



Tribunals Amalgamation Bill 2014

Submission to the Senate Legal and Constitutional Affairs Committee

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Civil Justice, Victoria Legal Aid

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About Victoria legal Aid

VLA is a major provider of legal advocacy, advice and assistance to socially and economically disadvantaged Victorians. Our organisation works to improve access to justice and legal remedies in the community and pursues innovative ways of providing assistance to reduce the prevalence of legal problems in the community. We assist people with their legal problems at courts, tribunals, prisons and psychiatric hospitals as well as in our 14 offices across Victoria.

Our specialist Commonwealth Entitlements team provides assistance to clients with administrative reviews of Centrelink decisions, and assistance with social security prosecutions. We provide telephone advice regarding social security administrative review matters. We also run an advice service in Melbourne and some of our regional offices and an advice service at the Administrative Appeals Tribunal (“the Tribunal”).

Legal representation should be permitted as of right

We do not support the removal of the automatic right to legal representation at hearings in the proposed Social Services and Child Support Division of the amalgamated Tribunal.

Proposed new section 32(2) of the AAT Act (substituted by Item 54 of Schedule 1 of the Bill) provides that the Tribunal’s permission is required for a person to be represented at a hearing in the Social Services and Child Support Division. In considering whether to give permission the Tribunal must have regard to the objectives of the Act and some other matters.

Following the proposed amendments, these objectives will require the provision of a mechanism of review that is accessible, fair, just, economical, informal and quick. It must also be proportionate to the importance and complexity of the matter and promote public trust and confidence in the decision-making of the Tribunal.

Consistent with the statutory objectives of the Tribunal, we consider that legal representation promotes fairness, accessibility and public confidence in the decisions of the Tribunal and, at a broader level, government. Given the inherently complex nature of social security law, access to legal representation for the preparation and conduct of hearings before the Tribunal is a proportionate response to addressing the structural inequality associated with the social security review processes.

For these reasons we support an amendment to the Bill that will ensure that a person may be legally represented *as of right*, without the requirement to obtain the permission of the Tribunal. This is explored further below.

Legal representation supports access to justice and better administrative decision making

VLA considers that legal representation should be an element of any process where an individual seeks to challenge a decision of government in a court or tribunal. No matter how successful the drive towards informality and accessibility in the tribunal system, there is a significant power imbalance between an individual who is dependent on government for income support and the government agency responsible for the assessment of eligibility and administration of those payments.

In our experience, people pursuing appeals from decisions of Centrelink at the Tribunal can present with a variety of issues that make them acutely vulnerable. Many experience disability and mental illness, unstable housing arrangements. Many come from culturally and linguistically diverse backgrounds and may experience difficulties with reading and writing. Social security law is widely accepted as an extremely complex area of law and legal assistance has a critical role in securing accessibility, fairness and justice for this vulnerable cohort of people.

Moreover, the effect of poor administrative decision-making can be devastating. For people in receipt of income support payments, it can mean having payments stopped or suspended. This can then lead to the loss of housing and the ability to access a range of support services. Public trust and confidence in the administrative decisions of government is strengthened where those decisions are subject to robust scrutiny. Access to legal assistance for review of administrative decisions enhances the imperative for government to improve processes and ensure that primary decisions are sound and comply with the legal and administrative frameworks for decision-making. We consider that legal assistance is critical in this context to ensure that the review processes get to the right decision at the earliest opportunity.

This is illustrated by the following example from our casework:

Case Study – Stella *

Access to legal advice and representation made a difference to Stella who had her disability support pension stopped by Centrelink. When the payment was stopped, Stella made an application for review. Due to administrative error, Centrelink did not respond to the application for review. Unaware of her legal rights, Stella did not follow up the request for review with Centrelink.

Five years passed and it was only when a Centrelink social worker encouraged Stella to pursue a further application that the original oversight in failing to respond to the request for review was revealed. In that time, Stella had become homeless and her mental health concerns had significantly worsened.

When Stella finally received a decision from Centrelink it was a negative outcome. She then contacted VLA and we provided representation in two appeals. There were substantial evidentiary difficulties caused but the extreme delays by Centrelink. Despite this, we successfully advocated on Stella's behalf and Centrelink has now conceded that Stella was eligible for the Disability Support Pension from the time her payment was stopped. As a consequence, Stella was eligible for five years of back pay. While this is a huge relief to Stella it will not change the pain and suffering she experienced as a consequence of the instability she endured when her payment was stopped.

Without access to the advice and representation provided by VLA it is unlikely that Stella would have been able to take up her rights and successfully pursue her appeal. This underscores the importance of continued access to legal advice and representation at the Tribunal.

* Not her real name.

Legal representation saves money

Access to legal representation promotes early resolution of matters. This is better for our clients who may experience significant consequences when there are changes to their Commonwealth payments. It is also the most cost effective way for us to provide services in this jurisdiction.¹

In our experience, many matters proceed to the second stage of review (AAT) where they could have been resolved at the first stage of review (SSAT) if the person had the benefit of legal advice in the preparation and conduct of their hearing. These matters are often settled prior to the AAT hearing, as once the appropriate reports are obtained there is better information to guide decision makers.

The effect of matters proceeding up the hierarchy of review without advice from lawyers experienced in the jurisdiction is a waste of public resources. This includes the costs associated with the conduct of hearings at the SSAT where the outcome is successfully appealed where fresh information is put to the tribunal following engagement with legal services. It also includes the more intensive services that are required from VLA to prepare a matter for hearing in the AAT as opposed to the SSAT. Then there are the additional costs associated with the actual conduct of the hearing at the AAT. In our view, these costs can be minimised if legal advice and representation is provided early in the review process.

Practical challenges for the delivery of our services associated with proposed new section 32(2)

The proposal to make representation subject to the discretion of the Tribunal also raises some practical issues for our services to clients in this jurisdiction. Currently, we provide advice to people before their hearing day. Some people are referred to us from the SSAT. Others seek assistance through our Legal Help phone service and our social security outreach services. Depending on their circumstances and legal issue, it may be sufficient to provide people with legal advice and information to empower them to represent themselves at hearing. Others will require a more intensive service and we will provide legal advice and representation at the hearing.

It is not clear from the Bill what arrangements will be put in place to govern the exercise of the discretion to permit legal representation at the Tribunal. It is conceivable that this would require a preliminary hearing as to whether leave should be granted which would add to costs and possibly increase delays.

In addition, from our point of view it would not be acceptable for the decision to be made on the hearing day. This would create too much uncertainty for clients and our service planning. It would also result in wasted expenditure if our lawyers prepared for a hearing and were not permitted to appear on behalf of the client.

¹ The costs of providing services at the current SSAT is much lower than for appeals at the AAT. A grant of aid for preparing a matter for hearing at the SSAT where the ARO Review was not aided is \$1447. A grant of aid for an appearance before the SSAT is \$928. By comparison, where a matter is heard at the AAT a grant of aid for preparation (where the SSAT appeal was not aided) is \$1628. A grant of aid for an appearance before the AAT is \$1504 (daily fee).

