Volume 3, Number 10, August 1999

SOCIAL SECURITY

Including Student Assistance Decisions

Opinion

The *A New Tax System (Family Assistance) (Administration) Bill 1999* was introduced in Parliament in June 1999. From its title it is merely an 'administration' Bill, designed to help in the implementation of family assistance measures after the introduction of the GST. It contained, however, a number of very important measures with respect to the rights of applicants and to the processes and procedures of the SSAT. Some of these were amended prior to its passage, although one important measure was not. It is worth commenting on even those sections which were amended in the Senate, as at least one other 'administration' Bill has been introduced, and it is not known whether it contains similar clauses or not.

Debt recovery

Section 97 of the *A New Tax System (Family Assistance) (Administration) Act* dealing with waiver of debt arising from error reads as follows:

> '**97.(1)** The Secretary must waive the proportion (the **administrative error proportion**) of a debt that is attributable to an administrative error made by the Commonwealth if subsection (2) or (3) applies to that proportion of the debt.
>
> (2) The Secretary must waive the administrative error proportion of a debt if:
>
> (a) the debtor received in good faith the payment or payments that gave rise to the administrative error proportion of the debt; and
>
> (b) the person would suffer severe financial hardship if it were not waived.'

Section (97)(2)(b) is entirely new, and appears to have been introduced with little, or no consultation.

The Secretary does of course have a duty to recover overpayments of social security pensions or benefits. However, when an error is due to mistakes made by Centrelink or the Department it seems unreasonable that the applicant must demonstrate not only 'good faith' as that is defined by caselaw, but also severe financial hardship. It must also be borne in mind that a large proportion of those receiving family assistance payments will be in some financial hardship. The recovery of overpayments not infrequently exacerbates that hardship. Those situations will be increased, rather than decreased, by this measure.

Many applicants have a horror of owing money to the Commonwealth. Others feel that their honesty and integrity are being attacked when a debt is raised against them. Many clients of Centrelink feel that not enough distinction is made between overpayments made in error by the Department, and received by them in the belief that Centrelink knows what it is doing, and

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The **Social Security Reporter** is published six times a year by the Legal Service Bulletin Co-operative Ltd. Tel. (03) 9544 0974 ISSN 0817 3524

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Typesetting: Last Word **Printing:** Thajo Printing, 4 Yeovil Court, Mulgrave.

Subscriptions are available at $60 a year, $40 for Alternative Law Journal subscribers.

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Print Post approved PP381667/00178

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those overpayments made to people who are 'rorting' the system. This amendment will reinforce those fears.

Family assistance payments will be simplified to some extent once all the measures contained in this Act, the *A New Tax System (Family Assistance) Act* and a variety of consequential amendments come into force. Nonetheless, there will be great scope for overpayments, including those caused by administrative error. To effectively amend the error waiver provision of the *Social Security Act* (s.1237A (1)) in this way will further disadvantage those who already suffer severe disadvantage.[1]

This amendment only applies to overpayments of family assistance. However, it can be expected that the situation will be altered to ensure that the waiver provisions are uniform in relation to all Centrelink payments.

SSAT procedures

Clause 112 of the Bill as it was first presented, set down a 28-day time limit for applications to the SSAT, although giving the SSAT the discretion to extend the period if 'satisfied that special circumstances exist'. This clause was omitted in the Senate. However, it is consonant with recommendations made about the administration of the SSAT in the early days of this Government.

It is worrying that the Government still shows an intention to limit access to review in this way. The Commonwealth Ombudsman in his Discussion Paper *Balancing the Risks*, of August 1998[2] specifically commented that one of the areas of most concern to welfare groups was the limited time applicants had to seek review of adverse decisions. This was in the context of a 13-week time limit for applications.

It is of course understandable, and important for administrative efficiency, that matters be dealt with speedily, and that there be finality of decision-making. However, it seems inequitable that a pension or benefit recipient should lose rights to money to which they were otherwise entitled simply because they did not apply within 28 days. This inequity is further underlined when one notes that it is often difficult for the individual to be aware of their rights — a matter also discussed in the Ombudsman's Discussion Paper. Clients of Centrelink rely on the agency to calculate their entitlements accurately. It is often very difficult for any client to understand how this is done. It could be argued that if the Commonwealth can seek recovery of moneys overpaid sometimes after a period of years, the individual should have reciprocal rights with respect to moneys underpaid.

Moreover, if one compares the rights of the pension or benefit recipient with the rights of taxpayers vis a vis the Tax Office, one cannot but be struck by the differences. Yet in both cases, the individual is disputing assessments of Government departmental officers, or of those working for Agencies which have taken over these roles.

Clause 126 of the Bill as introduced, would have allowed the Executive Director of the SSAT to:

> **'126.(1)** ... direct that a hearing be conducted without oral submissions from those parties that may make oral submissions if the Executive Director considers that the review hearing could be determined fairly on the basis of written submissions by all the parties to the review.'

That is, it would have been possible to have hearings 'on the papers' whether the parties agreed or not. This may lead to greater efficiency, and may not have had a major impact on the ultimate outcome, especially as the SSAT as constituted for a particular matter could have made an order permitting oral submissions if it considered this was necessary after considering the written submissions made by parties (cl.126(4)). Nonetheless, surveys of users of the SSAT have found that applicants frequently feel that the Tribunal was their first opportunity to be heard. Applicants have at times understood for the first time the basis on which an adverse decision was made after the matter has been explained at the hearing.

It is also the case that a disproportionate number of Centrelink clients are functionally illiterate, at least in English. For individuals such as this to have to make a written submission would be an insuperable hurdle.

Clause 126(1) was amended in the Senate to read:

> 'The Executive Director may direct that a hearing be conducted without oral submissions from those parties that may make oral submissions if:
>
> (a) The Executive Director considers that the review hearing could be determined fairly on the basis of written submissions by all the parties to the review; and
>
> (b) All parties to the review consent to the hearing being conducted without oral submissions.'

It will be interesting to monitor how many 'on the papers' reviews will be conducted, and whether there will be differences between different States on this issue.

Again, these matters have been introduced in the context of family assistance. However, they are both measures the Government had foreshadowed, and it seems more than possible that both measures will be again raised in the *Social Security (Administration) Bill*. Whatever changes are made regarding the process and procedures of the SSAT will need to be uniform between various pensions and benefits.

It is hoped that there will be an opportunity for the Tribunal and various user groups to discuss and comment on these changes should they again be introduced, and that there will be the same opportunity to comment on changes to the waiver provisions.

[A.B.]

References

1. The Opinion, 'Whose problem is administrative error?', (1999) 3(8) *SSR* 113 deals in greater detail with existing problems (as perceived by the Welfare Rights Centre) with the waiver provisions as they are currently in the *Social Security Act 1991*.
2. Summary and comments in Opinion, (1998) 3(6) *SSR* 77.