Number 47 February 1989

SOCIAL SECURITY

Opinion

Brave new world?

What impact will the new structure for social security appeals, created by the *Social Security (Review of Decisions) Act* 1988, have on the rights of social security claimants? Will the 'new' SSAT, with full decision-making powers, provide a more open and efficient process for correcting DSS errors than the AAT has managed to do? Although the AAT has significant powers which can be brought to bear on departmental errors and fallacies, there is at least a suspicion that it has not lived up to its initial promise: time delays, inconsistent decisions, too-ready acceptance of the departmental perspective and occasional irrationality are some of the points made by critics.

Will the SSAT develop flexible and efficient procedures, a consistency of approach, independence of outlook and a clear understanding of the social policy factors which underpin our social security system?

Or will the SSAT realise the worst fears of those observers who opposed giving it decision-making powers? Will it become over-formal, cumbersome and reluctant to challenge the DSS's view on the rights (and wrongs) of social security? No doubt most of us are, with our fingers crossed, modestly optimistic.

For myself, I have never doubted that giving the SSAT decision-making power was an essential, although not sufficient, element in advancing the interests of social security claimants. The system which operated from 1975 to 1988, which gave the DSS a veto on all SSAT decisions, made a mockery of the notion of 'welfare rights'. It simply allowed the DSS to impose its view of what the *Social Security Act* said (or should have said) on the SSAT and on claimants. Now the DSS will have to argue for that view in the AAT and the Federal Court, rather than unilaterally impose it on the SSAT.

Separation under one roof

A small example might underline this point. In 1987, s.3(8) was added to the *Social Security Act*. This sub-section provides that 'a person . . . shall be treated as a married person for the purposes of this Act' where -

> '(a) [the] person . . . was formerly a married person;
>
> (b) the person is living in his or her former matrimonial home; and
>
> (c) the person's spouse is also living in the same home';

where this situation (sometimes described as 'separation under the one roof') has persisted for a specified period (26 weeks or 52 weeks).

The meaning of some of the terms used in s.3(8) was discussed by the AAT in *Clarkson* (1988) 44 *SSR* 561; and *Malajew* (1988) 45 *SSR* 576. But those decisions did not consider the full impact of s.3(8) on the rights of

The **Social Security Reporter** is published six times a year by the Legal Service Bulletin Co-operative Ltd. Tel. (03) 544 0974 ISSN 8017 3524
Editor: Peter Hanks
Contributors: Regina Graycar, Peter Hanks, Denny Meadows, Jenny Morgan, Beth Wilson
Typesetting & Layout: Graphic Zone
Subscriptions are available at $30 a year, $20 for Legal Service Bulletin subscribers.
Please address **all correspondence** to Legal Service Bulletin, C/- Law Faculty, Monash University, Clayton 3168.

Registered by Australia Post - Publication No. VBH 6594

In this Issue

separated persons. The DSS takes the view that s.3(8) operates, first, to affect the rate of age and invalid pension, unemployment, sickness and special benefit payable to people who live separately under the one roof. For example, because those people are 'treated as married', ss.3(5) and 122(4) require the income of the pensioner's or beneficiary's notional 'spouse' to be taken into account in the income test.

It appears that the DSS takes the view that the provision has a more radical impact on the entitlements of people qualified for widow's pension and supporting parent's benefit. The Department's view is that any person caught by s.3(8) cannot qualify for either of those payments. This view is, at best, dubious.

Section 3(8) requires a person caught by the provision to be 'treated as a married person'. To be treated in this way does not operate to prevent a person meeting the qualifications for widow's pension or supporting parent's benefit.

The categories of women who qualify for **widow's pension**, according to ss.43(1) and 44(1) include 'a deserted wife'. To fall into that category, a person must be a married person. So, being 'treated as a married person' will not prevent a woman qualifying for widow's pension if she can establish that she 'has been deserted by her husband without just cause for . . . 6 months'.

To qualify for **supporting parent's benefit,** according to ss.53(1) and 54(1), a person must be 'an unmarried person', a term which is defined in s.53(1) to mean (amongst a number of alternatives) 'a married person who is living separately and apart from his or her spouse'. So, the qualifications for supporting parent's benefit clearly contemplate, as do the qualifications for widow's pension, payment to a 'married person'. It follows that being 'treated as a married person' will not prevent a person qualifying for supporting parent's benefit if the person can establish that he or she 'is living separately and apart from his or her spouse'.

Of course, the person who is 'treated as married' because of s.3(8) but who wishes to qualify for widow's pension or supporting parent's benefit will have to show a genuine desertion by or separation from the notional 'spouse', even though they are sharing the former matrimonial home. But family lawyers will tell you that this is (or was, before the concept of desertion was abolished) a common-place issue and presents no conceptual difficulties.

In summary, it would appear that for many people, s.3(8) will have the same impact on widow pensioners and supporting parent beneficiaries as it has on age and invalid pensioners - that is, it will affect the rate of pension payable rather than the basic entitlement. The income and assets of the notional 'spouse' will be taken into account, because of s.3(5), in applying the income and assets tests prescribed in s.48(3) for widow's pension and adopted by s.56(1) for supporting parent's benefit.

This analysis of the impact of s.3(8) does not strike me as far-fetched. Indeed, I believe it is the only rational way to read that provision. Section 3(8) does **not** say that a person caught by the provision is to be treated as 'living with another person of the opposite sex as the spouse of that other person . . .' (the s.3(1) definition of 'de facto spouse'). Section 3(8) does **not** say that a person caught by the provision is disqualified from receiving widow's pension or supporting parent's benefit. It says merely that such a person is to be 'treated as a married person' for the purposes of the Act.

This analysis can hardly be described as doing violence to the intention behind s.3(8), as revealed by the explanatory memorandum to the amending Bill, the *Social Security and Veterans' Entitlements Amendment Bill* 1987. The memorandum said that s.3(8) [then numbered s.6(5A)] would treat a person who had been separated from her or his former spouse under the one roof 'as married once more'. The memorandum made no mention of any intended disqualification from widow's pension or supporting parent's benefit.

Nor does this analysis give a person caught by s.3(8) an opportunity to manipulate the social security system: the level of the person's pension or benefit would still be liable to reduction because of the income or assets of the person's 'spouse', who would in most cases have no legal responsibility to provide the person with any support. The impact would be less draconian than the total loss of eligibility. But it would be very serious, particularly in those areas where property prices make sharing of accommodation the only possibility for many separated parents.

But to return to the anecdote - the analysis of s.3(8) outlined above was used by some SSATs when reviewing cancellations of widow's pensions before November last year. The DSS vetoed the SSAT recommendations that the cancellations be set aside and the rate of pension be calculated by reference to the income of the 'spouse'. A DSS officer conceded that the analysis was logically impressive - 'but it's not what we intended'.

How fortunate (from the Department's perspective) that it was given two large bites at the apple: one when it prepared the drafting instructions for Parliamentary Counsel, from which s.3(8) emerged; and the second when it had the opportunity to veto the SSAT's recommendations. Of course, it was not so fortunate for the claimants. The interesting question now is 'will the new appeal sytem, and the new powers for the SSAT, correct the type of imbalance of interests which the old system was unable to control?'

The point at issue here is not the 'correct' reading of s.3(8) but the unequal balance of power reflected in the old appeal system.

Old habits

The DSS, it seems, is finding it difficult to adjust to the new appeal system. In at least 3 recent cases where the SSAT has reversed DSS decisions (indicating that its decisions were to have immediate effect), the DSS has delayed implementing the decisions.

The DSS view was that, during the 28 days in which an appeal to the AAT was possible, it could ignore the SSAT decision. This attitude flies in the face of s.183 of the *Social Security Act*, which gives SSAT decisions immediate effect (apart from some exceptions, not relevant in these 3 cases).

The DSS view also ignores s.41 of the *Administrative Appeals Tribunal Act*, which provides that, in the event of an appeal to the AAT against a decision, the appeal does not affect the operation of the decision unless the AAT makes a stay order under s.41(2).

The National Convener has now written to the DSS, describing the DSS attitude as 'contrary to a proper recognition of the role and function of the Tribunal'; and seeking an assurance that SSAT decisions will be implemented immediately.

[P.H.]