their passage. It is interesting to note some of the comments made in opposition to the Bills during debate, regarding the public perception of the SSAT. It was stated:

> Indeed, the features of the SSAT in particular are held to be most sound by Australian legal welfare groups, its clients and the general community. I think that one of the pleasing aspects of the evidence that was given before the Senate committee inquiry into these bills was the mostly positive feedback from welfare groups and those working with individual members of the community who use the SSAT and the AAT about how well that process works. That does not mean that you do not necessarily always strive to make it better or that it is absolutely perfect in every way, but it does mean that, when you do finally have a system that seems to work fairly well for the majority of Australians, you want to be very careful before you go around changing it. Many of the positive aspects of the SSAT were threatened by the changes made in these bills.
>
> Some of the positive aspects of the features of the SSAT that are highlighted include: the absence of adversarial appearance by either the department or the agency; the absence of formality in both the lodgement and hearing processes; the ability of the consumer to be represented by a person of their choice including, but not limited to, legally qualified people: the provision of full papers to the tribunal; the timeliness on average of less than 10 weeks from appeal to conclusion; the readiness of access features for people from non-English speaking background and people with disabilities; the procedures conforming to procedural fairness principles that are accessible, clear, certain and relatively uncomplicated; and the ability to appeal as of right to the second tier of external review, the Administrative Appeals Tribunal...
>
> Common feedback from the existing tribunal system, particularly the SSAT, even from people who lose at the SSAT, is that they feel they have had a fair go. They have had an opportunity to have their situation considered fairly and impartially...

The tenor of the arguments made against the ART was that the model proposed was fundamentally flawed. It would appear unlikely, therefore, that any compromise will now be reached which will be acceptable to the opposition parties in the Senate, spelling the death knell for the ART in the form proposed under these Bills. However, given the expressed commitment of all parties to some form of merger of the various tribunals, it is likely that the proposal to establish a similar tribunal will re-emerge at some time in the future. In the meantime, however, those tribunals which were to be subsumed under the umbrella of the ART, will continue to function with a certain degree of uncertainty about their future and the danger that there will be a consequent lack of clear direction for those bodies.

[A.T.]

Administrative Appeals Tribunal Decisions

Disability support pension: in 'gaol'; conviction and rehabilitation

PARDO and SECRETARY TO THE DFaCS (No. 2000/1105)

Decided: 8 December 2000 by J. Handley.

Background

In September 1998 Pardo was ordered, under a Hospital Security Order, to be admitted and detained in the Rosanna Forensic Psychiatric Centre as a security patient for 12 months.

The order made by the magistrate was:

> Under s.93(1)(e) in lieu of a term of imprisonment I sentence the defendant by way of a hospital security order to be detained in an approved mental health service for 12 months.

Pardo's claim for disability support pension was rejected by Centrelink as he was considered to be in 'gaol' and therefore this pension could not be paid to him under s.1158 of the *Social Security Act 1991* (the Act).

The SSAT affirmed the decision.

The issue

The main issue for the Tribunal was whether s.1158 acted to preclude payments to Pardo.

This section states:

> An instalment of a social security pension is not payable to a person on a day on which such an instalment would normally be paid to the person if
>
> (a) on that day the person is
>
> (i) in gaol or
>
> (ii) undergoing psychiatric confinement because the person has been charged with an offence and
>
> (b) that day is not the first day and is not the last day in the period of imprisonment or confinement on which such an instalment would normally be paid to the person.

It was therefore necessary to decide whether Pardo was 'in gaol' or ' undergoing psychiatric confinement' because he had been charged with an offence.

Section 23(5) of the Act states:

> for the purposes of this Act a person is in gaol if the person
>
> (a) is imprisoned in connection with the person's conviction for an offence; or
>
> (b) is being lawfully detained in a place other than a prison in connection with a person's conviction for an offence; or
>
> (c) is undergoing a period of custody pending trial or sentencing for an offence.

Flowing from this definition it was necessary to decide whether Pardo had been 'convicted'.

The Tribunal also considered the term 'psychiatric confinement' which is defined in s.23(8) and (9) of the Act:

> subject to sub-section (9), 'psychiatric confinement' in relation to a person includes confinement in
>
> (a) a psychiatric section of a hospital; and
>
> (b) any other place where persons with psychiatric disabilities are, from time to time, confined.

Section 23(9) states:

> the consignment of a person in a psychiatric institution during a period when the person is undertaking a course of rehabilitation is not to be taken to be psychiatric confinement.

The submissions

Pardo submitted that:

- he had not been convicted — he had been sentenced and a hospital security order had been imposed under s.93 of the *Sentencing Act 1991;*
- he was not in gaol, he was in a hospital and had not been 'imprisoned';
- he had been 'engaged in rehabilitation' within the meaning of s.23(9) and that a decision in the case of *Secretary, Department of Family & Community Services & Fairbrother (1999) AATA 580* was a narrow interpretation of the law.

The Department submitted:

- that although the magistrate's order did not technically record a finding of guilt

or a conviction, this did not preclude a finding that Pardo was 'in gaol';

- that under the *Sentencing Act*, a hospital security order cannot be made without recording a conviction.
- that if Pardo is not 'in gaol' then he was 'undergoing psychiatric confinement because he had been charged with an offence'. Pardo was not undergoing a course of 'rehabilitation' until 22 February 1999 when he started a structured course in ward M5.

'In gaol'

The AAT was not satisfied that Pardo was convicted. It relied on the order made by the magistrate and, contrary to the approach taken by the SSAT, concluded that:

> It is obvious from the Order made by the Magistrate and by the certified extract ... that all the provisions of s.93 in so far as they apply to the applicant have been satisfied (excepting Sub-Section (d)). It is clear from this Section that a person may be found guilty and may be sentenced but not convicted. Because the applicant was not 'convicted', he is not 'in gaol' for the purposes of s.23(5) of the Social Security Act.

(Reasons, para. 35)

The AAT also referred to a discretion that exists under ss.7 and 8 of the *Sentencing Act 1991* which contain the words 'may' and 'whether or not'. The AAT concluded that the order made by the magistrate was within his power and by implication a hospital security order can be made without registering a conviction.

> The magistrate did not impose a conviction. He was entitled not to impose a conviction as a matter of law.

(Reasons, para. 44)

The AAT found that the SSAT had made an error of law by not observing the order made by the magistrate.

'Rehabilitation'

The AAT considered the meaning of this term within the Act and other legislation. Considerable evidence was taken from the social worker at the hospital concerning rehabilitation undertaken by Pardo.

The AAT also considered the meaning of the term 'a period' referred to in s.23(9) of the Act. In the case of *Secretary, Department of Family & Community Services & Fairbrother (1999) AATA 580* the AAT concluded that:

> I think the use of the word 'period' in conjunction with the use of the term 'course of rehabilitation' makes it clear that Parliament had in mind a formal course of rehabilitation with a finite duration, a structure, a beginning and an end.

The AAT took a different view. It concluded that rehabilitation is not capable of definition in relation to duration as this will vary depending on a person, the rehabilitation provider, the methods used etc. The AAT felt that on the basis of the social worker's evidence, all the programs undertaken at the hospital fell within the concept of 'rehabilitation', consequently Pardo was 'undertaking a course of rehabilitation ... during a period' while he was in hospital.

Formal decision

The AAT set aside the decision under review, and substituted a decision that at all relevant times Pardo qualified for receipt of disability support pension.

[R.P.]

Waiver of a debt: special circumstances while imprisoned

NEIVANDT and SECRETARY TO THE DFaCS (No. 2000/1115)

Decided: 24 November 2000 by E.K. Christie.

Background

Neivandt was receiving disability support pension (DSP), and had been sent a notice on 3 November 1999 requiring him to advise Centrelink within 14 days if he was sent to gaol after being convicted of an offence. He was so gaoled on 18 November 1999, and was released on bail on 24 December 1999. Centrelink was not informed and discovered the incarceration by a data match. It then asked Neivandt to refund DSP $1151.74 paid for the period he was in gaol.

The only issue for the AAT to decide was whether the debt could be waived. The relevant provisions of the *Social Security Act 1991* (the Act) are:

> 1237A.(1) Subject to subsection (1A), the Secretary must waive the right to recover the proportion of a debt that is attributable solely to an administrative error made by the Commonwealth if the debtor received in good faith the payment or payments that gave rise to that proportion of the debt.
>
> Note: Subsection (1) does not allow waiver of a part of a debt that was caused partly by administrative error and partly by one or more other factors (such as error by the debtor).
>
> 1237AAD. The Secretary may waive the right to recover all or part of a debt if the Secretary is satisfied that:
>
> (a) the debt did not result wholly or partly from the debtor or another person knowingly:
>
> (i) making a false statement or false representation; or
>
> (ii) failing or omitting to comply with a provision of this Act or the 1947 Act; and
>
> (b) there are special circumstances (other than financial hardship alone) that make it desirable to waive; and
>
> (c) it is more appropriate to waive than to write off the debt or part of the debt.

Neivandt argued that he was not personally responsible for the debt as he had taken steps to advise Centrelink of his imprisonment. He was at Maroochydore Watchhouse from 18 to 22 November 1999, and 'watchhouse rules' applied so he could not make phone calls and the police were too busy to care about personal problems of prisoners. He said he asked about advising Centrelink and the police had said they would sort it out, but that proved not to be the case.

For the next week Neivandt was at the Arthur Gorrie Correctional Centre. He said that on induction he had asked a social worker about advising Centrelink. He was told they would look after it and believed it would be done.

Neivandt was at Woodford Prison Farm for the rest of the time. He said that on arriving he asked to see a social worker so he could check on the status of his DSP, but his enquiry was considered low priority and he never saw a social worker. Prison policy was that he could only contact a government department through the Official Visitor or Ombudsman which could take several weeks.

The AAT had evidence from the Arthur Gorrie Correctional Centre that it had in place a process whereby counselling staff assisted inmates by supplying them with Centrelink forms, and then faxing completed forms to Centrelink.

In reaching its decision, the AAT appears to have agreed with the Secretary that the obligation to notify Centrelink was a personal obligation attaching to Neivandt (*Re Junor & SDSS* (1997) 48 ALD 326) which was not discharged by seeking to have another person discharge it or accepting another person's offer to discharge it.

The AAT agreed that the debt could not be waived under s.1237A(1) because Neivandt knew he was not entitled to be paid during imprisonment, so he did not receive it in good faith: Secretary, *DEETYA v Prince* 3(3) *SSR* 37.