

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Output 1.2

Question No. 28

Senator Crossin asked the following question at the hearing on 31 October 2006:

In relation to Social Security Appeals to the Administrative Appeals Tribunal (AAT):

(a) How is the Government's Model Litigant Obligation, that Commonwealth agencies should "avoid, prevent and limit the scope of legal proceedings wherever possible" followed/ applied in Social Security Appeals Tribunal (SSAT) matters?

(b) In the case of social security matters before the SSAT, who is responsible for the decision to appeal these decisions to the AAT?

(c) On what basis is the decision made whether to appeal?

(d) Are there any guidelines from AGD to agencies outlining the basis for appeals of administrative matters? If so, do these guidelines make reference to the Model Litigant Obligation?

(e) Are there any guidelines from other departments outlining the basis for appeals of administrative matters?

(f) Who represents the Government in social security matters before the AAT?

(g) Is the work shared amongst the panel or dominated by particular firms?

(h) Is a decision made on each case or are cases allocated in bulk to particular firms?

The answer to the honourable senator's question is as follows:

Four agencies are involved in representing the Commonwealth's interests in the SSAT:

- the Department of Education, Science and Training (DEST)
- the Department of Families, Community Services and Indigenous Affairs (FaCSIA)
- the Department of Employment and Workplace Relations (DEWR), and
- Centrelink.

All of the answers below, except that provided in response to question (d), are derived from information provided by these agencies. The Attorney-General's Department has no direct involvement in relation to these matters.

(a) Applicants for payments and recipients of payments can seek review of a wide range of matters in the SSAT. DEST, FaCSIA, Centrelink and DEWR are all subject to the model litigant

obligations in the *Legal Services Directions 2005*, and take those obligations into account in deciding how to conduct proceedings in the SSAT and whether to appeal a decision of the SSAT to the AAT.

FaCSIA has advised that Centrelink, through its Business Partnership Agreement with FaCSIA, is required to act in accordance with the *Legal Services Directions 2005*.

(b) DEST has advised that the decision to appeal SSAT decisions is made by the DEST Legal Branch in consultation with Income Support for Students Branch (ISSB) in relation to matters for which DEST is responsible. Under DEST's Chief Executive Instructions, the Chief Lawyer has final responsibility for the provision of legal advice and services required by DEST.

FaCSIA has advised that, in relation to appeals for which FaCSIA is responsible, the relevant policy area within FaCSIA instructs FaCSIA Legal Services Branch and the Legal Services Branch advises Centrelink whether to appeal a matter to the AAT. Each matter is assessed on its merits by FaCSIA's Legal Services Branch in conjunction with the relevant policy area before a decision is made whether to recommend an appeal. In deciding whether to appeal a case, reference is made to the model litigant obligation.

DEWR has advised that, in relation to matters for which DEWR is responsible, DEWR is responsible for the decision to appeal, with advice from Centrelink legal services.

(c) DEST has advised AGD that the current agreed practice between DEST's legal and policy areas for consultation on appealing social security matters is as follows:

ISSB role:

- (a) to consider whether an appeal may be justified on policy grounds and maintaining programme payment integrity, and
- (b) to consider whether the matter raises policy issues justifying possible legislative change or the issue of policy instructions to Centrelink.

Legal Branch role:

- (a) to consider whether there is a legal basis for an appeal, and
- (b) if so, to consider whether an appeal would be justified, taking into account:
 - (i) the *Legal Services Directions 2005* (in particular, the model litigant obligation)
 - (ii) the prospects of success, and
 - (iii) the cost effectiveness to the Commonwealth of an appeal.

FaCSIA has advised that a decision to appeal is made where it believes there has been an error of law or fact. Other factors are also taken into account, such as prospects of success and economic considerations.

DEWR has advised that it may consider appealing a decision to maintain the integrity of the social security system and where it believes that the correct or preferable decision has not been made.

(d) The Attorney-General's Department does not have guidelines outlining the basis of appeals of administrative matters. However, Appendix B to the *Legal Services Directions 2005*, and the notes to that Appendix, expressly apply to merits review proceedings in tribunals.

(e) DEST has advised AGD that DEST Legal Branch and ISSB are developing a procedure document, which will formalise the process for considering appeals of Tribunal decisions already in practice between the two areas, as outlined in the response to part (c) of the Question.

DEWR has advised that it is currently developing a set of internal procedure documents.

(f) DEST, FaCSIA and DEWR have advised that, for relevant matters within DEST's, FaCSIA's and DEWR's responsibilities respectively, each instructs Centrelink's Legal Services Branch or members of Centrelink's Legal Services Panel (for more complex matters) to represent the Commonwealth.

(g) DEST, FaCSIA and DEWR have advised that the majority of relevant work is done by Centrelink's Legal Services Branch. Remaining work is shared amongst panel providers. Of the panel providers, AGS receives the largest amount of work.

(h) DEST, FaCSIA and DEWR have advised that a decision is made on each case.