



12 December 2021

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary,

Submission on the performance and integrity of Australia's administrative review system

1. We welcome the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee's (**the Committee**) inquiry into the performance and integrity of Australia's administrative review system (**the Inquiry**). Our submission will specifically address Terms of Reference (a), the Administrative Appeals Tribunal (**the Tribunal**), including selection process for members and (d) any related matter.

About SSRV

2. Social Security Rights Victoria (**SSRV**)¹ is a state-wide Victorian community legal centre specialising in social security law and policy. Our vision is for a fair and just society in which all people are able to receive a guaranteed, adequate income in order to enjoy a decent standard of living. SSRV contributes to this vision through the provision of legal and related services to vulnerable and disadvantaged Victorians and those who support them. We assist

¹ Find out more about our work at <www.ssrv.org.au>.



our clients, and the community, to secure and protect their rights to equitable social security entitlements.

3. SSRV has been operating for almost 35 years, with funding from Commonwealth and Victorian governments, philanthropic grants and other sources. SSRV's services are directed primarily to people who are experiencing financial disadvantage and other forms of vulnerability such as those related to disability, physical or mental illness, age, family violence, family breakdown, Aboriginal and Torres Strait Islander background, cultural and linguistic diversity (CALD), remote location, the COVID-19 pandemic and natural disasters.
4. SSRV provides legal information, advice, ongoing casework and representation services to vulnerable and disadvantaged Victorians, including in the General Division and Social Services and Child Support Division of the Tribunal. We also design and deliver community legal education and professional development resources and workshops and contribute to policy, sector development and systemic advocacy on a state and national level.
5. Current SSRV staff, and contributors to this submission, include lawyers who have practised extensively in multiple areas of administrative law including social security, migration and refugee law as well as the National Redress Scheme. As a staff team, we have decades of experience working within Australia's administrative review system.
6. SSRV is a member of Economic Justice Australia (EJA)², the peak organisation for community legal centres providing specialist legal assistance to people in relation to social security issues and rights.

Introduction

7. SSRV welcomes the inquiry into Australia's administrative review system and sees this as a valuable opportunity to reflect on the positives, the challenges and the opportunities available to enhance the genuine accessibility of the system for all Australians who engage with it.

² Find out more about the work of Economic Justice Australia at <www.ejaustralia.org.au>.



8. SSRV sees the administrative review system as critical to the efficient, accurate and fair administration of Australia's social security and family assistance legislation. With over 9.4 million Australians engaged with the social security system and over 5 million claims processed by Centrelink in 2021³, the social security system is one which requires robust and fair review and accountability measures for Australians who disagree with decisions made by Centrelink.

9. This submission will focus on matters, within the scope of the Terms of Reference, in which SSRV has particular expertise, namely:
 - The functioning of the SSCSD and General Division of the Tribunal, including the importance of maintaining actual and apprehended impartiality, as well as the use of oral decisions
 - The impacts of the lack of available legal assistance and representation for applicants appealing Centrelink decisions to the Tribunal
 - The impacts of using non-statutory forms of financial support, such as grant schemes, to deliver on Australia's social security obligations.

10. On a fundamental level, the accuracy of decisions made by Centrelink have significant consequences on the lives of some of the most vulnerable members of our community. It can be the difference between financial safety to leave a violent relationship. It can be the difference between being able to meet the basic costs of living, including paying for safe housing, accessing adequate food or paying for necessary medical expenses.

11. Given the volume and complexity of the legislation applied by Centrelink staff and their lack of formal legal training, SSRV believes the current two-tiered independent merits review process available through the Tribunal is a vital component to ensure accuracy, accountability, efficiency and procedural fairness.

³ Services Australia 2020-2021 Annual Report, page xiii, <www.servicesaustralia.gov.au/sites/default/files/annual-report-2020-21.pdf>.



The Administrative Appeals Tribunal

Lack of legal representation for Centrelink appeals

12. SSRV also values the flexibility afforded by the Tribunal in relation to accessibility. The allocation of a case manager within the Registry staff as a single point of contact for self-represented applicants allows for continuity of service delivery and removes significant barriers in accessing information relevant to their individual matter for those unfamiliar with the Tribunal and administrative review system. SSRV also commends registry staff who have supported the work of SSRV by facilitating access to documents and information where our clients are unable to provide them to us directly.

13. SSRV notes that the Tribunal provides greater accessibility than other jurisdictions by way of telephone hearings as an alternative to in person hearings. SSRV assists clients across all of Victoria and as a result, physically attending an in-person hearing can be incredibly difficult for many clients and a significant consideration in their decision to request a review by the Tribunal. As such, the option of telephone hearings ensures genuine access to justice, especially for those who have significant health issues, mobility difficulties or live in regional or remote areas. However, there is a critical and urgent need for adequately resourced specialist social security legal services to meet unmet need for legal representation in the Tribunal.

14. The SSCSD is the second largest division of the Tribunal, with over 15,700 applications lodged in 2019/2020 and over 13,000 lodged in 2020/2021. Of this, Centrelink reviews made up over 13,000 applications to the SSCSD in 2019/2020 and over 10,000 in 2020/2021. Centrelink appeals in the General Division make up the largest caseload of the Division, with over 2,167 out of 5,584 total lodgements in 2019/2020 and 1,826 out of 4,775 total lodgements in 2020/2021.

15. In 2020/2021, 19% of Centrelink decisions on review in the SSCSD were changed and 21% of SSCSD decisions appealed to the General Division were overturned.

⁴ Administrative Appeals Tribunal 2019-2020 and 2020-2021 annual reports, <<https://www.aat.gov.au/about-the-aat/corporate-information/annual-reports>>.



16. Applicants at the SSCSD and in Centrelink related matters at the General Division are also the most frequently unrepresented. The following data, showing rates and percentages of legal representation, or lack thereof, in finalised Tribunal matters involving review of Centrelink decisions, has been obtained from the Tribunal's 2019/2020 annual reports⁵:

2019/2020	Tribunal decisions made	Number of applicants legally represented	Percentage of unrepresented ⁶ applicants
SSCSD Centrelink Decisions (1 st review)	14,138	265	98.1%
General Division, Centrelink decisions (2 nd review)	2,131	163	92.4%

17. There are currently no specific funds for social security legal services provided under the National Legal Assistance Partnership, despite the significant number of people affected by social security and family assistance decisions across Australia, many of whom in vulnerable cohorts including people experiencing family violence, people with disabilities, older Australians, young Australians, people affected by disasters, people from CALD backgrounds or those unable to self-represent for other reasons.

18. Centrelink are, of course, always legally represented in General Division matters. It is our position that set-aside rates in both Divisions, would be higher in relation to Centrelink matters if more people were able to obtain legal representation.

⁵ Administrative Appeals Tribunal 2019-2020 annual report, <<https://www.aat.gov.au/about-the-aat/corporate-information/annual-reports>>. <https://www.aat.gov.au/about-the-aat/corporate-information/annual-reports/2019-20-annual-report>>. Legal representation data was not published in the Tribunal's 2020-2021 annual report.

⁶ These figures consider legal representation only, not matters that involved representation from a non-legal advocate or a friend of family member.



Joan's story

Joan* suffers a significant mental health condition and physical disabilities which prevent her from working. Joan was receiving Jobseeker Payment and applied for Disability Support Pension (DSP). Her claim for DSP was rejected and her Jobseeker Payment was cancelled for failing to meet her mutual obligation requirements due to her permanent disabilities. After 12 months of contacting Centrelink to try and challenge the decisions, Joan contacted SSRV seeking advice and assistance on how to appeal the decisions to the Tribunal and what information to present to the Tribunal in order to help them understand her situation.

SSRV was able to spend time with Joan to understand the relevant facts and circumstances, the legal issues and prepare submissions to the Tribunal on Joan's behalf. Given the seriousness of Joan's mental health conditions and the complexity of the circumstances, Joan's circumstances and her legal arguments were not at all clear and it took many hours to understand her situation and obtain complete instructions. SSRV believes that access to legal advice and assistance was crucial to Joan's ability to present her case in a comprehensible and comprehensive way.

SSRV also believes that the time spent obtaining instructions and preparing submissions with Joan prior to the hearing assists the efficiency of the Tribunal and aids the Tribunal during the review process by drawing to their attention relevant facts, circumstances, legal issues and evidence.

** Name and some unnecessary details have been changed to protect the privacy of our client*

19. Lack of access to legal representation also causes applicants to feel intimidated by the process and unclear about the role of the Tribunal. SSRV has observed that there is a significant lack of trust in the process, stemming from an underlying lack of trust in Centrelink and continuing throughout the review process. We frequently hear from unrepresented applicants they felt compelled to withdraw Tribunal applications, particularly at the General Division, due to the complexity and the lack of feeling there was any chance they could be successful when faced with a legally represented opponent and a lack of clarity as to the Tribunal's role.



John's experience at the General Division

John* is an elderly Victorian resident, in his 80s, receiving the Age Pension. John is separated from his wife although they remain living under one roof in the property they own together. Due to their age, and the difficult financial situation they would find themselves in if they were to sell their house, they have decided neither will move out. John informed Centrelink of this separation many years ago and Centrelink agreed he was separated and started paying him the single rate of Age Pension (which is higher than the couple rate).

In 2019, Centrelink decided they were no longer going to consider John separated and started paying him a significantly reduced rate of Age Pension.

John challenged this decision right up to the General Division, on his own. He attended multiple case conferences, over the phone, with a General Division Registrar and lawyer representing Centrelink and found the process overwhelming and didn't understand their role.

John then contacted SSRV and explained, *"the 'two lawyers' representing Centrelink (referring to the Registrar and the single lawyer representing Centrelink) are encouraging me to settle and telling me I have no case."*

We are concerned that, if John hadn't been able to find legal advice and assistance in time, John would have likely ended up feeling pressured to withdraw his application from the General Division as he was made to feel that this was his only option. We are also concerned that John was not assisted to understand that the Tribunal were an impartial and independent review body, or that, when attending his case conferences, he was speaking with a staff member from the Tribunal and a lawyer representing Centrelink.

John is not the only General Division applicant who has told us they feel pressured to withdraw and confused about the role of the Tribunal Conference Registrar. Other clients of SSRV have stated they have felt belittled, overwhelmed and completely unable to participate in these processes alone and that it was not clear to them that the Conference Registrar's role is meant to be independent and impartial.

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20. Our clients also tell us they wouldn't have proceeded with a review application to the SSCSD or General Division without legal representation. Based on our casework experience, we also believe more people would rightfully seek review of Centrelink and SSCSD decisions they disagree with.



The importance of legal representation for our client, Lydia

Lydia* experienced significant family violence during her relationship with Tom. 12 months ago, she courageously left the relationship, with her three children, and spent months living in a family violence refuge as she was unable to find alternative housing. Lydia also suffers from Post-Traumatic Stress Disorder. Despite trying to build a new life for her family, Lydia was struggling financially. She had a Centrelink debt of \$27,000 due to the financial abuse Tom had perpetrated against her. Lydia had appealed her Centrelink debt, however, she was unsuccessful at the SSCSD.

After speaking with Lydia, SSRV formed the view that there were grounds to seek review of the SSCSD decision in the General Division. Lydia was reluctant to proceed with an appeal at the General Division as she had been involved in other court proceedings which had caused her significant distress. Lydia decided to appeal, though, as she had the assistance from an SSRV lawyer.

SSRV provided her representation throughout the proceedings. The balance of the debt was waived (approximately \$15,000). Lydia told us *"I had tried with them so many times. Thank you for believing though, otherwise I would've just probably let them take money from me.... It was the best news I heard after they waived that amount, now I can get on with my life and have money for the kids."*

For Lydia, access to legal representation, particularly at the General Division, was essential.

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21. It is our submission that this gross lack of available legal representation causes an almost complete stifling of the progression of Tribunal precedent to advance the interpretation of social security and family assistance legislation, and ensure it is applied fairly and accurately in all cases. In their 2020/2021 annual report Services Australia conceded that, out of 707 Centrelink (and review) decisions, and 10,531 Centrelink (1st review) decisions, *"the AAT made no decisions that had, or may have, a significant impact on the operations of Services Australia."*⁷

⁷ Services Australia 2020/2021 Annual Report, page 157 <www.servicesaustralia.gov.au/sites/default/files/annual-report-2020-21.pdf>.



Oral decisions

22. Judicial review is of course a fundamental component of any robust administrative review system. Decisions of the General Division can be appealed, on an error of law, to the Federal Court of Australia (FCA). Whilst there might not always be an arguable error of law in decisions of the General Division, it is fundamental that people affected by administrative decisions, including Tribunal decisions, have the ability to understand whether their decisions may be affected by an error of law. The use of oral decisions also prevents the Court from being able to *“properly discharge its functions if the reasons for the decision under review are not set forth”*⁸.
23. s43(2) of the *Administrative Appeals Tribunal Act 1975 (AAT Act)* allows the Tribunal to either make written or oral decisions, regardless of whether they are affirming, or setting aside, the decision on review. Whilst we have not been able to locate any data on the frequency of oral decisions made in Centrelink matters at the General Division, it is our experience that they are not infrequent. The use of oral decisions (which are followed by only a short order confirming the decision, but with no written reasons) stifles access to timely and effective legal advice about appeal options in the FCA.
24. When oral decisions are made in matters involving an unrepresented party, it is very difficult to provide any kind of assessment and advice on judicial review prospects within the allowed 28-day timeframe. Whilst parties in these matters have a right to request written reasons for their decision within 28 days of receiving the oral decision, it is our experience this is infrequently requested by unrepresented people.
25. There is scope (outside of the normal extension of time principles) to obtain an extension of time to file a Notice of Appeal in the FCA, following an oral decision, if written reasons are obtained and they differ from the reasons provided orally in the hearing.⁹ This, on paper, might seem like a reasonable way of restoring review rights for people who are given an oral decision by the Tribunal, but it is limited (both in substance and practicality) by the fact that it requires there be a difference between the written and oral reasons and, in order to even assess whether there is a difference, you need to both request written reasons within 28 days

⁸ *Civil Aviation Safety Authority v Central Aviation Pty Ltd* (2009) 179 FCR 554.

⁹ *Administrative Appeals Tribunal Act 1975*, s44(2B).



and obtain a transcript of hearing, a costly undertaking often beyond affordable for most of our clients.

26. Whilst the use of oral decisions has been described as desirable in circumstances where the complexity of the matter and the materials do not require further reflection,¹⁰ when unrepresented people receive oral decisions, even favourable ones, it also prevents legal and other support services from helping their clients understand the decision, understand whether Centrelink has correctly implemented the decision and understand whether there might be other unexplored legal remedies.

Hannah's experience

Hannah* lives in a remote town in regional Victoria. A few years ago, Hannah was injured at work and has not been able to return to work since. Hannah applied for Jobseeker Payment shortly after the injury. After a short time on Jobseeker, Centrelink imposed a Compensation Preclusion Period (CPP) as Hannah had received compensation due to a workplace accident. A debt was also raised against Hannah due to her receipt of the compensation. Hannah asked Centrelink to waive the CPP, and to reconsider her debt, on the basis of special circumstances, which included serious health and mental health conditions. She had no money left from the compensation and no access to any other form of income. Centrelink refused to waive Hannah's debts or CPP. Hannah then sought review of Centrelink's decision to the SSCSD and subsequently the General Division, without any legal representation.

Hannah was partially successful at the General Division and had her compensation preclusion period reduced. However, the Tribunal made an oral decision and Hannah didn't understand it. She had been at her hearing on her own and didn't understand what had been said. Her decision was then implemented by Centrelink and Hannah felt something wasn't right. She didn't understand the calculation they had used in determining how much her CPP was being reduced by and whether this entitled her to any backpay. It was at this stage that Hannah was referred to SSRV.

When Hannah approached us for assistance, all she had was the Order made by the Tribunal. Not knowing the reasons behind the decision, we were unable to determine whether Centrelink had correctly implemented it. If Hannah had received a written decision, with fully articulated reasons, we would have been able to assist her to determine whether Centrelink had implemented the decision correctly.

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¹⁰ Administrative Appeals Tribunal (26 October 2020), *Best Practice in Drafting*, <<https://www.aat.gov.au/about-the-aat/engagement/speeches-and-papers/the-honourable-justice-garry-downes-am-former-pres/best-practice-in-drafting>>.



The impacts of using non-statutory forms of financial support

27. On occasion, the Australian Government delivers its social security obligations to Australian citizens and residents via payments that are not provided for under the *Social Security Act 1991* and the *A New Tax System (Family Assistance) Act 1999*. This includes payments made via grant schemes, such as the recent COVID-19 Disaster Payment, or the former Jobs, Education and Training Child Care Fee Assistance (JETCCFA). As these payments are not captured by the social security and family assistance legislation and policy, they are not subject to the important statutory review and oversight provided for by that legislation.
28. Payments of this kind are enabled by the general power of the Commonwealth to spend money on grants and programs, sourced in section 32B of the *Financial Framework (Supplementary Powers) Act 1997*. JETCCFA and COVID-19 Disaster Payment are each listed in Schedule 1AA to the Regulations to that Act.
29. A further payment with limited administrative review is the Status Resolution Support Services (SRSS) payment which is administered by Services Australia on behalf of the Department of Home Affairs. The power to make SRSS payments has the same source as JETCCFA and COVID-19 Disaster Payment.
30. Decisions about JETCCFA eligibility were reviewable internally within the Department of Human Services (as Services Australia then was), with no review available to the Tribunal.¹¹ Similarly, Services Australia has limited power to review decisions made about SRSS payments.¹² Services Australia cannot review decisions about eligibility, rate of payment or the band of payment a recipient is in. Those decisions must be made by the Department of Home Affairs.
31. Recipients found retrospectively ineligible for JETCCFA or SRSS payments, or found to have been overpaid, have been issued with debts. The power to issue a debt for social security or

¹¹ Department of Social Services, '6.5 JETCCFA Review & Appeal Process', *Family Assistance Guide* (as available at 7 May 2018) <<https://webarchive.nla.gov.au/awa/20180506214515/http://guides.dss.gov.au/family-assistance-guide/6/5>>.

¹² See the Services Australia Operational Blueprint document 'Review of Decision for Status Resolution Support Services (SRSS) payment 00-506130000', catalogued at <<https://operational.humanservices.gov.au/public/Pages/migrants-refugees-and-visitors/005-06130000-01.html>>.



family assistance payments is sourced in the relevant Acts. JETCCFA and SRSS debts are sourced in the Rule to the *Public Governance, Performance and Accountability Act 2013* (PGPA Act). The PGPA Act provides for a discretionary debt waiver power vested in the Minister for Finance,¹³ but not for any administrative review of decisions made. Our experience is that Services Australia will not review JETCCFA decisions internally either, because they have no jurisdiction to do so.¹⁴ This places a debtor in the irregular position of being held responsible for a debt, with no avenue for review of that decision.

32. We consider that COVID-19 Disaster Payment decisions will place recipients in the same situation as JETCCFA or SRSS payment recipients. Our position is that this creates a danger that potentially thousands or even millions of recipients may face decisions to recover any alleged overpayments of the COVID-19 Disaster Payment, with no meaningful avenue for review of that decision.

33. We consider that the reliance on these discretionary grant-type payments to meet the Government's social security obligations and policy goals is short-sighted and creates a situation where citizens and residents are not able to access any meaningful review of decisions that greatly affect their lives.

Recommendations

Recommendation 1: Maintain the two-tiered independent merits review system at the Tribunal for review of Centrelink decisions.

Recommendation 2: Substantially increase Government funding, including core funding, for specialist social security community legal centres and services.

Recommendation 3: The Tribunal issue a Practice Direction directing Members not to make oral decisions for unrepresented applicants in Centrelink related reviews.

¹³ *Public Governance, Performance and Accountability Act 2013*, s63.

¹⁴ This is contemplated by the Services Australia Operational Blueprint document 'Reviews by an Authorised Review Officer (ARO) 109-03020020', catalogued at <<https://operational.humanservices.gov.au/public/Pages/review-of-decision-and-appeals/109-03020020-01.html>>.



Recommendation 4: The *Public Governance, Performance and Accountability Act 2013* be amended to include a provision that provides for Tribunal oversight of eligibility decisions, and decisions to raise debts under, r 11 of the *Public Governance, Performance and Accountability Rule 2014*.

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