

Review of the AD(JR) Act: redefining the Act's ambit. The Council's Committee has examined the submissions received on the Council's draft report released in mid 1988. The Council is currently preparing its final report, which it hopes to finalise in the first half of 1989.

Community Services and Health. The Council's Committee held public forums in Sydney and Melbourne in November 1988 to elicit community feedback on whether the present review procedures (if any) in this area are adequate, and to identify problems and issues on which the Council might concentrate in its project. The Committee has decided to focus on the following decision-making areas of the Department of Community Services and Health:

- the Supported Accommodation Assistance Program;
- medical, social and other assessments of individuals; and
- medical, scientific and other assessments of products.

The Committee is preparing a discussion paper which it expects to release for public comment in early 1989.

Migration. On 8 December 1988 the Minister for Immigration, Local Government and Ethnic Affairs announced in the Senate the government's response to the report of the Committee to Advise on Australia's Immigration Policies. The Cabinet has decided not to accept the CAAIP recommendation that it open the Migration Act to AAT review; and proposes instead to upgrade the current system of review by Immigration Review Panels.

Administrative Appeals Tribunal

NEW JURISDICTION

Since the last issue of Admin Review new jurisdiction has been conferred on the AAT under the following legislation:

Privacy Act 1988.

KEY DECISIONS

Use of 'DNA Fingerprinting' to establish familial relationship

In Thom Thi Nguyen and Department of Immigration, Local Government and Ethnic Affairs (6 December 1988) the Tribunal was requested to review decisions by the Department, under section 56 of the Freedom of Information Act 1982, refusing to amend documents relating to the applicant. The applicant's son had sponsored her entry to Australia in 1980, with her husband and five other children. The sponsorship and entry forms completed at that time by the sponsor in Australia and the applicant in Vietnam indicated that the applicant had six children. In 1987, however, the applicant sought to amend the forms relating to her entry to Australia, to show that she had two additional children, then living in Thailand and France. The applicant hoped by this means to establish that the Thai resident was her son and was therefore eligible to be sponsored by her to Australia.

After nine days of hearing, the parties agreed that blood samples from the applicant, members of her family and her putative son in Thailand be tested according to the recently developed technique known as 'DNA fingerprinting'. A subsequent report by the South Australian Forensic Science Centre concluded that it was 'highly likely' that the man was the son of the applicant; and the Department agreed to amend its records accordingly.

The Tribunal made specific reference to a 1986 Departmental circular headed 'Refugees - Changes to Personal Particulars', with regard to amendment of records. This pointed out that:

'In 1976 and immediately thereafter, many Indo-Chinese refugees were suffering from the disruption of war and civil unrest which often necessitated falsification of personal particulars to ensure personal safety. There remain instances in which refugees have good reason to adjust their personal particulars and do not feel secure in revealing this until after arrival in Australia.'

The applicant requested that the Tribunal recommend her costs be paid by the Commonwealth. The Tribunal found in her favour on the grounds that payment of the costs would cause her financial hardship; that there was a public interest in this application as a test case; and that there was no commercial benefit to the applicant, although she had acknowledged a very real personal benefit.

'Substantial success' as criteria for award of costs

In Jacobs and Department of Defence (27 October 1988) the Tribunal considered submissions about costs relating to a decision already given on the substantive issues of this case (see Admin Review 18:82). The Department had argued that, as the Tribunal had found that information included in a personal record was incomplete but not incorrect, out of date or misleading, the application had not been 'substantially successful' as required by section 66 of the FOI Act.

Senior Member Mrs Dwyer concluded that the understanding of the words 'substantial success' should not be gauged by quantity but rather by the quality of the outcome achieved. The Tribunal relied on Justice Deane's findings in Tillmans Butcheries Pty Ltd v Australasian Meat Industry Employees Union (1980) 27 ALR 367, and concluded that the applicant's success in this case had been substantial. However, the Tribunal declined to make a recommendation as to costs, as the applicant, having conducted the case himself, had obtained substantial success without being caused financial hardship.

Unemployment benefit: alleged misleading advice

In Roberge and Secretary, Department of Social Security (30 September 1988) the applicant requested review of a decision not to grant him an unemployment benefit. He claimed that his parents had obtained advice regarding waiting periods from the Department on a number of occasions, and that this advice later proved to be incorrect. The Tribunal (Senior Member Mr McMahon)

found that, as the legislation (section 127(1) of the Social Security Act 1947) contained no discretionary power there was no scope for review of the decision, and that in any case a claim based on negligent advice is a claim at common law and not a claim made under the Social Security Act.

Although the Tribunal did not make reference to this avenue, a complaint regarding this matter could also have been made to the Ombudsman's office.

Witness credibility and conflicting medical opinion

In Matta and Australian Telecommunications Commission (30 November 1988) the applicant requested review of a determination by the Commissioner for Employees Compensation that the respondent was not liable to pay compensation for a repetitive strain injury allegedly incurred at work.

The applicant presented medical evidence of decreased use of her right arm and shoulder due to pain and discomfort, and of inability to perform any substantial tasks over a period of four years. She also claimed a depressive condition arising from the pain and reduced employment prospects arising out of the physical condition. Mrs Matta had received compensation over a period of three and a half years since the incident, but the Compensation Commissioner's determination had halted these payments.

The evidence presented included conflicting medical evidence as to dysfunction, video evidence of the applicant with apparently normal use of her right arm and shoulder, and evidence regarding declarations as to physical fitness and business vehicle usage records made by the applicant for a taxi licence. The Tribunal found that the applicant 'is not a truthful and reliable witness', and that the evidence stood in 'significant contrast to the gross restrictions which the applicant represented she suffered from at this hearing'. It found that the applicant was not incapacitated for work, and affirmed the decision under review.

Freedom of Information

Freedom of Information Act - Annual Report 1987-88

The sixth Annual Report on the Freedom of Information Act, now available from AGPS, indicates 'continued heavy use of the Act and a widespread acceptance of its objectives by politicians, administrators, business and public interest groups...At the same time Government efforts to reduce the overall costs to the Commonwealth of administration of the Act have met with some success.'

The numbers of FOI applications recorded by the AAT during each quarter since March 1983 suggest a considerable decline in the numbers of appeals since mid-1985.