ADJUDICATION PROCEDURES WITHIN THE ART

A Client Perspective

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The National Welfare Rights Network, on whose behalf I am here to speak today, is a network of community legal centres that do social security law. We have people in cities and regional areas all around Australia. Our community legal centre workers—some of them are lawyers, some of them are non-lawyers—assist people with social security problems. Our assistance includes going to the Social Security Appeals Tribunal with people in some cases or advising them on how to solve their problem and what to do when they get there. Sometimes people contact us after they have been and we just hear how they went, for better or for worse.

Similarly, we do the same thing with the Administrative Appeals Tribunal. We are probably the nearest thing here today to being the direct voice of these clients.

The first thing I need to say is that administrative review is for consumers; it is not for the government and it is not for the bureaucrats. The whole rationale of administrative review is actually to solve problems for consumers. This is really important because it is their needs and expectations that have to be at the heart of consideration of this bill. Other matters, such as administrative convenience and how tedious it might be to organise the rosters for multimember tribunals, are secondary to the ultimate outcome of better decisions for consumers. They are the ones who should be at centre stage.

Having said that consumers should be at centre stage, what do we do with them? We need to look at the features of consumers. It appears to me that the current bill has been drafted without a lot of thought about what consumers' needs and expectations are. Consumers are going to act and behave totally differently from what the people who have drafted this bill have imagined. Consumers, to cut a long story short, have no idea of what to expect from the administrative review system. If they have any idea, they have got it from American television shows, and that does not help. They have no idea how to prepare: what things to take along, what not to take along, what might be relevant and what might not be relevant. Moreover, they play this game only once. Everybody else in the system is a repeat player, especially decision makers who can frame their decisions in such a way that they contain a lot of useful information in case they are going to be reviewed.

Similarly, that is the case with tribunal members. As for everybody else, assumptions become ingrained, and you forget some of the things that clients need to be told unless, mercifully, they happen to remember to ask about what their experience is going to be.

At the Welfare Rights Centre, we really make a point of asking people—whether or not we went with them—what the tribunal was like and what experience they had. The things that they report back are not what you would expect. Things such as formality make a huge difference to clients. Clients will often say, 'I went into the room. This man came in and everybody stood up. I didn't know that and it threw me.'

We would not think that would be such a big worry, but it sent a blinding light out to the client saying, 'You don't know the processes here. Warning, warning: you're out of your depth,'

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and they clam up. I believe that even the best tribunal members never hear the whole story from consumers. I suspect that, even behind the closed doors of my own office, I hear only a bit more. It is very important to look at the needs of users and how this works. Also, if the system is being redesigned to make it harder for consumers, which I believe this bill does, I believe we are going the wrong way. Consumers are already afraid to go to the tribunal and in fact take a lot of coaxing to go along. If they are not afraid, unfortunately they are overconfident because they think that if they can just see somebody sensible and explain their story the problem will be fixed and will go away. They think the solution is obvious and so are unable to attend to all the necessary preparations. This is the reality of the people who go to these tribunals.

Also, having received a decision they are not happy with or having had a previous unfortunate experience with the bureaucracy, which is usually why they are appealing, they are already a little suspicious that this tribunal is part of the government and so think it is going to be on the government side anyway. They come through the tribunal's doors with a bit of a feeling that might not be able to help them. This is why the system not only has to be utterly scrupulous, utterly transparent and utterly independent but also has to be seen to be such. It is not good enough to have provisions in an Act if we are going to rely on the good graces of the good people in the tribunal to try to avoid or hold off any future influence—it is not good enough. The consumer has to be able to reach that belief when they walk through the door; otherwise, they are not going to have faith in the process. If they do not have faith in the process, the tribunal system is not achieving the ultimate aim. It is a real challenge to bring consumers to the centre of this.

That brings me to the two-tier review, which probably sounds as though it is not much about procedure. However, the two-tier review is about procedure because at the moment we have the Social Security Appeals Tribunal and we have the Administrative Appeals Tribunal for social security cases. If you lose at the Social Security Appeals Tribunal you can appeal straight on—no problems. The reason the current processes are so successful you can observe only by stepping back and having a look at those two tribunals as they work together. It is necessary to see the composite picture to understand how the various disadvantages which are faced by the consumers I have just described are alleviated by the current system.

Currently, in many cases, consumers suddenly have no money and are in a desperate situation. They need a quick decision. Alternatively, they have some long, very complicated disaster that needs to be looked at really carefully, in detail. It is impossible to tell which is the case until they are through the door. You do not know whether you have a problem which you can solve reasonably quickly and needs one of those short time frame decisions or whether you have one of those nightmares—a filing cabinet that is full of files about this person and it is going to take forever to sort out.

With the current two two-tier system, firstly, the quick SSAT is about a one-hour hearing. Clients do almost no preparation; they just show up. It has a highly skilled, multimember panel which has skills to extract everything from this worried person, who has no idea what is relevant and what is not, and then reality test them so that they go out the door feeling they have had a fair go. It does this very quickly. It means that the clients who suddenly have no money can get their decision checked very quickly. This is critical in this area. We know that only 10 per cent appeal, so 90 per cent of people are satisfied with the Social Security Appeals Tribunal outcome at that level. Only 10 per cent need to appeal further. Those 10 per cent tend to be the people who had cases that were not suitable for the very quick SSAT process. Just because there are some cases that are not suitable for the quick SSAT process does not mean you abandon them and deal only with the large number. What it does mean is that you need something else to capture these cases.

The current bill, with its barrier to two-tiered review, (and it is a barrier) basically says that only one level of external review is available unless only one tribunal member heard the matter and it raises a principle that is an issue of general significance. Who decides that? How do you decide that? Consumers will not be able to argue that they have an issue of particular significance. They will not get up and be able to argue that they have an issue of particular significance. Also, I notice when we look at the bill that a decision is made on whether you have an issue of significance, (unless the tribunal automatically refers it up to the appeal panel), by written submissions—they cannot do that either—or if both parties agree that the first level decision had a manifest error of fact or law. I have to say that I have never seen that happen in 13 years. That will not happen.

This is single-tier review for our clients, which basically means that this 10 per cent, this batch of cases that were not suitable for the Social Security Appeals Tribunal, have got nowhere to get resolution. I am concerned about these clients. Yes, I can see why people would say, 'We only want really important cases to get a higher degree of scrutiny,' but when I sit down and try to figure out who is important and who is not or which case has got a significant issue, what it means for me working in a legal centre is that I have to look thoroughly at every single case that comes in my door. There is not enough of me to go around. There is hardly any legal aid in New South Wales for these kinds of cases. These community legal centres I speak of are really small operations. Some of our members of the National Welfare Rights Network have got only one worker in a huge geographic area. The reality is that the scrutiny of the cases to figure out who needs to be assisted so that they can get on to the higher tier is not available; it is not a reality.

Similarly, for the very same reasons I have described, representation for all of these clients is not available either. The loss of this second-tier structure builds in a really serious inequity because consumers stuff up when they go to the tribunal. You just get plain old injustice because they stuff up. They forget to say the critical thing, they do not bring the critical thing or, after they have been to the tribunal, they realise what going to a tribunal is all about but it is too late. They are the people who need to be able to go on to this second tier. Similarly, the ones with important issues are undetectable by me, my colleagues or anyone else. Their issue will never get there. I think this creates a huge injustice.

I think the second tier is critical to getting justice out of administrative review for the kinds of clients we are talking about, the really disadvantaged people who need a huge amount of help but who also need decisions really fast. The only way you can solve this, even though I know it was not the original design, is by what we actually have. What we actually have works really well. It presents a quick sift. It costs $758 per case. It is the cheapest tribunal around but the most effective for the poorest people in the country. I think it is so important that we save this tribunal to work as it does now and similarly enable that small amount of duplication for those people who need some more expansive process. I tried to figure out when I looked at this why on earth we were getting rid of this second-tier anyway, other than maybe if you were cynical you would think it was just cost cutting. I looked at the Administrative Review Council's *Better Decision*s Report—which I think was otherwise a really good report because it recommended representation, it recommended multimember panels, it recommended a whole load of things that are not in this ART Bill— to see why they wanted to get rid of this second tier. What was the reason? Have things changed? Is that reason no longer relevant?

The reasons put forward in *Better Decisions* for blocking that second tier were, first of all, preventing duplication. The evidence is that there is no documented overuse in the social security jurisdiction of appeals to the AAT. That one is out the window. Is it expensive? No, because the SSAT is only $758 anyway, and there is only such a small proportion of people who double up. It is not that. I think it was this one: there are a few problems in the veterans' jurisdiction. I think that is what it was. I think that was really the thing that made them think,

'We don't want this second-tier review.' I do not know for sure, but this is the only one that is left that I cannot quickly dismiss.

The thing is that the passage of time has dismissed that for us. The veterans are out of the ART first tier, but my clients are not. My clients will still suffer with the problem that was put into the report to solve somebody else's problem. This is really unfortunate. I think it is critical. As soon as we do not have two-tier review, we get all these procedural problems.

And the procedural problems that we get are partly because, now that we are at the last tier of review—the only tier of external review—the department wants to be there too. At the moment the Social Security Appeals Tribunal does not have the department physically present. This is a really important matter relating to access. If I had a dollar for every time a client has said, 'And the department will not be there, will they?' before they go to the SSAT, and I have been able to say, 'No, it's okay; just these three nice people around the table will be there,' my Centre would be rich. It is so important to clients—they ask about it all the time. The fact that the department wants to be there, as you can see through the bill, has created these labyrinthine processes that clients will not be able to understand.

It is relevant to a look at the Consequential and Transitional Provisions Bill as it affects social security. One of the few good things we have with the ART is conferences that people can go to before they go to the hearing. But the department does not have to go to them. But if my client does not attend a conference, their appeal is dismissed. This is in the Consequential Amendments Bill for the social security division. The cards are stacked against social security clients. It is not a level playing field. The bottom line is that there are many procedural problems, many trip-wires in this bill, as was mentioned by Kathryn Cronin. To unravel all of the injustices in this bill would require some awesome plan. This bill does not do what it was supposed to do, which was just to amalgamate. It does something worse: it gets rid of the rights of administrative review for ordinary, disadvantaged people.