Legislation

SOCIAL SECURITY LEGISLATION AMENDMENT BILL 1986

Major amendments to the *Social Security Act* have been foreshadowed with the introduction of the *Social Security Legislation Amendment Bill* 1986. The major features of the Bill include the introduction of a 'young homeless allowance'; a bar to the payment of unemployment, sickness or special benefit to full-time students eligible for Commonwealth education allowances; a new rule for apportioning lump-sum compensation when the DSS seeks to recover sickness benefit payments; simplification of the residence rules for family allowance (and handicapped child's allowance); and a legislative base for the Government's social security amnesty announced on 12 February 1986.

Young homeless allowance

This allowance, which is to be introduced from 1 July 1986, will take the form of amendments to s.112 of the *Social Security Act* - the section which provides for the rate of unemployment and sickness benefits. Under the amended s.112, a person under the age of 18 years, who has not been living at home for at least 6 weeks because the person's parents are not prepared to allow the person to live there or because of 'domestic violence, incestuous harrassment or other . . . exceptional circumstances' is qualified to receive an increase in the standard under-18 rate of benefit.

That entitlement is contingent on the person not receiving continuous support from parents, guardians or any government agency. The amount of the increase will bring the rate of benefit up to the maximum TEAS living allowance. On present figures, this will amount to an increase for homeless young people from $50 to $73.28 a week.

Benefit not payable to full-time students

The Amendment Bill will insert a new s.133 in the *Social Security Act*. This section will prevent payment of unemployment, sickness or special benefit to a person while he or she is a full-time student and eligible to receive support under such schemes as TEAS, the Post-Graduate Awards Sceme or the Secondary Allowance Scheme.

In addition, the new s.133 will prevent payment of these social security benefits to a person who would have been eligible for support under these schemes but for the person's income or failure to meet conditions relating to academic progress. In introducing this amendment, Social Security Minister Howe explained that -

> 'the policy this reflects is that such person should look to and be covered by education allowances rather than what are, primarily, workforce related benefits.'

He also said that the new s.133 'will create estimated savings of $10m. in 1986-87 and $20m. in 1987-88'.

One effect of this amendment will be to reverse part of the decision in *MT* (1986) 30 *SSR* 372, where the AAT granted special benefit to 2 students enrolled in year 11 of secondary school and in receipt of an allowance under the Secondary Assistance Scheme. However, the amendments will not disturb another aspect of the decision in *MT*, where the AAT grrted special benefit to 2 students enrolled in year 9 of secondary school, who were ineligible for an SAS allowance.

The amendments will also narrow the group of tertiary students who can take advantage of the Federal Court decision in *Thomson* (1981) 38 ALR 624 and claim unemployment benefit while enrolled as a full-time student. For example, the applicant in *Eleftheriadis* (noted in this issue of the *Reporter*) would probably have been defeated by the new s.133.

Apportioning lump-sum compensation

When a person recovers compensation for an incapacity for which sickness benefit has been paid, the DSS has a right to recover the amount of sickness benefit, but only from that part of the compensation paid for the same incapacity as the sickness benefit: s.115B, *Social Security Act*. The incapacity for which sickness benefit is paid is loss of earning capacity over the period for which sickness benefit is paid.

Of course, many compensation or damages awards are intended to cover a relatively long period - substantially longer than the period for which sickness benefit was paid. And, therefore, not all the compensation included in such awards is available to the DSS for recovery of sickness benefit. Accordingly, when such an award of compensation or damages is made, it is necessary to scrutinize the award in order to decide what period the award was intended to cover.

The DSS used to employ a simple formula for this exercise: it divided the compensation or damages award by the prevailing weekly rate of sickness benefit to produce the period for which the DSS assumed the award had been made. If that period were longer than the period for which sickness benefit had been paid, the DSS would proceed to recover all the sickness benefit paid - perhaps leaving very little of the compensation award intact.

In *Edwards* (1981) 3 *SSR* 26, the AAT rejected that approach and said that the lump-sum award made in that case should be regarded as covering the remainder of the person's working life; only a small amount (calculated using an actuarial formula) related to the period for which Edwards had received sickness benefit; and only that small amount was available to the DSS for recovery of sickness benefit payments. A basically similar approach was taken in the later AAT decision in *Castronuovo* (1984) 20 *SSR* 218.

The result of these decisions was to attribute only a small proportion of the lump-sum award to the period during which the applicants had received sickness benefits; only that small proportion was available to the DSS for recovery of sickness payments; and the applicants were able to keep the bulk of their lump-sum awards.

Under the Amendment Bill, s.115B of the *Social Security Act* is to be amended. New sub-sections will (to quote the Explanatory Memorandum) 'provide that a lump-sum would be regarded as the sum of a series of payments equal to average weekly earnings'; so that the period for which a lump-sum award has been made will be calculated by dividing the amount of that award (or that part of the award which relates to loss of earning capacity) by the current rate of average weekly earnings. This should lead to the DSS recovering a greater part of sickness benefit payments from any such award than the decisions in *Edwards* and *Castronuovo* allowed. On the other hand, the amendments do not endorse the practice followed by the DSS before those decisions.

Family allowance residence rules

From time to time, the AAT has criticized the complex relationship between ss.96, 103 and 104 of the *Social Secuirty Act* - the sections dealing with eligibility for family allowance, residence in and absence from Australia. The Amendment Bill has attempted to simplify these decisions by repealing s.104 and parts of s.103 and incorporating the substance of s.104 into s.96. The amended s.96 will provide that family allowance is only to be paid to a person if the person and the person's child are Australian citizens, or are the holders of permanent entry permits or have been in Australia for 12 months (unless they are prohibited non-citizens).

The rather technical rules relating to absence from Australia are simplified by a new sub-section, s.96(3), which provides that 'a person who resides in Australia [and] is absent from

Australia', and the person's dependent child, shall continue to be eligible for payment of family allowance.

This new sub-section not only simplifies but liberalizes the complex rules relating to absent residence formerly included in s.103(1)(d) and (e) and s.104(1)(e) and (2)(now repealed).

The restrictive effect of those provisions, with their use of the phrase 'usual place of residence . . . in Australia' was illustrated by the Federal Court's decision in *Hafza* (1985) 26 *SSR* 321. It seems certain that, once the amended s.96 comes into operation, it will be easier for parents and their children to qualify for family allowance while outside Australia.

Social security amnesty

Part III of the Amendment Bill sets out the legislative basis for the social security amnesty which operated between 12 February and 31 May 1986.

According to s.45 of the Amendment Bill, a person who has failed to notify the DSS of a change in circumstances affecting the person's social security entitlements will not be liable to prosecution or to recovery of any overpayment *if* the person 'voluntarily informed the Department of the . . . change of circumstances' during the amnesty period *and* had not been charged with an offence or notified of recovery proceedings before notifying the DSS.

Section 45(2) of the Amendment Bill extends the amnesty, subject to the same limiting conditions, to persons who have made false statements to the DSS; however, in the case of a false statement, it is essential that 'at the time of making the statement, the person did not know that the statement was false': s.45(2)(c). **P.H.**

Background

SICKNESS BENEFIT AND INVALID PENSION - A CASE FOR MERGER?

This article looks at the possibility of merging sickness benefit and invalid pension into a 2-stage 'unfit for work' progression. In such a scheme the test for transition to the second stage (with access to fringe benefits) would be the length of time an individual had *already* been unfit for work, rather than the severity and permanence of the person's incapacity.

Any SSAT member who has sat on medical appeals must have experienced the immense feeling of helplessness and inadequacy when trying to determine whether the appellant is 85% permanently incapacitated for work; and must also have wondered at the futility of it all. How severe is the pain? How genuine is the appellant's belief in her own invalidity? How permanent is this belief? Has she, as is sometimes implied, merely a desire for a lazy life, close to the poverty line?

What a costly exercise it is, this attempt to draw what is surely a totally irrelevant demarcation line between more than 85% and less than 85%, and between permanent and temporary. A person is either fit for work or not fit for work, at any given time. Whether totally unfit or marginally unfit is as irrelevant as is the probable duration of the unfitness. In either case, a person who cannot work *now*, through sickness, and who has insufficient money for self or family support, qualifies for financial assistance.

The need for amalgamation

My experience is that in only a very small minority of the invalid pension appeals is unemployment benefit or special benefit considered the correct entitlement. The vast majority of cases are concerned with the choice between invalid pension and sickness benefit - and in the vast majority of cases the over-riding reason for claiming invalid pension is its financial advantages, small though these may be.

Alan Jordan notes that, when invalid pension was first introduced in 1910, on the first pay day one officer said: 'I had no idea so much suffering and sickness was to be found in a city like Melbourne . . . we have had visits from the halt, the maimed and the blind, in fact every kind of invalid you can think of'. (*Permanent Incapacity: Invalid Pension in Australia*, Research paper No. 23, Development Division, DSS, 1984)

Proportionately, I am sure there are just as many today. Jordan goes on to say:

> 'Whatever its origins in the particular case, invalidity is a social role sustained co-operatively by the person and those with whom he interacts . . . Invalidity is a social status and incapacity for work is an economic status; neither of them is a medical status although both have some relationship to medical status'.

Automatic progression

Social status, economic status and medical status are all completely entwined in the invalidity of one individual.

Surely there is a way of merging invalid pension and sickness benefit into a single 'unfit to work' entitlement or at least of making the transition from sickness benefit to invalid pension automatic. Anyone who has been sick for a long time needs the eased income test, fringe benefits and other concessions available to an invalid pensioner but not to someone on sickness benefit. This has already been conceded in part by the granting of supplementary rent assistance to people on long term sickness benefit. Why can this concession not be extended so that, after a set period, a person on sickness benefit would automatically become eligible for the additional benefits available to an invalid pensioner?

Overseas comparisons

I have only a superficial knowledge of disability benefits in other countries but I have looked at the relationship between sickness benefit and invalid pension in just a few.

I have grossly over-simplified the comparisons as many systems are complicated by, for example, contributory, earnings-related benefits. Nevertheless, it does appear that several countries have a far smoother integration of sickness benefit and invalid pension than we have.

In Belgium there is a waiting period of one year on sickness benefit before invalid pension is paid (at a lower rate!). In Canada the waiting period is 3 months; while in Finland and the Netherlands the waiting period is one year on sickness benefit. In the United Kingdom the waiting period is 28 weeks; while in Norway it is 2 years. (There is no waiting period in Norway if the disability is congenital or if the applicant was disabled when young.)

The impact of this proposal

To give an idea of what would happen here if persons unfit to work moved from sickness benefit to invalid pension after a set period, I have taken some figures from the DSS *Annual Report 1983-84*.

In 1983-84 the total number of sickness benefits granted was 142 179, an average number on benefit each week of 63 200. Of those on benefit in May 1984, the duration of benefit was:

under 3 months - 33.8%;
3-6 months - 15%;
6-12 months - 18.3%;
12-18 months - 10.4%;
18-24 months - 6.8%;
24-36 months - 8%;
over 36 months - 7.5%.

These figures indicate that, if one year were set as the waiting time to be spent on sickness benefit before being eligible (subject to the usual tests) for fringe benefits and other concessions, approximately one third of persons granted sickness benefit would eventually claim. As sickness benefit is so