity. He suggests reforms which would require of applicants a single initiative to bring them before a new tribunal. The reformed procedures would make appeals freely available, would see them resolved promptly, and would utilise a tribunal completely independent from the Department of Social Security. He sees a refurbished and strengthened Social Security Appeals Tribunal as the tribunal which would be central to the proposed reforms.

A. INTRODUCTION

The review of administrative action in general, and social security in particular, is a creature of the growth and consolidation of the welfare state over the course of this century. The provision of basic — if less than comprehensive or adequate — entitlements to income support and housing, or to services such as health care and public transport, has transformed the lives of average citizens. State largesse is now perceived as an asset akin to the more traditional forms of proprietary interest recognized by law (Reich 1964, 1965; Sackville 1978). Citizens aggrieved by the

manner in which the bureaucracy discharges its mandate to administer the distribution of these important rights and benefits, quite properly have pressed for the establishment of independent avenues of redress.

Debate about the manner in which such review might best be provided is not new. Lawyers wedded to Dicey's analysis of the British constitutional position (Dicey 1964: *cii-cvi*, Chapter 12; Goldring 1981a: 1), were inclined to leave such matters to be resolved within the public service, subject to limited forms of judicial review in the courts. British Labour governments, concerned to promote the role of social security in palliating the effects of inequalities in the distribution of income and wealth[1] and highly distrustful of the conservative values espoused by the judiciary,[2] insisted on the establishment of a separate system of very informal review bodies. The Whitlam Labour government continued this tradition, with the establishment in 1975 of Social Security Appeals Tribunals (henceforth SSATs). Finally, a series of reports and committees of enquiry into government administration — such as the Franks Committee in Britain, and the Kerr and Bland Reports in Australia (UK 1957; Australia 1971; Australia 1973a; Australia 1973b; Australia 1973c; Goldring 1981b) — has argued the case for the establishment of an all-embracing system of review which would incorporate revitalized procedural protections, while retaining the traditional advantages of specialization, informality and expedition which can be attributed to the best of the informal tribunal arrangements.

The recently published report of the Administrative Review Council on the subject of social security appeals (Australia 1981) has recommended that this latter strategy be adopted in Australia. The Council has proposed that social security appeals be handled by a new division of the Administrative Appeals Tribunal (henceforth AAT) which was established in 1975 to serve as a general avenue of redress for all classes of administrative grievance (Administrative Appeals Tribunal Act 1975 (Cth) s 5). This article argues that this proposal is misconceived. It is contended that a viable and effective system for the review of social security decisions must possess certain characteristics which cannot be provided within the framework of the AAT standing alone.

A viable review process must, it will be argued, be able to accommodate a large volume of cases, few of which will, in isolation, raise complex issues of law or policy. The inclusion of such cases is, however, of vital importance in ensuring that the decisions of the review process strike an acceptable balance between the competing demands for individualized justice and for uniformity and consistency of decisions.[3] The objectives of promoting easy and widespread access to review; of providing for expeditious resolution of grievances; and of foregoing a relationship with the bureaucracy which will maximize the normative impact of decisions (and thus reduce the number of similar grievances in the future) — all militate against acceptance of the Administrative Review Council proposal. The existing system of SSATs already possesses many of the features which have made for success in comparable overseas jurisdictions. This article argues the case in favour of reforming and upgrading those Tribunals, in preference to relying on the AAT as the sole channel of independent review.

1. Social Security and the New Administrative Law

The role of the law, and legal institutions, in regulating the relationship between the citizen and government has undergone a marked transformation over recent years. The changes which have been wrought in the field of administrative law have been dramatic. It has evolved well beyond a system concerned principally with the niceties of constitutional propriety and the conventions of the Westminster system of government.[4] Indeed administrative law has now passed through an intermediate stage which sought to control discretionary powers through reliance on doctrines of procedural regularity or principles designed to confine discretion to lawful territory.[5] Many writers now speak of a third phase of development[6] for which they have coined the rather unimaginative description "the new administrative law" (*eg* Taylor 1977; Goldring 1981a: 3; Goldring 1981b: *passim*).[7]

Whatever the limitations of the descriptive rubric, it nevertheless documents a genuine development in the relationship of the citizen to the decision-making structures of government departments. The essence of that new relationship involves a recognition of the need to confront the reality that discretionary processes[8] have equal legitimacy, and a stature at least equivalent to, that of the archetypal "rule based" systems of decision-making on which many lawyers (and courts) have been weaned. The body of writing which drew attention to the central role of discretion in government decision-making went on to identify the weaknesses in the traditional legal measures which might be deployed on behalf of the citizen to ensure that discretion is properly exercised (Davis 1967: *passim*; Dworkin 1967).

As McMillan has recently commented:

> we have accepted the pervasive spread of administrative power and [have] recognized that neither political and executive accountability to Parliament, nor judicial correction of disparate errors, constitutes a system of administrative control. With this in mind, new institutions have been created and new techniques utilized to ensure not only that decisions are lawful and are regularly made, but that "good administration" prevails as well (McMillan 1980: 112).

Social security administration puts these issues in high relief: discretion holds pride of place; the traditional legal mechanisms have not coped well with the protection of the interests of the citizen/client (*eg* Prosser 1979; Hanks 1977: 377; *Green* v *Daniels* (1977) 13 ALR 1); and innovative new procedures have been fashioned (and refashioned) to meet the challenge. In many ways social security appeal and review procedures are in the vanguard of "the new administrative law". This article will document some of the successes and failures of the reform measures which are at the "cutting-edge" of these new developments.

2. The Contextual Pressures of Social Security

Analysis of the social security administration must firmly establish the size of the client group which might potentially be affected by decisions, and identify some of the pertinent characteristics of that group. That information must then be supplemented by material describing the basic characteristics, and the working ethos, of the administrative system itself. Finally it is necessary to draw out some of the policy issues presented by the interaction of clients with this administration.

The latest available statistics establish that there are very large numbers of clients of the Department of Social Security (henceforth DSS). To take but one client group — the unemployed — by way of illustration, it is literally true to say that there are "a million and one things that can go wrong". For it is estimated that the DSS handled over a million applications for that benefit during 1978-1979 alone.[9] Significant numbers of such people are on unemployment benefits at any one point in time during the year. Thus, on the latest statistics, an average of 306,300 people were on this benefit (Australia 1980a: Table 45 p 120).

Both the "throughput" of people passing through the system, and the burden carried at any one time, clearly establish that social security decisions affect a considerable proportion of the population.

In addition to the fact that social security clients constitute a group of people of no mean dimensions, they generally share two characteristics which call for special sensitivity in the design of adequate decision-making or review procedures. First, this is a group of people who are not generally well versed in the ways of bureaucracy. They tend not to be articulate or assertive. Many feel particularly uncomfortable with processes which rely extensively on written records and printed channels of communication. For very many clients, the DSS provides their first contact with an "alien" environment; an administration which rejects the oral communication tradition with which they are familiar. Secondly, this is a group of people who generally lack reserves of both money and psychological stamina. They are often literally "on their uppers". Cash reserves (if any) have been depleted and psychological confidence shattered. As a consequence they do not have the luxury of being able to tolerate time-consuming delays in the application, payment or review processes.[10] For this group there is no longer an economic or psychological cushion to protect them against the social costs of delay.

The administrative structure also has several pertinent characteristics. Again the unemployed may be taken as an illustration. The "unemployment" administration (the DSS and the Commonwealth Employment Service (henceforth CES)) is very large and complex. Social security accounts for a large slice of the workforce within the public service. There were some 11,000 officers in approximately 140 regional offices throughout Australia in 1980 (Australia 1980b: para 107; Australia 1981: 1). It accounts also for a substantial share of Commonwealth outlays (*eg* some $925m was expended on unemployment benefits in 1979-1980 and total outlays on all pensions and benefits were $7,289m: Australia 1980a: 18, 6). It is an archetypal "bureaucracy".[11] The magnitude and complexity of the operation constitutes a major contributing cause of public dissatisfaction with the welfare administration. As the Coombes Report expressly stated, the concern by the public about "the system" was one which "seems . . . likely to us [to] represent an accurate perception of the inadequacies of the arrangements through which programs are carried out" (Australia 1976: para 6.2.3, p 128). This has implications both for preventive strategies — such as the administrative reforms recommended by Coombs — as well as for the design of remedial measures. The ultimate aim of any review process must be to improve the quality of primary decision-making within the Department. Measures fashioned to achieve that purpose must, however, take account of the time constraints, limited resources, susceptibilities to influence from policy pronouncements of Ministers, and the limited fact finding and investigative powers

of the officers concerned (Kirby 1980: 176, 191, 192).

The final contextual feature to be borne in mind concerns the policy schizophrenia evident in the statutory expression of many of the key discretionary provisions. The legislation governing payment of unemployment benefit nicely illustrates this point. Although some provisions (notably the new definition of "industrial dispute" which serves as a bar to payment, or the discretionary "postponement" penalties for workers voluntarily leaving a job) (Social Services Act 1947 (Cth) ss.107(4), (7), 120(1)(a)-(1); Carney 1977: 366-377; Carney 1979; Capogreco 1980) can properly be characterized as subscribing to the philosophy that the maintenance of workforce discipline and conformity to the work ethic must take priority over the meeting of hardship or need, the bulk of the provisions are notable for their "ambivalence towards unemployment beneficiaries" (Sackville 1978: 256). The balance of forces may strongly flavour interpretations which deny entitlement to workers who flout the conventional values regarding the work ethic and industrial conformity, but the latitude conferred upon administrators charged with the exercise of the delegation to determine whether a person has taken "reasonable steps to obtain . . . work" is very considerable. As Keeler has suggested, the legislature (which represents a somewhat divided electorate on this issue) has deliberately avoided making the legislation more explicit (Keeler 1980: 83). Occasionally these policy choices are addressed by way of internal Departmental directives issued by the Permanent Head (or by the Minister in a statement to Parliament). Frequently, however, they are devolved (by default) on frontline (and often also junior) officers in the Department.

The hallmarks of the social security administration are its size and complexity; the deliberate ambiguity and obscurity of legislative objectives; and the consequential very wide scope for discretion. In the place of the "rules" which lawyers (and the citizen) come to expect in administrative systems, social security is notable for the conferral of broad, ill-defined, discretionary powers.

There are at least three important policy implications to be considered as a result of these characteristics of the client group and the administration. A primary consideration, as with any bureaucracy (but especially one of such magnitude), must be to fashion procedures which will ensure that this "corporate colossus" is made accountable to the individual. A critical component of accountability in this context is that the citizen should *understand* the processes, and have adequate opportunities to *participate* in the decision-making. As a Canadian law Reform Commission paper put it, the citizen "wants to be informed of the reasons for, and machinery of, administrative actions that affect him, of his rights . . . avenues of appeal . . . and the exact extent of his obligations . . . The fundamental demand of the citizen in the service state is that they be associated with the decision-making process . . . enabl[ing] the individual to contribute, by expressing his own view of the case, to the making of the decision which will affect his interests" (Canada 1977: 234).

Secondly, as with any discretionary process, attention must be paid to the framing of measures which will ensure that discretion is properly exercised, both in individual instances (the main focus of this present article) and at an aggregate level (where statistical "quality" control measures are critical) (Mashaw 1974; Sackville 1978: 262-263).

Finally, in common with all arrangements which devolve policy-making functions on the bureaucracy — particularly where discretions may be exercised in areas riven

by division on basic social, political or cultural values — attention must be given to the question of the accountability of the bureaucracy to the public in policy-making (Davis 1967: *passim*; Keeler 1980: 103).

This article will not be concerned to explore such important questions as the legal and legislative techniques for boosting the "rule content" of the legislative framework (Keeler 1980: 73-90); or the technique for rendering the bureaucracy more accountable through open and reasoned decision-making, staff sensitization (Colliver 1974: 19-22) or personalized primary decision-making (Canada 1977: 29). Nor will it examine machinery for making decision-making a more uniform process (Mashaw 1974; Sackville 1978: 262-263); nor procedures for ensuring that the policy formulation by the bureaucracy is more open, explicit and accountable to the public (Keeler 1980: 84-87). Instead this article will concentrate on procedures for remedying *individual* grievances of applicants or clients of social security.

B. THE HISTORY OF SOCIAL SECURITY REVIEW IN AUSTRALIA

1. The Position Before 1975

Initially the only avenue of review provided for within the Australian social security administration was that invested in the Director-General of the DSS by ss 14 and 15 of the Social Services Act 1947 (Cth). Both the claimant, and the Department itself, could initiate such a review. Up to 1975 the Director-General exercised this power unaided, and a hearing was not accorded. Instead the Director-General decided appeals on the basis of information contained in an internally generated "report" on the issues. That file was prepared by officers of the Department. Together with any written submission which might have been made by the claimant, that file provided the basis for a "review on the papers". Mossman had described the process:

> The written decision of the Director General generally recited the facts on which his decision was based and set out his reasons for agreeing or disagreeing with the original decision . . . However, there was no active program within the department to inform claimants of their right to initiate review of a decision, and they generally were denied access to the department's report in presenting their claims for review (Mossman 1979: 223).

This internal and rather haphazard system for resolving grievances was vigorously defended by the Department in the evidence placed before various enquiries established in the early 1970s to review the procedures relied on to check and correct the exercise of administrative discretion. Thus in evidence to the Bland Committee, which reported in 1973 (Australia 1973a; Australia 1973c; Goldring 1981b), the Department contended that the existing system provided the best means of coping with the large numbers of discretionary decisions, would best promote the proper and uniform exercise of discretion, and would be the most effective and efficient means of providing review without displacing the alleged priority given by DSS to the prompt and "humane" treatment of claimants (Australia 1973c: para 62; Mossman 1979: 224). This line of argument found greater favour with this Inquiry than had been the case with the Kerr Committee in 1971 (Australia 1971).

The Kerr Committee had recommended that aggrieved clients be provided with a choice of review processes. One avenue was to be a review conducted by a general

ombudsman (with power to report and make recommendations, but not to implement action to redress grievances), which review would principally be designed to screen out the grievances capable of a "negotiated" settlement. The other option was to be an appeal to an administrative tribunal (Australia 1971: 113-118). But this dual-track, elective system was rejected by Bland. That Report proposed that social security claimants be confined to but one avenue — that of an approach to the ombudsman. In support of this recommendation, the Bland Committee chronicled what it saw as "risks that may attend the introduction of [an appellate review] process" (Australia 1973c: para 61).

The "risks" identified by the Committee struck a chord with the Departmental viewpoint. The Bland Committee argued that an appeal process would lead to "some qualifications of the benevolent attitude" of the Department and to "some reduction of flexibility . . . and an excess of caution" on the part of officers (Australia 1973c: para 62). It was also claimed that there would be problems of access by clients to tribunals, and it was asserted that "[i]t seem[ed] likely . . . that in many cases the most that could be hoped for would be a paper review of decisions . . . if inordinate delays . . . were to be avoided" (Australia 1973c: para 63). Finally, the Report turned its attention to the "dramatic and striking warning" (Australia 1973c: para 64) provided by the (then) Repatriation Tribunals. It went on to claim that to invest an administrative appeals tribunal with jurisdiction over social security matters would:

> oblige the Tribunal to direct itself, *to the detriment of other aggrieved persons, with problems more appositely the affair of the Tribunal*, to matters which we believe would more sensibly and properly be handled by the Ombudsman . . . [and] we think that only rarely will decisions under discretionary powers raise matters of that character or complexity about which there could be room for serious disputation or which would be appropriate for a formal tribunal (Australia 1973c: para 67 — emphasis added).

This last paragraph encapsulates the essence of the reasoning and the philosophy of the Bland committee. Although the detailed content of the recommendations of that Committee has not been closely adhered to in the field of social security administration, the series of measures which has been introduced between 1975 and the present, has been in close conformity with the basic philosophy enunciated by Bland. The departmental ethos, as endorsed by the Bland Report, has largely held sway throughout the period since its publication. In some cases the very elements of the review procedures themselves have been based on proposals in that Report. Thus the "appeals units" (henceforth AUs) established to provide the initial reconsideration of cases before the SSAT's were based on the recommendation contained in paragraph 68. The more recent reform, that is, to allow a grievance to go straight to the AAT (by-passing the SSAT) where the Director-General issues a "certificate" as to its importance, derives from paragraph 70. Rarely have the measures introduced stepped far beyond the philosophy embodied in it.

Given the suspect nature of the reasoning in the report — particularly its views that discretionary decisions were not worthy of, or responsive to, adjudicative review (a proposition laid to rest by David (1967)) and that social security posed but a multitude of simple mundane matters[12] — it is perhaps surprising that it should

have proved to be so influential. But, as the subsequent material will demonstrate, it has continued to play a major part in shaping successive developments of the appeal and review structure in Australia.

2. The "1975" Advisory SSATs

From February 1975, by virtue of an administrative directive of the then Minister Bill Hayden, SSATs were established in each State and Territory in order to provide a "general and independent avenue of redress" (Mossman 1979: 226). These Tribunals, which remain in place, each comprise two or three part-time, non-departmental members (a lawyer and someone with medical training and/or someone "experienced in welfare") and a full-time "seconded" officer of the DSS, to whom secretarial support staff are answerable. The Tribunals are not housed on DSS premises. However, the SSATs have no statutory structure, nor do they hold any formal delegations of the powers of the Director-General; they simply serve in an advisory "screening" role. SSAT recommendations favourable to clients do not operate without express endorsement of the Director-General or a state office delegate, although in practice it is accepted that an SSAT rejection of an appeal is conclusive without more.

The SSATs are designed to operate so that they become seized of all appeals lodged, but the first step in dealing with the appeal involves an "internal reconsideration" by the DSS. AUs have been established as specialist bodies to engage in reconsideration. Following AU enquiries, many appeals are "conceded" by the DSS. The cases conceded by the DSS are forwarded on to the Tribunals for "vetting" to ensure that the claimant's case has in fact been adequately met, but generally this "scrutiny" is conducted by the Departmental member of the Tribunal. Internal review accounts for the bulk of recommendations to "uphold" an appeal. Thus, in 1978 29% of all appeals were conceded by DSS AUs while in 1979 the proportion was 28%. This may be contrasted to SSATs which upheld only a further 15% (1978) to 18% (1979) of those cases.

The SSATs conduct a review only of those *unconceded* appeal cases referred on by the AU. The SSAT receives the DSS file and a one- or two- page report from the AU giving the facts with supporting reasons for the Unit's decision to reject the appeal. Apart from in New South Wales and the ACT (and during the course of a pilot evaluation in Victoria in 1977-1978), SSATs initially did not routinely offer appellants the opportunity to attend the hearing in person. When such a request was received from an appellant, SSATs routinely acceded to it. But since appellants were unaware that they might make a request, such a request was unusual. Otherwise, appearances by appellants in person occurred only where the SSAT proffered an invitation, following its initial consideration of the "papers". The vast bulk of the appeals outside New South Wales and the ACT were therefore simply "paper reviews" (Australia 1978: 1, para 23).

However, that picture has now changed in some States. In Victoria, for example, it is now the practice to invite attendance in all cases other than in "work test" matters. Even so, due to their "advisory" role, the SSATs are, as the Administrative Review Council put it, still "exposed to the danger of becoming little more than another level in the chain of 'passing up' of decisions through the Department" (Australia 1978: 1, para 22; Australia 1981: 98, para 3, 103).

Favourable recommendations from the SSATs are further considered within the DSS (by the Director-General or by his delegates at State Director level). Recommendations not accepted during the course of the process of "handing up" of SSAT "decisions" may be *vetoed* by the Director-General. Published statistics show a decline in the "veto rate" for favourable SSAT decisions from around 20% in 1977 to approximately 5% in 1979 (Hanks 1981b). This may indicate a softening of the position of the Director-General (according more *de facto* power to SSATs), or a change in the composition of the case-load of the SSATs. On the other hand (as is more likely) it may be a reflection of SSAT "policy" in most tribunals (other than in New South Wales — and one Victorian panel in 1977-78) of not persisting to make favourable recommendations once a Director-General's veto has been received on a similar case (Australia 1978: 1, para 23). Unfortunately, the available data does not permit this question to be taken further at this stage.

3. The Review Officers

In 1978 the place of the SSATs in the chain of"passing-up" of decisions, was significantly altered by way of modifications made to the "intake" stage of the review process. Previously, there was an open and generous mode of access to the review process. Appeals to the SSAT were (and still may be) initiated by telephone, letter, inquiry by a member of Parliament, or by personal attendance. A simple pro-forma of appeal exists but compliance with that form is not essential. Advice as to appeal rights is supposed to be forwarded with *adverse* decisions by the DSS but, according to one study, these procedures often break down.[13] When notification of appeal rights is conveyed, the prospective appellant still may find himself operating "in the dark" due to DSS failure to give (any or precise) reasons for the decision in question (Australia 1978: para 12; Australia 1981: 83, para 8. 034).

The 1978 changes were modelled on procedures of the United States Internal Revenue Service (Kirby 1979: 6) and were given the stamp of approval by the Administrative Review Council in its first Consultative Paper (Australia 1978: para 5; Australia 1981: 33, para 6.018). From May 1978, DSS has progressively established Review Officers (henceforth ROs) at State headquarters and in all regional offices. Instructions have been issued that notification of decisions should now give the name, designation and telephone number of the RO and invite beneficiaries to address their complaints to him (Australia 1981: 86, para 3.041). Resort to the RO is not a mandatory precondition to an SSAT appeal, but prior resort to this channel is strongly encouraged by the Department. An immediate and "independent" review is to be conducted, which may involve either a partial or total concession, or simply an explanation of the original decision (Australia 1981: 87, para 3. 047). In cases where the decision remains unchanged, the RO is supposed to advise of appeal rights and assist claimants to set it in train. ROs are expected to conduct a personal interview,[14] unlike AUs which rarely go beyond the papers.

These procedures were justified by the DSS and the Administrative Review Council on the grounds that they would ensure prompt handling of grievances, quickly dispel confusion and misinformation, provide humane counselling of clients, and generally serve to "screen-out" routine errors capable of speedy redress — a set of justifications reminiscent of the Kerr and Bland Reports (Australia 1973c: para 62; Mossman 1979: 224; Australia 1971: 113-118).

Those justifications can be challenged on three main grounds. First, these benefits could equally — and might more properly — be achieved through reform of primary decision-making. Specifically, they would be promoted by introducing the Canadian personalized decision units for handling all initial claims by "one-to-one" contacts . As Keeler put it, such "personalized service" would reduce the problem of the "dialogue of the deaf" (Keeler 1977: 190).

Secondly, speedy correction of decisions by internal reviews could be accommodated within the framework of the appeals structure. It should not become a pre-condition to (and thus postpone) access to independent review by an external body (Kirby 1979: paras 10, 17). The Administrative Review Council recognized that the RO was a *de facto* precondition to external review. Nevertheless, it opposed integrating ROs into the external review procedure (Australia 1981: 33, 91, paras 3. 065, 6. 022-027). Thirdly, it can safely be predicted that the RO concept will deflect from the SSAT cases which ought properly to come before it leaving grievances unremedied. This is because ROs will be confused with external review. Many appellants will take the view that "if at first you don't succeed [before the RO], then give up". Inarticulate and overawed DSS clients will be deterred by the obligation to take two steps — first contact the review officer and, if that fails, lodge an appeal with the SSAT. The "double stimulus" consequence magnifies the strategic advantage held by the DSS which was recognized by the Administrative Review Council (Australia 1981: 94, para 3. 081), of the decision to engraft review officers on to SSATs in this way. It enables the Department to use delay in the restoration of payment as a major deterrent to appeals.[15]

4. The 1980 Reforms

On 1 April 1980, the AAT acquired jurisdiction to hear appeals lodged by people aggrieved by a decision of the Director-General to reject a favourable recommendation of an SSAT (Administrative Appeals Tribunals (Social Services Act) Regulations 1980, 62 SR 1980; Social Services Act 1947 (Cth) s 15A (operative in respect of decisions of SSATs, or appeals by-passing SSATs after 9 September 1980)). This reform, which was first announced as government policy in April 1977 (Cth PD Sen 26 April 1977, 969), was not entirely inconsistent with the Bland Committee's report (Australia 1973a: paras 69, 70). For an aggrieved client, however, the post-April system provides for a "three stimulus system". Review by the genuinely independent AAT (with a legislative base, a wide charter over "policy matters" and authority to impose its decisions on DSS) requires the client to take three separate iniatives. First, set in train a review by the RO and (if unsuccessful) secondly, lodge an appeal with the SSAT and if successful before SSAT only to fail before the Director-General finally, lodge a further appeal with the AAT. Each of these "stages" would involve frustrating delays. Furthermore it is not until the procedures built into the AAT legislation are triggered that an appellant gains any real guarantee of compliance with the rudiments of procedural fairness or "natural justice". Only then will an appellant be entitled to a full statement of the case being argued by the Department, and have the opportunity to meet that case. Prior to this point the availability of reasoned primary decisions (now available to an "aggrieved person" under s 13 of Administrative Decisions (Judicial Review) Act 1977 (Cth)), access to the departmental "facts" recorded on file, and entitlement to a "hearing",

depended on the benevolence of the officers and bodies concerned (Meadows 1979: Chapter 7). Appellants in most states now receive the Departmental submission to the SSAT. Personal hearings are now fairly universal.

Following pressure generated by the "invalid pension crackdown",[16] receipt by cabinet of the Administrative Review Council *Report on Social Security Appeals* (in June 1980), strong lobbying from an SSAT delegation to the Minister, and the tendency of election campaigns to concentrate the political mind — the Government announced another series of modifications operative from 9 September 1980. These involved firstly the extension of a right of appeal to the AAT in cases where an SSAT *rejects* an appeal, and, secondly, the provision of a right of appeal direct to the AAT (by-passing SSATs) if the Director-General certifies the matter to be of sufficient importance.[17] The last of these changes, the "certification" procedure, simply implemented paragraph 70 of the Bland Committee Report (Australia 1973c). The first reform is of greatest significance, but before dealing with it in detail, some reference must be made to the procedures for judicial review and appeal.

5. Access to Judicial Review

The avenues of "appeal" open to an aggrieved social security client stretch beyond, and may serve as an alternative (or a supplement) to the administrative review obtained at, or prior to, a hearing before the AAT. Thus an appeal lies from the AAT to the Federal Court on points of law and, in addition, decisions may be challenged by way of the legislation which has codified the procedures for obtaining judicial review of administrative action.

A person with a grievance which falls within the ambit of one of the nine statutory grounds for obtaining judicial review, may pursue that remedy in the Federal Court. These grounds were enacted by parliament to replace and simplify the procedures of the common law providing for judicial review by means of the prerogative writs (the course relied on by Karen Green in challenging, in the High Court, the government policy not to pay unemployment benefits to "school leavers"[18]). This serves as a parallel line of attack in respect of those decisions which fall within the statutory grounds (Sykes, Lanham, Tracey 1979: Chapter 25). Judicial review would be open in cases where the substance of the grievance is that the Department has failed to conform to the procedural standards of the rules of "natural justice", has stepped beyond the bounds authorized by law, or has taken into account irrelevant (or excluded relevant) considerations.[19]

Claimants who elect to pursue the remedies provided by the chain of Departmental and external advisory (SSAT) procedures which may culminate with "tribunal review" before the AAT, do not entirely exhaust their remedies at that point. An "appeal" (for Constitutional reasons it is strictly an exercise of original jurisdiction) lies from the AAT to the Federal Court. This is available in respect of points of law or decisions by the AAT not to accept a person as an "affected party" (Lane 1980: 15). Only one appeal has been lodged by the Department against a decision of the AAT. At present more are in contemplation (Cth PD Sen 9 September 1981: 625). A reference of a point of law to the Federal Court on the initiative of the AAT leads to a hearing by the Full Court, otherwise the matter is, in the first instance, dealt with by a single judge of the Federal Court (Lane 1980: 16).

Before turning to the proposals of the Administrative Review Council, the strengths and weaknesses of the SSAT elements of the present system, might be briefly surveyed.

6. An Evaluation of the Current System

On the "credit" side of the ledger, the major advantage of the latest reform of the SSAT/AAT relationship is that it provides an opportunity for a dedicated appellant to allow the AAT to "cure" injustices wrought by virtue of the procedural defects, lack of independence, and the ambiguity of role manifested by the SSATs. Claimants who suffer at the hands of the SSATs now have equal rights with those who suffer at the hands of the Director-General's "veto". Since SSAT dismissals take effect immediately appellants suffering at the hands of the SSAT will be able to institute an AAT appeal more promptly than would be the case for Director-General vetoes.

On the debit side, however, this latest reform can be criticized for failing to address the major problems. It fails to overcome the weaknesses of a multiple-stimulus system. Three initiatives are still required, thus deterring the inarticulate prospective appellant (or further appellant). This strengthens the "strategic advantage" held by the DSS for whom delay is not money or survival. (McMillan 1980: 11, 120 discusses advantages held by a "corporatized" bureaucracy against the inarticulate, isolated individual). Nor does it address the injustices wrought by the failure to accord full "due process" before the SSATs (especially the absence of a clear right to be present, to see files or to receive reasons for primary decisions). It does nothing to stiffen the resolve of SSATs against allowing their independence to be compromised such that they become no more than another "bureaucratic cog" in the administration.[20] And it will not counter any decline in public confidence in SSATs — a lack of confidence which would exacerbate problems of barriers to access.[21] This is a matter of no small moment, as is demonstrated by the evidence presented on behalf of the Australian Council of Social Service by Joan McClintock (at the Administrative Review Council) seminar to the effect that "most people denied benefits would never appeal whatever system was introduced" (Kirby 1979: para 5). People will either not take *any* initiatives, or will be reluctant to approach the SSATs if they lack confidence in the impartiality or competence of the review to be set in train by that action. Substantial reforms are still required.

C. THE PROPOSALS DEVELOPED BY THE ADMINISTRATIVE REVIEW COUNCIL

1. The Administrative Review Council Report

The Administrative Review Council (a Commonwealth body comprising a chairman, the president of the AAT, the chairman of the Australian Law Reform Commission, the Commonwealth Ombudsman and ten members with "extensive experience at a high level in industry, commerce and public administration . . . ") constituted in 1976 (Administrative Appeals Tribunal Act 1976 (Cth) s 50), has recently published a report based on a major review of social security appeals

systems. The project was the first major review conducted by the Council and it proved to be no small undertaking. The review was rather more protracted than the Council might have anticipated at the outset. And, in the course of the preparation of consultative papers and seminar discussions of those papers, the Council was obliged to modify substantially its position to accommodate insights gained about the nature of the problem at hand. The final recommendations to Government (Australia 1981: 4-6; Australia 1980b: Chapter 6), endorse many of the precepts advanced in this article as being fundamental pre-conditions to the framing of a viable and effective system of review. But if the rhetoric of the Report is acceptable, the detailed proposals for implementing those basic principles leave much to be desired.

Two quite vital principles found favour with the Council. First, it was accepted that social security clients are "underprivileged people" (as the Council rather quaintly described them) for whom it is imperative that there be a minimum of initiatives for setting review in train. Specifically, the Council stated that " . . . requiring social security claimants to take a series of initiatives to obtain external review would have an undesirably discouraging effect" (Australia 1980b: para 146; Australia 1981: 6, r22; 34, para 6. 025). Secondly, the Council was receptive to the view that adjustments need to be made to the classical "passive umpire" role normally adopted by adjudicative tribunals (Australia 1980b: para 133; Australia 1981: 38, para 8. 003; 29, para 5. 035). In short, the Council subscribed to the view that a system requiring multiple initiatives by appellants was undesirable; and it conceded that a more inquisitorial role might be appropriate for the tribunal.

On other matters of principle, however, the Council was less convincing. The Council did not seriously entertain the proposition that careful attention must be given to the selection of review machinery which is able to handle a large number of grievances, in order that a proper balance be struck between the competing interests of equality of treatment of cases and that of justice to the individual case and in order to promote client access to the system and Departmental confidence in, and acceptance of, the rulings of the external review body (Goldring 1981a: 26). In consequence, the Council rather lightly disposed of the case for an integrated, multi-layer, appeals system (Australia 1981: 22, para 4.020). The case for a mandatory multi-disciplinary composition of the external review body was also glossed over in the Report (Australia 1980b: para 130; Australia 1981: 24, para 5. 006). However, lip-service was paid to some of the critical values identified in this article. The synopsis of the Report prepared by Council for inclusion in its Fourth Annual Report concluded with the statement that:

> . . . the purpose of a system of review of administrative decisions is to provide for resolution of grievances by *correct* and *authoritative* decisions *which command general confidence*. To this end . . . the review authority should have powers and procedures for effective and efficient *fact-finding*, should observe high standards of procedural *fairness*, and should be *accessible* both *physically and psychologically* to persons seeking review. It should be *designed as a total process* . . . should not involve a disproportionate use of resources having regard to the importance of the subject matter to persons affected by decisions. In addition [it should accommodate special features arising from]

the *nature of the questions dealt with* and from the *personal attributes* of many of the claimants (Australia 1980b: para 152 — emphasis added).

The rhetoric of the Report cannot easily be faulted.
What remains in doubt is the extent to which the Council has been able to devise machinery capable of giving effect to those goals and objectives. Reservations about the detailed proposals lie in three areas.

In the first place, the Council accepted the view that the RO should remain as a preliminary point of contact to be exhausted by an aggrieved person before entry to the appeal process proper. The procedures do not make consideration by a RO a mandatory precondition to external review; indeed, the Council suggests that claimants be notified of the "by-pass" route direct to external review. However, the Report also recommends that the "desirability" of prior RO reconsiderations be stressed and also indicates "that RO reconsideration of primary decisions should be separate from and prior to the external review process" (Australia 1980b: para 145; Australia 1981: 33, 34, paras 6. 002, 6. 023, 6. 025-6. 027). This will perpetuate the perception of the external review process as being less than independent; and will fail to prevent meritorious appeals from being sidetracked (or the issues obfuscated). Secondly, although the proposals of the Administrative Review Council would ensure that the "trigger pressure" required to initiate an appeal would be reduced to an acceptable level for that group of aggrieved clients who are sufficiently well versed in the ways of the bureaucracy to make *written* requests for review by a RO (in which case there would be an *automatic* reference to independent review unless the RO conceded the case in full (Australia 1981: 34, para 6. 027(a)), unacceptable barriers persist for the remainder — indeed the vast bulk of claims. Most clients are either too inexperienced or are so psychologically drained that they will simply make an oral request for review. For this group the *oral* request for RO reconsideration will exhaust their stamina. Unlike those making written requests, their case will not automatically go on to an appeal body should that case not be met. In short, a *de facto* "multiple-stimulus system" would be retained for the most vulnerable group of clients — those who are unfamiliar with the tradition of written forms of communication.

Finally, segregation of the RO system from the external review process creates a system which in total (despite the benefits of informal, speedy correction of *some* grievances) will be inferior to, and a step backwards from, the original AU/SSAT "screening" procedures. In the critical areas of procedural regularity, independence from the influence of internal DSS "lore", and barriers to access to external review — the RO concept falls short of the (already inadequate) standards set by the original AU/SSAT combination. ROs are, it is submitted, no more than another "cog" in the bureaucratic machine; procedural protections will be entrusted to people with, at best, a paternal interest in their enforcement. Consciously or otherwise, the impression will be conveyed to aggrieved clients that there is little point proceeding beyond the RO stage.

2. Australian Social Security Review: an evaluation

An evaluation of the Australian structure of social security appeals should, it is contended, be based on a close adherence to the standards enunciated by the

Canadian Law Reform Commission in the course of its review. The Report claimed that:

> Access to the review authority should . . . be easy and require a minimum of formality. The structure and organization of the review authority should enhance its *impartiality* and technical *competence* and its decisions should *impress* both the *administrative authority* and all members of the *public* with their quality (Canada 1977 — emphasis added).

There are three imperatives to be borne in mind in translating these Canadian Law Reform Commission principles into a viable and effective review system.

The first of those imperatives flows from an acceptance of the proposition that the essence of the matter concerns the striking of a proper balance and relationship between the bureaucracy and the individual. In high volume decision-making areas, such as social security, that objective cannot be attained by the traditional methods of judicial review by superior courts, nor by external administrative review processes Which are simply an analogue of that model.[22] Yet the Council opts for such an analogue.

Secondly, it must be recognized that the people in need of the assistance of a review process are going to be predominantly the inarticulate, the unsophisticated, the powerless, the dispirited and the "unrepresented" citizens. For this group of people the luxury of a "leeway" of time to await decisions, cash reserves to cushion loss of benefits (see endnote 15) or resources of knowledge (or bureaucratic guile), are denied. As a result, the premise on which an adversarial adjudicative model is predicated is contradicted by the facts. Two courses of action are open by way of a response to this situation. Either a variety of resources needs to be injected on their behalf (such as *effective* information, advice and representation/advocacy) or the review machinery should, at least in part, be premised on acceptance of an inquisitorial/outreach rationale (or other more radical reforms). The "Ombudsman Solution" is one such possibility, but it is not favoured by this author (see further, Curtis 1980: 100). The Council rather falls between the two stools.

Thirdly, it should be stressed that the Australian system of social security (as with its overseas counterparts) is noteworthy for the fact that discretionary processes are pre-eminent. Discretion dominates in the rule/discretion "mixture" of social security administration. It is therefore imperative that review processes be designed in ways which ensure that it is sensitive to discretion. In the context of social security, this requires that, while according procedural fairness, procedures should be sensitive to the multi-disciplinary implications of the exercise of such discretions; not the least of which is the obligation to temper individual justice with the requirements of overall fairness and equity (see endnote 3). It should also be recognized that high volume systems, reliant on junior officers, can permit superficially adequate procedures for the control and retention of flexible discretions to be subverted so that in practice they degenerate into inflexible, rule-based administration. The Council does not appear to have grasped the point that the best guarantee of the sound management of discretion is a review system with roots which penetrate deep into both the client population and the lower echelons of primary decision-making.

An application of these "principles" and "imperatives" has implications in terms of the position taken on several key features of the review system, namely:

1. the number of separate "appeal initiatives" to be required of an aggrieved person before exhausting his remedies;
2. the choice between an "elitist" type of appellate system handling low volumes (with consequential low penetration into primary decision-making), and a high volume system with more substantial impact on those lower levels of the bureaucracy responsible for primary decision-making;
3. the choice as to the number of tiers or "layers" built into the appeal process; and
4. the degree, and the breadth, of expertise represented in the membership of the appellate bodies.

The following table sums up the position taken in this article regarding the way in which the principles and imperatives identified above, bear on these four critical dimensions of the appellate/review process.

Imperatives	*Features of system consistent with imperatives*			
	Single stimulus (No Review Officer)	*Deep (high volume) penetration*	*Multi tier system*	*Multi disciplinary composition*
Balancing the bureaucracy and the citizen		X	X	
Powerless and inarticulate clients	X		X	
Highly discretionary system			X	X

It is submitted that ideally there should be a single-stimulus, high-volume (deep penetration) system. That system should incorporate *all* departmental reconsiderations of appeal cases, including RO reviews, so as to ensure that the considerable advantages of *speedy* correction of some errors by ROs would be preserved, without creating another barrier to access. ROs and other reconsideration procedures should operate under the auspices of the external review body and be subject to a maximum time limit — say 28 days — for the completion of all departmental reconsiderations. Once lodged with the external review body, provision should be made for immediate Departmental reconsideration of the case. That prompt reconsideration might continue to be conducted by ROs, but that choice — and the choice of subsequent tiers of the Departmental handling of reconsiderations should be made by the Department, acting within the time parameters.[23] Should the case not be fully conceded (a conclusion which should itself be monitored by the external review body) it should automatically be passed on to an intermediate tier for a "second option" (which might continue to be provided by the "appeals units"). All cases not conceded by the Department at one of the reconsideration levels, would automatically be listed for hearing by the appeals

tribunal, together with any cases which had not been reconsidered by the Department within the allotted time.

Three critical goals of an effective appeal process are: (i) accuracy of fact-finding and decision-making; (ii) neutrality and impartiality of adjudicative bodies; and (iii) participation by affected parties. As Rawls points out, it must be appreciated that these goals could be realized in a variety of ways. Not all of these accept the premise that an adversarial model of decision-making or adjudication will be the best vehicle for attaining these objectives. The goals of accuracy, neutrality and legitimacy need not be attained within the adversary model. A more active inquisitorial role for the decision-maker may ensure that relevant facts are brought to notice and tested for accuracy. Attendance by the aggrieved party may in and of itself make a substantial contribution to accurate fact-finding — particularly if the facts are uncomplicated, all relevant sources of information are readily accessible, and the matters at hand are comprehensible to the layman (Rawls 1972: 239; Rubenstein 1976: 48; Connolly 1975: 439, 440-1).

The author stresses that a multi-disciplinary composition should be retained for the external review tribunal and an inquisitorial role (combined with procedural guarantees) and informal hearings should also be preserved. The whole system should be properly grounded in legislation to guarantee that appeals bodies have tenure, independence from influence (or the appearance of it) by the bureaucracy, and the authority to implement their decisions. A single further right of appeal by either side to the AAT might also be provided, subject to careful attention to devising procedures which will not deter prospective appellants from taking that further step.

Shortly stated, the existing SSATs, including initial Departmental reconsiderations conducted while that body is seized of the appeal, should be refurbished and strengthened (principally by according full procedural protections such as automatic hearings, access to all information relied on by the Department, and reasoned decisions). ROs should be absorbed into the SSAT auspice. The Administrative Review Council proposals to jettison the SSATs and to devolve the bulk of the current work on Departmental administrative procedures (leaving a small proportion of the "more significant" cases to be dealt with by a more elitist and exclusive tribunal — the AAT) should be rejected on the ground that such an arrangement contravenes the four imperatives elaborated above.

Apart from the features identified in this Table the only other significant reforms required of what might be described as the "old SSATs" lie in the areas of representation of, and appearances by, appellants at the lower level (SSAT-style) stage of review.

A research study conducted by the author in 1978 (Carney 1978) demonstrates that a right of attendance at the hearing has a very significant impact on the ability of the SSATs to identify (and correct) decisions made in error. People with genuine grievances were markedly assisted by provision of a right of appearance.[24] This finding is in line with overseas evidence to the effect that success rates of appellants are enhanced by conferral of a right of attendance (Keeler 1980: 100). It reinforces the view of the Administrative Review Council that a right of attendance is a fundamental pre-requisite of a fair and effective review process (Australia 1980b:

paras 115, 133; Australia 1981: 28, para 5. 033). This recommendation should be made a mandatory requirement of the operation of the revamped SSATs.

The case made by the Council for provision of a network of advocacy/advice services to buttress the social security review system (reformed or otherwise) cannot be taken to be self-evidently compelling (Australia 1981: 36, 37, paras 7. 010-7. 012). In terms of the promotion of the goals of accuracy of fact-finding, participation in the decision and confidence in the outcome of the review — it rests mainly on a simple declaration of faith in the continued relevance of a trusted stand-by which has served these interests well in the context of traditional forms of judicial dispute resolution (Hanks 1980a: 274-277; Australia 1975: 9). This is no reason to *preclude* people from being represented by advocates (lay or legal) of their choice — for there is no evidence that such representation would be positively harmful (at worst, it is of but marginal advantage in promoting these goals). But it does have implications for the form of advocacy which might be heavily promoted by government. Government support for advocacy should in the first instance be directed towards: first, the provision of advocacy services which seek to support clients in pursuing their own case (thus promoting the attainment of the goal of "participation" for a group who — absent psychological props — would be severely disadvantaged); and, secondly, the provision of advocacy and advice services which assist in bringing out relevant information and facts (thus advancing the objective of accurate decision-making). Beyond that, it would be wise to tread warily. Pilot programmes, diversity of approaches, and rigorous evaluation should be the order of the day once these two basic objectives have been realized.

D. CONCLUSION

Advocacy and review systems for social security clients cannot be copied, in an uncritical fashion, from other judicial or departmental models. Social security involves a set of unique considerations: the administration is heavily dependent on the exercise of discretion by junior staff who are responsible for a high volume of individual decisions; and many members of client groups are ill-informed and passive. These special features invalidate the strategy of reform by way of transplanting a version of the adjudicative reviews familiar in other areas.

This article has argued that the unique features of social security administration require that innovative new review processes be designed. The package of proposals advanced here recommends that an integrated (but internally layered) system of review be established. That system should handle high volumes of grievances, should adopt semi-inquisitorial methods of procedure and should ensure that client inertia works against the Department rather than against the client. A single initiative should suffice to ensure the full exploration of the merits of a grievance. Finally, it is proposed that a universal right of attendance at hearings be provided and that this be supplemented by access to advocacy services which provide psychological support for people pursuing a case or which would assist in bringing relevant facts to light.

It is submitted that nothing short of this package will advance the real interests of social security clients. This is a minimum case for substantive reform. Anything less

will pay but lip service to the goal of providing an accessible and effective review and appeals system for social security clients. Unfortunately, the reform proposals advanced by the Administrative Review Council — while constituting a small step forward — fall substantially short of this idea. The Report cannot be recommended for implementation in its present form. Further work is required to design procedures and machinery which conform to the goals identified in this article. The Council has endorsed many of these objectives, but has largely failed to develop proposals capable of attaining those goals. The challenge to government, and the community, is to fashion procedures which will conform to these agreed goals. The scheme outlined in this article is one viable way of achieving this.

Endnotes

1. The degree of inequality in the distribution of income and wealth in Australian society has been documented by several writers (Ternowetsky 1979:22; Head 1980:47). Theories of the role and function of the welfare state are canvassed in Elliott 1980:42; and Krieken 1980:33.
2. Aneurin Bevan expressly stated that this was designed to prevent "judicial sabotage of socialist legislation". Subsequently, Professor Titmuss, who held the Chair of Social Administration at the London School of Economics, developed an eloquent case in favour of the continued exclusion of the judiciary, arguing that judicial intervention would displace the scope for flexibility and humanity in the administration of the system (UK PD HC 23 July 1946:1983; Titmuss 1974:74-86; Titmuss 1971; Wade 1981:374).
3. Goldring has commencted on the prospect of " . . . a failure to realise that justice in the individual case is not the only aspect of justice which merits consideration: questions of distributive justice and of overall fairness and equity, which may require some elements of 'injustice' in an individual case, are also highly relevant" (Goldring 1981a:26).
4. English lawyers long resisted the notion that there was an identifiable body of administrative law. Historically this is explicable on two main grounds. The successful opposition of the courts of common law (assisted by Parliament) to the attempts by the Stuarts during the 17th century, to create special prerogative courts and bodies which would be responsible for matters of government (or executive administrative issues) was one factor. The second reason was the influence of Dicey's view that the "rule of law" (a concept enshrining values such as the even-handed application of the law to all citizens, irrespective of position or status) dictated that Parliament should be sovereign and that its pronouncements should be tested by a single system of courts applying a common body of rules of law (de Smith 1968:4-7). For a recent example of an analysis of the "constitutional" dimension of administrative law see Garner 1979:1-93.
5. The traditional concerns of administrative law have been with ensuring that decisions are taken in accord with minimum standards of procedural fairness (enshrined in the principles of "natural justice"); to avoid breaching the limits placed on the ability for decision-makers to delegate to subordinates; to avoid co-mingling legislative judicial and executive functions (the doctrine of "separation of powers"); and to comply with the rule of law (via the insistence that decision-makers not step beyond the boundaries specified by Parliament, nor ignore relevant — or include irrelevant — factors prescribed in the appropriate legislation (Flick 1979:1-2). As de Smith put it, the two major bases for judicial review were that the decision-maker had failed to exercise a discretionary power or that the decision-maker had stepped beyond, or abused, the discretion he was entrusted to administer (de Smith 1968:Chapter 6).
6. This phase is characterized by the fact that the field of study has been extended to encompass the operation of tribunals lying outside the formal hierarchy of courts and by the consideration accorded to internal processes of the bureaucracy. The comment by Benjafield and Whitemore in 1966 to the effect that "[T]he daily life of the citizen is regulated and controlled by the decisions of officials to a far greater extent than by common law rules . . . Nothing is tained by denying these decisions the status of law", is now a truism (Benjafield and Whitemore 1966:1-2). It is now increasingly (if by no means universally) recognized, that "administrative law may affect both the structure and activities of the executive branch and the *making of policy* . . . " (Goldring 1981a:3).
7. The policy issues raised by these new developments are touched on by several writers including Brennan 1979:14,22; Kirby 1980; Goldring 1981a.
8. The Australian income security legislation, in common with its overseas counterparts, is noteworthy for its heavy reliance on discretions in preference to pre-ordained rules. Although the Australian

system of social security is rather unique in that it prefers "standardized" payments to the "individually tailored" supports provided by, for example, the Supplementary Benefits administration in Britain; and differs from most overseas models by relying on general revenue funding rather than the "insurance rationale" (with its associated complexity and need for individuation of contributions and entitlements) — it nevertheless is no less discretionary in nature. As the Administrative Review Council put it, the Social Services Act "is a complex structure conferring on the Director General and his delegates a large number of discretionary powers" (Australia 1981:1, see also paras 2.004, 2.005). Examples of the breadth of these discretions can be found in provisions such as those prescribing the "work test" which must be satisfied to qualify for unemployment benefit ([that the claimant satisfy the Director General that] "he was . . . capable of undertaking, and was willing to undertake paid work that . . . was suitable . . . and had taken . . . reasonable steps to obtain such work": s 107(1)(c) Social Services Act) or the qualification of "need" utilized for special benefit ("[a person] with respect to whom the Director-General is satisfied that, by reason of age, physical or mental disability or domestic circumstance . . . that person is unable to earn a sufficient livelihood . . . ":s124(1)(c)). Other examples may be found in the cohabitation provisions affecting entitlements to widows or supporting parents benefits (ss 59, 83AAA(1)); the provisions allowing back-payment of family allowance and other benefits beyond the six month period of grace for late lodgment (ss 102(1)(a), 105D, 105R); the determination of financial hardship for one of the two categories of handicapped child's allowance (s 105JA(6)) or the exercise of the power to recover overpayments against ongoing benefit entitlements (s 140(2); *Buhagiar* v *Director-General of Social Services* AAT N.81/1-23 October 1981). The expansive nature of the discretionary powers conferred by the Social Services Act can be attributed in no small degree to the intractable nature of the policy dilemmas which confront Parliament when enacting such legislation: see further Keeler 1980-68, 82-84.

9. The most recent estimate of the number of *applicants* for unemployment benefit was for 1978-1979, during which period the estimated figure was 1,078,000 applications. The number of applications *granted* during that period was 810,500 (also an estimate), a figure which was estimated to have declined to 792,300 in the year 1979-1980 (Australia 1979:20, Table 39 p95; Australia 1980a:18, Table 45 p120).
10. The Royal Commission on Australian Government Administration attached high priority to studies of the relationship between the bureaucracy and the public. In its final report the Commission states that "[p]ossibly the most universal complaint from users of the [welfare] services . . . was about the time involved: time taken to receive attention; time taken to get matters sorted out when something had gone wrong; and time elapsing before the service applied for was delivered. It emerged that people are more likely to complain about the inadequacies of the underlying administrative arrangement of programs — the complexity of the forms, the slowness in processing and the delay in receipt of cheques *etc* — than about the public contact workers . . . ": Australia 1976:128, para 6.2.3.
11. Two features of the Australian system bear this out. First the system relies heavily on "paper shuffling"; for example, the Royal Commission on Government Administration noted one study which documented an average of 27 separate acts of transporting file papers from one part of an office to another before finalization of the standard claim for pension or supporting parent's benefit (Australia 1976: para 6.2.5. p 129). Secondly the decision-making process relies on the hierarchical "chain of passing up" of files (Australia 1976:para 6.2.6.) The Canadian model of linking each client to a stable "service unit" of two "paired" officers, with extensive powers of decision, could be copied with advantage in Australia. In its absence the Australian system is slower, much less personalized, and more intimidating (Canada 1977:29).
12. Keeler notes that this view was decisively and properly criticised in the *Second Main Report of the Poverty Commission* and other subsequent enquiries and comments that "[i]t is incredible that the Bland Committee thought that decisions 'of a character or complexity . . . ' would be rare, given the English experience in construing, in the sphere of unemployment benefits, substantially the same legislation *without* the added complexity of means-testing" (Keeler 1977:193).
13. Brewer 1978:51. 29% of the sample became aware of appeal rights by virtue of a *positive* initiative by DSS; 23% were orally informed by CES; 13% were informed by welfare agencies and 15% by friends. The research study conducted by the Victorian Tribunal in 1978 (Carney 1978:11) concluded that " . . . in at least 28% of the appeals lodged, inadequate advice of the grounds for a decision was a factor which could realistically [have contributed] to the failure by an appellant to tender evidence or argue a contrary case [to that of DSS]".
14. This has its parallel at the level of primary decision-making. Reforms, set in train in 1978-1979, established "pre-grant" interviews for all applicants for benefits (pensioner procedures already built in such a requirement). The evidence regarding the degree of compliance with these standards is rather equivocal. The Administrative Review Council found that in one Brisbane office only one fifth of reviews involved personal attendance (Australia 1981:88, para 3.052). The Council also expressed

some concern at the lack of seniority and a less than complete detachment from the decisions under review, on the part of some ROs (Australia 1981:91, para 3.065). The possible impact of the RO in (unintentionally) serving as a deterrent to people who genuinely wish to appeal to the SSAT, is more equivocal. Although the Council was not unduly concerned on this score (Australia 1981:90,94, paras 3.059-069, 3.082-084), it should be noted that the Director-General, in evidence to the Senate in 1979, concluded that the RO had brought about a substantial drop in the number of appeals (Australia 1981:89, para 3.058). The empirical study suggested by the Council (Australia 1981:90, para 3.062) should be urgently commissioned in order to resolve this issue.

15. Certain classes of clients who have an existing entitlement to pensions or benefits, may preserve ongoing income support, pending determination by the SSAT of an appeal against a departmental decision to terminate that entitlement. This applies only in the case of pension, supporting parent's benefit and handicapped child or sheltered employment allowance. Even then it is confined to terminations based on the formulation of an "opinion" by DSS, provided an appeal is lodged within 14 days (and provided also that the beneficiary has not "admitted/accepted" the DSS opinion by way of a signed statement — as in cohabitation cases). This facility is denied to all existing recipients of benefits outside this class (thus ongoing payment is not available to unemployment, sickness or special benefit recipients) and is denied to *all applicants* for pensions or benefits (Australia 1981:95, paras 3.088-090).
16. The invalid pension saga, which involved an attempt to tighten eligibility for pension by way of internal directives that the employment consequences of medical conditions be disregarded in assessing pension, has been documented elsewhere: Hanks 1980b; Hanks 1981a:94-5; Webster 1981. The controversial directive (since withdrawn) and the introduction of central vetting of all medical reports by a senior medical officer within the Health Department, was designed to check the disproportionate rise in invalid pensioners when calculated as a proportion of the eligible population (up from 1.7% in 1969 to 2.5% of the eligible population by 1979: Australia 1980). These measures had the desired impact. Thus 10% of all initial applicants for pension, and 6% of pensioners up for medical review of their entitlement, now receive an adverse decision due to the action of the senior medical officer in reversing the favourable recommendations made by the initial assessor (the Commonwealth Medical Officer (henceforth CMO)). Previously pension would have been granted, or continued, on the basis of the CMO report (statistics calculated from data in Cth PD Sen 27 May 1981:2220-1).
17. The SSATs also acquired jurisdiction to hear "medical appeals" (from Health Department initial reviews) in *eg* invalid pension matters: Ministerial Press Release MG 80/28 9 September 1980.
18. *Green* v *Daniels* (1977) 13 ALR 1. Ms Green was successful in her action, but the majority of school leavers improperly denied benefit at this time, were subsequently "outflanked" by the Department (which was able to turn to other aspects of the discretionary powers associated with unemployment benefit, in order to deny — or delay — payment). Subsequently the government introduced legislation to validate its position: see now Social Services Act 1947 (Cth) s 120A, see also Prosser 1979; Hanks 1977.
19. Administrative Decisions (Judicial Review) Act 1977 (Cth) s 5. A litigant dissatisfied with the Federal Court decision may appeal to the High Court only by leave (Lane 1980:18). Technically the right to seek judicial review in the High Court by way of the prerogative writ procedure (prohibition, mandamus or injunction) directed against an "officer of the Commonwealth" remains open. This is an avenue expressly conferred by the Constitution and thus it is incapable of dilution, whether by the new "administrative remedies" or by the recent legislation divesting the High Court of much of its primary and appellate jurisdiction: Lane 1980:*passim*.
20. There is a substantial risk that SSATs may not rise above conformity to the first of Mossman's three models: Mossman 1979:229-31. [The three models are: (a) a review of decisions to establish whether or not they *conform to* DSS Manuals; (b) a review of the exercise (weight etc. accorded to) *DSS defined* discretions; (c) a review based on *statutory criteria.*]
21. Recommendations are made in order to "distance" the review officer from the primary decision-making structure, but the Report itself concedes "(t)the RO cannot be fully independent . . . nor can he mimic external review" (Australia 1980b, para 143; Australia 1981:33, para 6.019).
22. The only exception is where a "judicial body" is merely one element of an integrated system pursuing a radically different tack. The model for this approach is to be found in the "multi-tier/integrated" British and Canadian structures (Canada 1978:*passim*).
23. The provincial welfare legislation in Canada provides several working models of the scheme proposed in this article. The recommendation that all adverse review office (or other) reconsiderations be automatically treated as an appeal, has its counterpart in the (more extensive) Nova Scotia legislation treating all adverse primary decisions in this way: Family Benefit Act 1977 (Nova Scotia) s 16(7)(a); Social Assistance Act 1970-71 (Nova Scotia) s 4(6)(a). The procedure in this Province also involves multi-tier handling. Applications for review must be lodged within 30 days of the initial decision

unless "it is apparent from the notice that the person is dissatisfied with a decision". Appeals are dealt with by a Review Board and adverse decisions of that Board (akin to the proposed revamped SSAT) automatically go on to an Appeal Board, where a hearing and normal procedural rights are accorded: Social Assistance Appeal Regulations 1976, SRNS 440, rr 10,16,17,24,26,28,29,30,31,32. Similar procedures apply in Saskatchewan. The appeal is lodged through a Departmental officer — the unit administrator — who must "determine if an error has been made and if an adjustment is possible to the satisfaction of both parties". If not, he must arrange for a "fair hearing by an Appeals Committee" (in private, unless a public hearing is requested within 10 days). A right of appearance, questioning and tendering of evidence is provided. If unable to resolve the matter, or if the appellant is still aggrieved, there is a further appeal. Welfare Board (Assistance) Act 1966 (Saskatchewan) s 13(1); Department of Social Services Act SS, c 35 1972 s 10(1); Assistance Regulations 1966 (Saskatchewan) rr 41.43. Variants on this model are found in provinces as far apart as British Columbia and Ontario (Guaranteed Available Income for Need Act 1976 (British Columbia) s 25; Family Benefits Act (Ontario) s 10c).

24. The study found that the universal issue of invitations to appellants to appear before the Tribunal more than doubled the previous rate of recommendations to uphold appeals.

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