Child support and the SSAT: An Anglo-Australian comparison

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This article discusses the new arrangements for reviewing decisions of the Child Support Agency, which came into force on 1 January 2007. Since that date the jurisdiction of the SSAT has been expanded to include merits review of agency decisions. There has been bipartisan political support for the introduction of a greater element of external review into the child support scheme. This article examines the new arrangements in the light of the experience of the child support scheme in Great Britain, where appeals against agency decisions have been heard by tribunals modelled on those used for resolving social security disputes since 1993. The British experience suggests that the inquisitorial ethos of the SSAT model, premised on a citizen v state dispute, is not necessarily well suited to dealing with child support disputes, which are typically adversarial in nature.

Introduction

This article examines an important procedural aspect of the reforms to the child support system which have been introduced in the wake of the report of the Ministerial Taskforce on Child Support, chaired by Professor Patrick Parkinson.[1] The introduction of this substantial package of reforms is being phased in over three stages. Stage 1, which commenced on 1 July 2006, involved a number of relatively straightforward measures, such as a reduction in the child support income cap for high income earners and an increase in the minimum payment amount.[2] The stage 2 reforms, which came into force with effect from 1 January 2007, included provision for the independent review of Child Support Agency decisions by the Commonwealth Social Security Appeals Tribunal (SSAT) as well as reforms designed to improve the inter-relationship between the child support scheme and the courts.[3] The major changes to the child support formula itself will follow from 1 July 2008, when stage 3 will be implemented.[4]

The focus of this article is the decision to expand the role of the SSAT to include independent review of agency decisions, one of the key stage 2

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1 Report of the Ministerial Taskforce on Child Support, *In the Best Interests of Children — Reforming the Child Support Scheme*, FACS, May 2005.

2 Child Support Legislation Amendment (Reform of the Child Support Scheme — Initial Measures) Act 2006 (Cth) (No 53, 2006).

3 Child Support Legislation Amendment (Reform of the Child Support Scheme — New Formula and Other Measures) Act 2006 (Cth) (No 146, 2006), Schs 3 and 4.

4 Ibid, Schs 2 and 5–8 inclusive.

measures. The justification for this reform was explained by the Minister in the following terms in the Second Reading debate on the Child Support Legislation Amendment (Reform of the Child Support Scheme — New Formula and Other Measures) Bill 2006:

> Until now, there has been no mechanism for external administrative review of child support decisions except through the courts, which is expensive and time consuming for parents. The new arrangements will improve the consistency and transparency of child support decisions and will provide a review mechanism that is inexpensive, fair, informal and, most importantly, quick.[5]

The parliamentary debates on the 2006 Bill demonstrated unanimous cross-party support for the expansion of the role of the SSAT to include review of agency decisions. The reform was described by Liberals as 'long overdue'[6] and as introducing 'a much greater degree of objectivity into that appeal process'.[7] It would 'improve the consistency and transparency of child support decisions — something that parents have been crying out for'.[8] Labor members likewise welcomed the introduction of 'a transparent means of reviewing child support decisions'[9] which was 'much needed'.[10] This article will explore, in the light of the experience in Great Britain,[11] whether such bipartisan confidence in the potential of the SSAT both to review individual agency decisions and to improve standards of initial decision-making generally is well-placed.

The British experience is highly relevant in the context of the Australian stage 2 reforms as Great Britain has operated an independent appeals process, modelled on the social security appellate system, to resolve child support disputes since the launch of its own Child Support Agency in April 1993. Furthermore, the comparison of the review mechanisms in the Australian and British child support schemes respectively is justified as the two systems share a number of common characteristics.[12] First, they both involve a national administrative agency being charged with responsibility for the assessment, collection and enforcement of child support liabilities.[13] Secondly, both systems use a formula (rather than discretion) to arrive at the level of child

5 Hon Mr M T Brough, Minister for Families, Community Services and Indigenous Affairs, *Hansard*, House of Representatives, No 13, 2006 (14 September 2006), pp 2–3.
6 Mr P J Lindsay (Herbert, Qld, LP), *Hansard*, House of Representatives, No 14, 2006 (12 October 2006), p 22.
7 Mr K J Bartlett (Macquarie, NSW, LP), ibid, p 29.
8 Mrs L E Marcus (Greenway, NSW, LP), ibid, p 36.
9 Mrs J C Irwin (Fowler, NSW, ALP), ibid, pp 19–20.
10 Ms C F King (Ballarat, Vic, ALP), ibid, p 37.
11 In jurisdictional terms the United Kingdom operates two child support schemes — one in Great Britain (GB), and a separate but parallel legislative framework for Northern Ireland. However, for all practical purposes they are identical. All statutory references in this article are to the GB scheme.
12 On the British scheme, see further N Wikeley, *Child Support Law and Policy*, Hart Publishing, Oxford, 2006.
13 See ibid, Chs 5 and 6 on the influence of the Australian scheme on the United Kingdom.

support awards.[14] Thirdly, both schemes exclude the courts' role in child support matters to a greater or lesser degree.[15]

At the outset, however, it is important to acknowledge that there are also some fundamental differences between the Australian CSA and its British counterpart.[16] In particular, the British scheme was retrospective in nature from the start, as policy makers adopted a 'big bang' approach, with the effect that agency assessments overruled pre-existing court settlements.[17] In addition, the Australian child support scheme has always had much closer structural, organisational and above all IT links with the tax system, whereas in Britain, at present at least, the tax and child support authorities engage in only very limited interchange of official data relating to individuals' incomes.[18] These and other various differences between the two regimes have all had an impact on the relative success in operational terms of the Australian CSA when measured against its British counterpart.[19]

This article starts by summarising the development of the British child support scheme and in particular its appeals system. The article also reviews the debates over the years in Australia on the appropriate means of challenging agency decisions. The new stage 2 review arrangements in force from January 2007 are then analysed, drawing on the experience of the British system. In conclusion, this article questions whether the SSAT in Australia will be able to operate in a truly inquisitorial fashion when handling child support disputes.

A brief history of the British child support scheme

The history of the British Child Support Agency has been little short of disastrous, so much so that by comparison its Australian counterpart may be viewed as a resounding success enjoying high levels of public support. The Child Support Act 1991 (GB), as with its predecessor Australian legislation, was intended to deliver child support awards which were set at a realistic level as well as being fair, consistent, transparent and regularly reviewed and updated. As these outcomes were to be delivered by a formula, with only a limited role for the exercise of discretion, Mrs Thatcher's Conservative government followed the Australian model by establishing the Child Support Agency to assess, collect and enforce child maintenance liabilities with effect from April 1993. From the outset, the British CSA has been plagued with

14 See respectively Child Support (Assessment) Act 1989 (Cth) Pt 5 and Child Support Act 1991 (GB) Sch 1.

15 Compare Family Law Act 1975 (Cth) s 66E and Child Support Act 1991 (GB) s 8.

16 See J Millar and P Whiteford, 'Child Support in Lone-Parent Families: Policies in Australia and the UK' *(1993) 21 Policy and Politics* 59 and now T Ridge, 'Supporting Children? The Impact of Child Support Policies on Children's Wellbeing in the UK and Australia' (2005) 34 *Jnl of Social Policy* 121.

17 *Crozier v Crozier* [1994] Fam 114.

18 Information sharing between the GB authorities is hampered both by the incompatibility of agency IT systems and strict privacy laws which restrict the disclosure of tax data. The current proposals for reform of the GB child support system, discussed in outline below, envisage greater use of such data.

19 For comparative data see *Child Support Agency, Child Support Schemes: Australia and Comparisons 2006*, Australian Government CSA, Canberra, 2006. See also Wikeley, above n 12, Ch 6.

severe operational problems, especially with its IT systems, and non-compliance with child support orders has become endemic. The first New Labour administration under Tony Blair, elected in May 1997, acknowledged that the original formula was too complicated, causing long delays in processing applications for child support. Moreover, because of the operation of the social security system, children in the poorest families enjoyed no financial advantage where maintenance was actually in payment.[20]

A White Paper issued in 1999 accordingly set out the Blair government's agenda for reform.[21] According to the Prime Minister, the CSA 'was based on sound principles. But its operation has failed to live up to them.'[22] The proposals included the radical simplification of the formula, the instigation of a wider range of sanctions and tougher enforcement against defaulters, the introduction of a 'child maintenance premium', enabling payees on social security to benefit directly from the payment of child support and a new improved service to be delivered by the CSA. The legislative framework for these changes was embodied in the Child Support, Pensions and Social Security Act 2000 (GB), which further substantially amended (rather than repealed) the Child Support Act 1991 (GB).[23]

The original plan was that the new reformed scheme would commence operations in 2001. In the event, however, serious ongoing problems with the CSA's IT systems meant that the start date was pushed further and further back until eventually the 2000 Act was brought into force as from 3 March 2003. Since that date, all new applications for child support have been dealt with under the 'new scheme' formula. This uses simple percentage rates,[24] similar in principle to the Australian model (at least before the Ministerial Taskforce's stage 3 reforms take effect), which depend on just two variables — the number of children and the payer's income.[25] However, the CSA's existing 'old scheme' caseload remains subject to the original and much more complex formula based on social security rates, which takes account of both parents' incomes and also makes allowance for housing costs. There have been major operational problems in transferring cases from the old (post-1993) scheme to the new (post-2003) scheme, a process known as 'conversion', and from the old to the new IT systems ('migration'). As a result, in December 2006, more than three years after the reforms were launched, the number of old scheme cases (805,700), still governed by the pre-March 2003 law, substantially outnumbered those currently handled under the new rules (584,500).[26]

In the face of this crisis the responsible minister, the Secretary of State for

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20 Traditionally the means-tested income support scheme, which performs broadly the same function as Family Tax Benefit A, has counted child support income on a pound-for-pound basis; in other words, in contrast to the Australian scheme, there has been no additional 'disregard allowance' for such income, or other measures to ensure pass through of child support to payees who are income support claimants.

21 Department of Social Security (DSS) White Paper, *A new contract for welfare: Children's Rights and Parents' Responsibilities*, Cm 4349, HMSO, London, 1999.

22 Ibid, p viii.

23 See N Wikeley, 'Child Support — The New Formula' (2000) 30 *Family Law* 820.

24 Namely 15% for one child, 20% for two children and 25% for three or more children.

25 See further Wikeley, above n 12, Ch 10.

26 Department for Work and Pensions (DWP), *CSA Quarterly Summary of Statistics December 2006*, DWP, London, March 2007, Table 1.

Work and Pensions, declared in February 2006 that 'neither the agency nor the policy is fit for purpose' and announced a two-stage strategy for reform.[27]

First, the CSA published its own *Operational Improvement Plan 2006–2009*,[28] designed to 'stabilise and improve the performance of the agency in the short term'.[29] This included the usual tired promises about quicker and firmer action on defaulters, including greater use of deduction from earnings orders[30] and a more active enforcement policy, involving the contracting out to the private sector of some debt recovery work.[31] The immense scale of the systemic failings blighting the CSA was evident in a highly critical report by the National Audit Office later in the year.[32]

Secondly, Sir David Henshaw[33] was appointed to head a scoping team charged with the task of redesigning the child support system to make it truly 'fit for purpose'. The Henshaw Report[34] and the government's response,[35] accepting the broad thrust of the report, were published simultaneously in July 2006. In summary, the unsurprising verdict of the Henshaw Report was that 'the CSA brand is severely damaged and its credibility among clients is very low'.[36] Henshaw's central proposal was that the existing arrangements should be replaced by a new system designed to tackle child poverty and to promote private agreements for child support, with a residual role for the state.[37] This new scheme would involve tougher sanctions for defaulters and a fresh start for the CSA's successor organisation.

Both the Henshaw Report and the government's initial response were short on detail, although a White Paper published in December 2006 provided a little more by way of information.[38] The White Paper's main proposal was to replace the CSA with a new Child Maintenance and Enforcement Commission (C-MEC), a non-departmental public body run by an independent board. Subject to the necessary legislation being enacted (and a further Bill to reform child support law is anticipated in the course of 2007), C-MEC will implement a range of reforms to the child support system in Great Britain over the period from 2008 to 2013, with the emphasis on encouraging parents to reach their

27 Rt Hon John Hutton MP, *Hansard*, House of Commons Debates, Vol 442 col 1020 (9 February 2006). See N Wikeley, 'Child Support — Back to the Drawing Board' (2006) 36 *Family Law* 312 and 'Child Support — Looking to the Future' (2006) 36 *Family Law* 360.

28 CSA (GB), *Operational Improvement Plan 2006–2009*, February 2006.

29 *Hansard*, House of Commons Debates, Vol 442 col 1021 (9 February 2006).

30 This is an administrative process involving deduction of child support at source from wages, but currently used much less in GB than in Australia.

31 See Contracting Out (Functions Relating to Child Support) Order 2006 (SI 2006/1692).

32 Report by the Comptroller and Auditor General, *Child Support Agency – implementation of the child support reforms*, House of Commons Paper 1174, Session 2005/06, The Stationery Office (TSO), London, 2006.

33 The retiring chief executive of Liverpool City Council.

34 DWP, *Recovering child support; routes to responsibility*, Cm 6894, TSO, London, 2006.

35 DWP, *A fresh start: child support redesign*, Cm 6895, TSO, London, 2006.

36 DWP, above n 34, p 33.

37 Encouraging private agreements is also a major theme of the latest Australian reforms: see, eg, above n 1, Chs 13 and 15.

38 DWP, *A new system of child maintenance*, Cm 6979, TSO, London 2006.

own private agreements over child support.[39] The various British official policy documents fail to address any of the problems which are associated with the tribunal-based system for challenging agency decisions and which are used to inform the analysis in this article of the recent Australian reforms.[40]

An overview of Great Britain's child support appeals system

There is a clear conceptual distinction in the British child support system between complaints and appeals.[41] In short, the complaints procedure is an appropriate avenue to follow when a parent is unhappy with the level of service provided by the agency; in itself, the complaints procedure cannot result in a decision made under the child support legislation being altered, although it may result in the payment of compensation.[42] In contrast, a substantive decision on a child support assessment can be changed only through the three formal (and highly technical) statutory routes of 'revision', 'supersession' or 'appeal', three procedures which have been inherited from the social security jurisdiction. In principle, the fundamental difference between the first two internal methods of review (revision and supersession) is simple: revision is a means of changing an initial decision which was wrong, with effect from the date of that original decision, whereas supersession is a means of substituting a new decision with effect from some later date, for example because of a subsequent change in circumstances.[43] The only external means of challenging an agency decision is by way of appeal to a tribunal. Applicants are not required to exhaust the internal processes of revision and supersession before an appeal to a tribunal is lodged, although as a matter of practice the agency will conduct an internal reconsideration of its decision in any case in which an appeal is lodged.[44]

When child support appeal tribunals were first established under the 1991 Act, they comprised three members, including a legally qualified chair, but since 1999 they have typically consisted of a lawyer chair sitting alone.[45] These lawyer members are either salaried independent full-time judicial office holders (known as District Chairmen) or part-time chairs, typically local legal practitioners.[46] Although the lawyer member usually now sits alone, this is not always the case; he or she may be joined on a two-person tribunal by a

39 For doubts about this policy, see House of Commons Work and Pensions Select Committee, *Child Support Reform*, Fourth Report, Session 2006/07, House of Commons Paper 219-I, TSO, London, 2007.

40 See D Burrows, 'Child Support: What the White Paper Doesn't Say' (2007) 37 *Family Law* 242.

41 Whether this distinction is clear to the CSA's customers is less obvious: see N Wikeley et al, *National Survey of Child Support Agency Clients*, DWP Research Report No 152, London, 2001, Ch 7.

42 There is an Independent Case Examiner — effectively a specialist ombudsman — who deals with complaints which are not resolved through the agency's internal procedures.

43 See further Child Support Act 1991 (GB) ss 16 and 17.

44 An internal review was a prerequisite for an appeal under the original Child Support Act 1991 (GB), but this requirement was abolished by the Social Security Act 1998 (GB).

45 See, generally, N Wikeley, 'Burying Bell: Managing the Judicialisation of Social Security Tribunals' (2000) 63 *Mod LR* 475.

46 See Social Security Act 1998 (GB) ss 6 and 7(2) for the qualifying criteria for appointment.

financially qualified panel member (ie, an accountant).[47] The legislation provides that such a two-person tribunal should sit to hear child support appeals raising 'issues which are, in the opinion of the President, difficult' and which relate to matters such as the interpretation of accounts,[48] typically involving self-employed payers.[49] Appeal tribunals dispose of appeals either following an oral hearing or in the absence of the parties at a 'paper hearing'.

Once the decision had been taken in Great Britain to use social security tribunals rather than courts as the avenue for child support appeals,[50] then the model of the social security jurisdiction led logically to the creation of a further appellate tier in the form of the child support commissioners.[51] The title 'commissioner' in this context is somewhat misleading,[52] as he or she is a judicial office holder appointed by HM The Queen. Moreover, appeals to the commissioner lie exclusively on a point of law[53] and so in Britain only the first instance appeal tribunals offer a form of merits review on the facts. There is no means of avoiding the tribunal with a referral direct to the commissioner. The commissioner will normally determine the case on the papers, on the basis of the parties' written submissions, but oral hearings are held in a minority of cases.[54]

There is, accordingly, a hierarchy of decision-making in the British child support scheme, mirroring the social security model: initial decisions are taken by agency officers, acting on behalf of the Secretary of State, thereafter tribunals and commissioners provide two levels of independent appellate scrutiny, although only the former offer merits review. Tribunal members and commissioners hold judicial appointments which now fall within the remit of the new independent Judicial Appointments Commission in England and Wales[55] — therefore, at least for the purposes of the British understanding of these terms, shorn of the Australian constitutional niceties, the SSAT and the child support commissioner both clearly exercise a *judicial* rather than *executive* function.[56] There is a further right of appeal on a point of law from

47 Exceptionally a further member may be appointed, eg, for the purposes of judicial induction: Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991), reg 36(5).

48 Ibid, reg 36(3)(b). In practice, the president does not exercise this judgment on an individual case-by-case basis; instead, district chairmen typically give directions in appropriate appeals for the case to be listed before a tribunal which includes a financially qualified member.

49 Child Support Commissioner's decision *CCS/872/2000*.

50 See further Wikeley, above n 12, pp 414–16.

51 Not without some adverse comment; see, eg, Lord Simon of Glaisdale's complaint about the 'fragmentation of our system of judicature in order to provide additional specialisation': *Hansard*, House of Lords Debates, Vol 528 col 1810 (16 May 1991).

52 Of course, the potential for confusion will be that much more as and when the Child Maintenance Enforcement Commission (C-MEC) is established. However, the title of the current child support commissioners is likely to change in any event as a result of proposals in the Tribunal, Courts and Enforcement Bill 2007 (GB) to create a new upper tribunal.

53 Child Support Act 1991 (GB) s 24.

54 On the work of the commissioners generally, see T Buck, D Bonner and R Sainsbury, *Making Social Security Law: The role and work of the Social Security and Child Support Commissioners*, Ashgate, Aldershot, 2005.

55 There are separate arrangements for Scotland and Northern Ireland respectively.

56 In contrast, of course, the Australian Constitution precludes the SSAT exercising judicial power; in practice, however, both SSATs perform a very similar function in deciding appeals.

the commissioner to the Court of Appeal (or in Scotland to the Court of Session). This specialist statutory regime means that the ordinary civil courts are largely bypassed in terms of dealing with appeals from the CSA's decisions, although they retain the jurisdiction to make child maintenance consent orders and to deal with paternity disputes and enforcement matters.[57]

The slow road to independent review of child support decisions in Australia

In contrast to the British system, the Australian child support scheme has traditionally prioritised systems of internal review over external and independent merits review. Over the years, several official reports have recommended the introduction of a more accessible form of external review as a means of challenging CSA decisions. The matter was first considered by the Child Support Evaluation Advisory Group in 1992, which indicated a preference for an expedited process of review or appeal through registrars of the Family Court.[58] The Advisory Group also explored the option of review by an administrative tribunal, but this was regarded as unsuitable in the then prevailing circumstances.[59] The Advisory Group also noted the government's announcement of the decision to establish an internal review system, as from 1 July 1992, under which Child Support Review Officers (CSROs) would reconsider formula liabilities on the basis of a departure, or what is now known as a 'change of assessment'.[60] There was, however, insufficient detail available at that stage for the Advisory Group to form a view as to the appropriateness of this procedure.[61]

The CSRO system for challenging agency decisions was examined by the Joint Select Committee on Certain Family Law Issues in its 1994 report (the Price Report) which examined various models for restructuring the review system.[62] The Price Report stressed the importance of seeing reviews as a three-tiered end-to-end process. First, it recommended the creation of a proper internal review system, which it described as an objection procedure, for all administrative decisions and applications for departure from the formula assessment.[63] Secondly, it proposed a new process for external review, a Child Support Appeals Office, with matters being heard by an appeals officer sitting alone.[64] The Joint Committee appear to have envisaged this appellate body as representing an amalgam between a more independent CSRO and the existing SSAT. Thirdly, the Price Report recommended that further appeals from the new Appeals Office should go either to the Family Court (if relating to a point of law) or to a specialist child support division within the AAT (if concerning

57 See further Wikeley, above n 12, Ch 13.
58 Child Support Evaluation Advisory Group (CSEAG), *Child Support in Australia*, AGPS, Canberra, 1992, Vol I, p 264.
59 Ibid, p 263.
60 Child Support (Assessment) Act 1989 (Cth) Pt 6A.
61 CSEAG, above n 58, pp 263–4.
62 Joint Select Committee on Certain Family Law Issues, *The Operation and Effectiveness of the Child Support Scheme*, AGPS, Canberra, 1994, Ch 12.
63 Ibid, paras 12.37–12.43 and Recommendation 76.
64 Ibid, paras 12.44–12.46 and Recommendations 77–80.

an administrative decision).[65] It was only the first of these proposals that was eventually implemented by government, with the result that the objections procedure was grafted on top of the CSRO process. The courts remained as a back-stop, but otherwise there remained no external and independent system of tribunal-based review of agency decisions. As a result, in broad terms there were three principal mechanisms for challenging CSA decisions in place immediately before the reforms implemented on 1 January 2007.

The first, and most important in practice, was the objections procedure, which enabled a different officer of the agency to reconsider the decision in issue and, if appropriate, reach a fresh determination.[66] The objections procedure, introduced with effect from July 1999 as a belated response to the Price Report, remains in place after the January 2007 changes and provides a form of internal review against most agency decisions, including 'change of assessment' decisions by Senior Case Officers, as CSROs are now known (and which are determined de novo at the objections stage).[67] These cases involve parents who feel that the standard formula outcome produces an unfair result in their particular circumstances and so have applied for a 'change of assessment' on one or more of a number of specified grounds.[68] This is certainly one area in which the Commonwealth Ombudsman has been critical of the agency's decision-making and review processes,[69] although hard evidence of inconsistency is lacking.[70]

Secondly, a parent who was dissatisfied with the outcome of the objections procedure could appeal to a court with family jurisdiction.[71] In practice relatively few such challenges have reached the courts.[72] This right of appeal remains in place after 1 January 2007, subject to certain modifications, but now only after review by the SSAT.[73]

Lastly, the Administrative Appeals Tribunal (AAT) had a limited and even more rarely invoked jurisdiction to review certain CSA decisions, largely

65 Ibid, paras 12.47–12.54 and Recommendations 81–4. For criticism of this proposal, see G T Riethmuller, 'Reviewing the Method of Review' (1995) 9 *AJFL* 95 at 119.

66 Child Support (Assessment) Act 1989 (Cth) Pt 6B and Child Support (Registration and Collection) Act 1988 (Cth) Pt VII.

67 *Garnaut v Child Support Registrar* [2004] FCA 1100 (unreported, 25 August 2004, BC200405439). A decision under Pt 6A on change of assessment is not subject to judicial review: Administrative Decisions (Judicial Review) Act 1977 (Cth) s 3 and Sch 1, Item (s).

68 Child Support (Assessment) Act 1989 (Cth) s 117; see further L Young, 'Child Support: A Practical Approach to the Change of Assessment Process' (2002) 8 *Current Family Law* 45.

69 Commonwealth Ombudsman, *Child Support Agency: Change of Assessment Decisions*, Report No 1/2004, Canberra, 2004.

70 The analysis in the Ombudsman's report is not always convincing: see N Wikeley and L Young, '*Smith v Secretary of State for Work and Pensions*: child support, the self-employed and the meaning of "total taxable profits" — total confusion reigns' (2005) 17 *Child & Family Law Quarterly* 267 at 288. As Riethmuller has argued in an earlier context, inconsistency is assumed rather than demonstrated: above n 65, at 118.

71 Child Support (Assessment) Act 1989 (Cth) s 110 and Child Support (Registration and Collection) Act 1988 (Cth) Pt VIII. Courts with jurisdiction include the Family Court, the Federal Magistrates Court, state and territory Magistrates Courts and the Family Court of Western Australia.

72 S Henderson-Kelly, 'Does the Child Support Sacred Cow Milk Parents of Administrative Justice?' (2005) 44 *AIAL Forum* 26 at 34.

73 Unless it is a complex departure case: see below n 106.

relating to procedural matters.[74] This jurisdiction has now been mostly (but not entirely) subsumed by the SSAT.[75]

So what led to the stage 2 reforms of January 2007? Dissatisfaction with the system for reviewing agency decisions re-emerged in 2003 with *Every Picture Tells a Story*, the report of the House of Representatives Standing Committee on Family and Community Affairs.[76] While recognising that the change of assessment process was an improvement on the previous court-based system, the Standing Committee pointed out that this remained an internal review process — accordingly, in something of a throw-away line, it recommended 'a proper external review process similar to the Social Security Appeals Tribunal processes'.[77] Such a review process could have formed part of the remit of the Joint Committee's proposed, but ill-fated, Families Tribunal.[78] The matter was then further reviewed by the Report of the Ministerial Taskforce on Child Support, which was published in May 2005.[79] The Taskforce Report expressed the opinion that 'the continuing absence of an accessible administrative review process external to the Agency appears unsustainable'.[80] The Taskforce Report, recognising the case that had been made for CSA decisions being subject to external review by the SSAT,[81] argued that:

> Inexpensive, expeditious external review in a non-court based, less adversarial, multi-disciplinary style fits well with the new approach that will unfold with the development of Family Relationship Centres.[82]

Accordingly the Taskforce Report, although recognising the potential role for courts in dealing with departure directions, otherwise than as a review of a tribunal decision,[83] called on the government to consider the introduction of some form of external review mechanism, using either an existing or a new tribunal.[84] Strictly, consideration of this issue was outside the taskforce's terms of reference, as Professor Parkinson has since publicly acknowledged.[85] In February 2006 the government announced its decision to accept the

74 Eg, relating to extension of time limits and remission of penalties: Child Support (Assessment) Act 1989 (Cth) ss 98ZE and 98ZF.

75 The AAT retains its jurisdiction to review certain decisions relating to departure prohibition orders (DPOs) made under Child Support (Registration and Collection) Act 1988 (Cth): see s 72T and on control by the courts see ss 72Q–72S.

76 House of Representatives Standing Committee on Family and Community Affairs, Report of the Inquiry into Child Custody Arrangements in the Event of Family Separation, *Every Picture Tells a Story*, Canberra, 2003.

77 Ibid, para 6.133.

78 Ibid, para 6.217 Recommendation 29; but see the Hon J Howard MP, *Reforms to the family law system*, Media Release, 24 September 2004.

79 Above n 1.

80 Ibid, p 249 (section 17.2.2).

81 T Wolffs, 'External Review of Child Support Agency Decisions: The Case for a Tribunal' (2004) 43 *AIAL Forum* 55.

82 Ministerial Taskforce, above n 1, p 249 (section 17.2.3).

83 As well as the agency-based change of assessment process, the courts have an original jurisdiction in certain circumstances to order a departure from the formula: see Child Support (Assessment) Act 1989 (Cth) s 116.

84 Ministerial Taskforce, above n 1, Recommendation 23.

85 Senate Standing Committee on Community Affairs, *Reference: Child Support Legislation Amendment (etc) Bill 2006*, 4 October 2006, CA 53.

taskforce's proposals, and in particular to give the SSAT jurisdiction to review agency decisions.[86]

Review of child support decisions in Australia since 1 January 2007

External review and the case for the SSAT

The case for the reform of the system for reviewing Child Support Agency decisions was not difficult to make. Effective internal mechanisms for monitoring the quality of agency decisions are vital to ensure high standards, but the absence of public accountability through a proper system of external review of agency decisions has always been something of an anomaly in the overall landscape of Australian administrative justice. The question then, of course, was to determine the appropriate model for independent scrutiny of agency decisions. The case for the courts to do so was less than overwhelming, given the funding implications and concerns about the courts' accessibility and expedition. The creation of a wholly new tribunal to deal with such reviews would arguably be both undesirable in principle and an inefficient use of scarce public resources. Once the government had dismissed the idea of a Families Tribunal, the most likely solution was always going to be the adaptation of an existing tribunal. On that basis commentators noted that the obvious contender was the SSAT. As Professor Parkinson has since explained, echoing the SSAT's statutory objective, 'The advice that I gave to the department when they were considering this was, "Whatever you do, make it quick, simple and cheap".'[87]

Most notably, Tammy Wolffs, in an article which clearly influenced the Ministerial Taskforce, identified three principal advantages associated with review by a tribunal. The first was that 'conflict between parents may be significantly reduced'.[88] This was partly because tribunals would operate in a less adversarial fashion and partly because the agency (rather than the other parent) would be the effective respondent. The second was that a tribunal's inquisitorial approach 'would mean that the process would be less formal and less costly'.[89] The third was that establishing a tribunal 'may also improve normative decision-making processes' by providing more timely and comprehensive feedback than review by the courts.[90] Wolffs's conclusion was that the SSAT should be given the role of external merits review over child support decisions.[91] In doing so, she identified a number of reasons why the SSAT was the most appropriate model, not least because Centrelink and the CSA both fell within the same ministerial portfolio and their caseloads were similar in socio-economic terms. Wolffs noted, however, that SSAT procedures would need to be adapted as 'any decision made by the CSA

86 Department of Family and Community Services, 'Child Support Reforms To Deliver Fairer System', Press Release, Canberra, 28 February 2006.
87 Senate Standing Committee, above n 85, CA 53. See also below n 98.
88 Wolffs, above n 81, at 67.
89 Ibid, at 67.
90 Ibid, at 67–8.
91 Ibid, at 68.

affects two parties in diametrically opposing ways'.[92] As we shall see, given the experience in Great Britain, it is arguable that the new Australian arrangements do not pay sufficient heed to this special nature of child support disputes within the wider framework of administrative justice.

An overview of the new review system

Since the implementation of the stage 2 reforms in January 2007, dissatisfied parents have five means open to them to challenge Child Support Agency decisions, as summarised in the agency's glossy brochure *Your Options*. These are (1) using the agency's complaints process (with the further option of lodging a complaint with the Commonwealth Ombudsman); (2) objecting to an agency decision; (3) applying to the SSAT; (4) applying to the AAT; and (5) applying and appealing to court. The focus of this article is on the third of these routes, namely, review by way of application to the SSAT. The details of the new system for reviewing agency decisions were enacted by the Child Support Legislation Amendment (Reform of the Child Support Scheme — New Formula and Other Measures) Act 2006 (Cth).[93] Section 3 of the 2006 Act introduces the various Schedules to the Act, of which the most important in the present context is Sch 3, which amends the review provisions in the Child Support (Registration and Collection) Act 1988 (Cth). The discussion that follows refers to the provisions of the 1988 Act, as so amended, unless otherwise stated.

Part VII of the 1988 Act deals with internal objections procedures for certain decisions, and incorporates provisions relating to internal review which have been transferred over from the Child Support (Assessment) Act 1989 (Cth). The object of this Part, as set out in s 79E, is to provide for internal reconsideration of decisions of the registrar before the decisions may be reviewed by the SSAT under the new Pt VIIA. Part VII is largely a question of statutory good housekeeping, as the overall impact of the relevant provisions is mostly unchanged from the position before 1 January 2007. Thus, in outline, parents can object to certain decisions of the registrar under the Assessment and the Registration and Collection Acts[94] by lodging such an objection within 28 days of the notification of the disputed decision.[95] The objection 'must state fully and in detail the grounds relied on'.[96] The registrar must serve copies of the grounds of objections on other interested parties, who in turn have the right to make representations.[97] Under s 87 of the Act the registrar must then consider the objection and within 60 days either allow (in whole or in part) or disallow the objection. One difference as compared with the previous arrangements is that the registrar is no longer deemed to have made a decision to disallow the objection if the 60 day limit passes without the decision being made.

The brand new Pt VIIA of the 1988 Act deals with SSAT review of agency decisions and comprises seven Divisions. Division 1 provides the simplified

92 Ibid, at 69.
93 No 146, 2006.
94 As specified in the Child Support (Registration and Collection) Act 1988 (Cth) s 80.
95 Ibid, s 81 — on extensions of time see ss 82 and 83.
96 Ibid, s 84.
97 Ibid, ss 85 and 86.

outline and confirms that in exercising its powers the SSAT 'must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick'.[98] Divisions 2 and 3 of Pt VIIA concern applications for review and parties respectively, while Divs 3A, 4 and 5 deal with pre-hearing conferences, hearings and decisions on review. Division 6 consists of a single enabling provision, s 103ZA, which empowers the SSAT executive director and an SSAT presiding member to make general or specific directions for handling reviews under Pt VIIA. The discussion that follows examines the most important provisions in Divs 2 to 5 inclusive.

Parties before the SSAT

Section 101(1) of the 1988 Act defines those who are parties for the purposes of SSAT proceedings: these are the applicant, the registrar, any person who is entitled to apply for a review (which by implication will typically be the other parent) and anyone who has been joined as a party by the executive director. As to the last category, anyone 'whose interests are affected by the decision' may apply to be joined as a party.[99] Two points may be made about this provision as a whole. First, children are specifically excluded from its scope.[100] The second issue concerns the potential breadth of the executive director's discretion to join any person 'whose interests are affected by the decision'.[101] A liberal reading of this rule would enable either parent's new partner to apply to be joined to the proceedings, a prospect which seems less than desirable. Presumably the question of standing will be determined by whether the individual has a genuine personal interest that may be affected *by* the decision, not that they simply have an interest *in* the decision.[102] In the British scheme, however, only 'qualifying persons' — typically the payer and payee — have the right of appeal to a tribunal[103] and the parties to the proceedings are those persons with a right of appeal and the Secretary of State.[104] There is no power to add any other persons as parties and no evidence that the absence of such a power has caused any particular difficulty in practice.[105]

Applications to the SSAT

The Australian SSAT's new review jurisdiction is effectively defined by s 89(1) of the 1988 Act, which provides that a party may apply to the SSAT for review of the registrar's decision under s 87 (under Pt VII) on an objection (or against an application for an extension of time to lodge an objection). The

98 Ibid, s 88. This goal is taken, of course, from the social security jurisdiction: Social Security (Administration) Act 1999 (Cth) s 141.

99 Child Support (Registration and Collection) Act 1988 (Cth) s 101(2). This mirrors the power in Social Security (Administration) Act 1999 (Cth) s 156.

100 Child Support (Registration and Collection) Act 1988 (Cth) s 101(3).

101 See also ibid, s 102, providing for those who are not parties but may be affected by the decision to be given notice of the application.

102 *Dudzinski and Department of Family and Community Services* [1999] AATA 860 at [45]–[52] supports a narrow construction of the joinder rule.

103 Child Support Act 1991 (GB) s 20.

104 Decisions and Appeals Regulations 1999 (GB), above n 47, reg 1(3).

105 See, eg, *Denson v Stevenson* (reported as *R(CS) 2/01*) at [21].

right to seek SSAT review of the registrar's decision is expressly excluded where that decision is that an application for a departure is too complex to be decided within the agency and so the case is to be transferred to court for determination.[106] It follows that an applicant must first exhaust the agency's internal procedures before applying to the SSAT for review. In some cases this will mean no more than pursuing the objections procedure; but a dispute over a change of assessment must be considered first by a Senior Case Officer and then be challenged through the objections process before the applicant may apply to the SSAT — and it is only after the SSAT that (in certain circumstances) the court's jurisdiction may be invoked. This is a jurisdictional assault course,[107] and the Law Council of Australia has expressed the concern that:

> very few people will last the distance if they have a genuine gripe with the system. Most people find that the system wears them down by the time they have been through the review and objection process and do not take it any further.[108]

This concern is supported by the experience of child support reviews in the Great Britain. Under the Child Support Act 1991 (GB), as originally enacted, the independent child support appeal tribunal (CSAT) could not hear an appeal unless the matter had already been the subject of a mandatory internal 'second-tier review' within the agency.[109] This procedure, allied with the Child Support Agency's own administrative inefficiency and operational problems, resulted in serious delays in appeals being heard. The statutory requirement for an internal review in the British scheme was subsequently repealed with effect from 1999. Even since its abolition, only a small proportion of the agency's customers today lodge appeals with the tribunal in Great Britain.[110]

Applications for review by the SSAT are subject to a 28-day time limit;[111] this is the same as the limit operated initially in Great Britain, although since 1999 a 'one month rule' has applied there, which was thought to be clearer and simpler to apply. The 28-day deadline for applying to the SSAT may be extended,[112] although the legislation does not seek to define what may be permissible reasons for a late application for review.[113] Ultimately this is a matter for the exercise of discretion, subject to the guidelines developed in the

106 Child Support (Registration and Collection) Act 1988 (Cth) s 89(2); see Child Support (Assessment) Act 1989 (Cth) ss 98E and 98R.

107 Similarly, Centrelink decisions are subject to Original Decision Maker (ODM) review, followed by scrutiny by an Authorised Review Officer (ARO) before the SSAT can be involved.

108 Mr D Farrar, Treasurer and Executive member, Family Law Section, Law Council of Australia in Senate Standing Committee on Community Affairs, *Reference: Child Support Legislation Amendment (etc) Bill 2006*, 4 October 2006, CA 12.

109 G Davis, N Wikeley and R Young, *Child Support in Action*, Hart Publishing, Oxford, 1998, Ch 6.

110 The CSA's caseload is approximately 1.4 million; in 2005 tribunals heard only 3045 child support appeals (less than 2 % of the SSAT caseload): *Hansard*, HC Debates, Vol 445, col 124W (18 April 2006).

111 Child Support (Registration and Collection) Act 1988 (Cth) s 90.

112 Ibid, ss 91–93.

113 See by way of contrast the Decisions and Appeals Regulations 1999 (GB), above n 47, reg 32 on late appeals.

case law.[114] The application procedure itself is extremely flexible — the application may be made in writing to either the agency[115] or the SSAT, or direct to the SSAT itself in oral form, including by telephone.[116] The desirability of the facility for oral applications, especially by telephone, was questioned by the Law Council of Australia, which argued that the initiation of the review process required careful reflection at a time when 'emotional responses are common'.[117] The counter-argument, of course, is that the system needs to be accessible and responsive to users, not all of whom will necessarily be comfortable in articulating their grievances on paper.[118]

The documentation relating to the review and restrictions on disclosure

Once an application has been properly lodged, the registrar must send to the SSAT executive director a statement about the decision under review, which sets out the findings of fact made by the agency, refers to the evidence on which those findings were based and gives the reasons for the decision.[119] This must be accompanied by the original or a copy of every document or part of a document that is in the possession, or under the control, of the registrar; and is relevant to the review of the decision.[120] This paperwork must be provided within 28 days.[121] However, there is clearly some scope for disagreement here, as views may legitimately differ as to whether a document 'is relevant to the review of the decision'. Certainly tribunal members in Britain complain that the agency fails to produce relevant documentation in a timely and comprehensive manner.

The Australian scheme has the potential for added contention as the registrar may apply to the SSAT for a direction that certain papers be withheld.[122] The SSAT executive director may make such a direction, either on the registrar's application or of his or her own initiative:

> prohibiting or restricting the disclosure to some or all of the parties to a review of the contents of a document or statement . . . that relates to the review if he or she is satisfied that it is desirable to do so because of the confidential nature of the document or statement, or for any other reason.[123]

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114 See *Re Secretary, Department of Family and Community Services and Roberts* (2003) 73 ALD 412; *Laing and Child Support Registrar* (2004) 85 ALD 223 drawing on, eg, *Hunter Valley Developments Pty Ltd v Cohen, Minister for Home Affairs and the Environment* (1984) 3 FCR 334; 58 ALR 305.

115 See further Child Support (Registration and Collection) Act 1988 (Cth) s 95(1) where an application needs to be forwarded to the SSAT.

116 Ibid, s 94. The option of lodging an appeal direct with the SSAT is a marked improvement on the position in Great Britain, where appeals must be lodged with the CSA in the first instance: Decisions and Appeals Regulations 1999 (GB), above n 47, reg 33.

117 Family Law Section, Law Council of Australia, *Submission to the Senate Community Affairs Committee*, para 23.

118 This informal means of application has been borrowed from Social Security (Administration) Act 1999 (Cth) s 154.

119 Child Support (Registration and Collection) Act 1988 (Cth) s 95(3)(a).

120 Ibid, s 95(3)(b).

121 Ibid, ss 95(3) and 96(1).

122 Ibid, s 97.

123 Ibid, s 98(2). See by comparison Social Security (Administration) Act 1999 (Cth) s 169.

This provision in the Bill was roundly criticised by the Law Council of Australia. Its Family Law Section noted the reluctance of the agency 'to require the provision of all relevant financial documents to the other party in change of assessment matters'.[124] There was a clear risk, it argued, that relevant documents — eg, tax returns and business accounts — would be regarded as being of a 'confidential nature' and so not be disclosed. The Law Council's position was clear:

> unless the document would be privileged from production in court proceedings then production should be compellable for SSAT proceedings. Full and frank disclosure of all relevant information and documents is fundamental to the proper resolution of all aspects of financial issues between former partners, including liability for or eligibility to receive child support.[125]

The potential for tension between this power to withhold information and normal principles of procedural fairness is self-evident.[126]

In this context we may note that the British scheme has no such wide-ranging power for tribunals to limit disclosure of relevant documents. On the contrary, the only relevant provision which permits non-disclosure is a narrow rule which enables the address of either parent, or any information which might lead to their being located, to be withheld.[127] In practice the agency in Great Britain can be over zealous in seeking to protect parties' confidentiality, with the result that all sorts of relevant material may be excised from the papers (eg, the name and address of a party's lawyer or accountant).[128] But subject to this rule, *any* relevant evidence must be made available to all parties.[129] Indeed, British law goes further than this, in that the agency has statutory authority to disclose information about one party to a child support assessment to another party where it is necessary to do so in order to explain certain specified types of decision which it has made.[130] As Hale LJ (as she then was) observed, 'the rules of natural justice require that the information needed to explain the end product is communicated to both parties in a maintenance assessment'.[131] In contrast, the Australian provision enabling information to be withheld seems to be drawn unnecessarily widely and can hardly help the cause of justice not only being done, but being seen to be done. The failure to provide any right of appeal against the executive director's decision to issue such a direction only compounds the problem.

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124 Family Law Section, Law Council of Australia, above n 117, para 26.

125 Ibid, para 27.

126 On procedural fairness, see, eg, *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88; 222 ALR 411.

127 Decisions and Appeals Regulations 1999 (GB), above n 47, reg 44; see also the special rule relating to confidential medical evidence in reg 42, which is unlikely to arise in the child support context.

128 See the discussion in Child Support Commissioner's decision *R(CS) 3/06*, where the law governing disclosure was described as 'a bewildering hotchpotch' at [19] per Mr Commissioner Jacobs.

129 See, eg, Commissioner's decision *CCS/1925/2002* (hearing unfair where evidence was sent by payer to tribunal but not disclosed to payee until a few minutes before the hearing over two months later).

130 Child Support (Information, Evidence and Disclosure) Regulations 1992 (SI 1992/1812) (GB) reg 9A(1).

131 *Huxley v Child Support Commissioner* [2000] 1 FLR 898 at 906.

A fair and effective review system obviously requires full and frank disclosure of all relevant documentation. The SSAT's wide power to impose restrictions on the disclosure of confidential information has already been noted and criticised above. However, the new scheme makes provision for the SSAT to require disclosure from parties in three ways. First, the SSAT executive director may ask the registrar 'to provide the SSAT with information or a document that the registrar has and that is relevant to the review of a decision'.[132] The registrar must comply with such a request as soon as is practicable and in any event within 14 days. Secondly, where a person has relevant information, or custody or control of relevant documents, the executive director may ask the registrar to exercise his or her powers under the child support legislation to obtain evidence and information.[133] Lastly, the executive director may require a person to provide information, to attend the SSAT for questioning or to produce relevant documents 'if it is reasonably necessary for the purposes of a review', with the penalty for non-compliance being imprisonment for up to six months.[134]

The first two of these powers exist in the SSAT's normal social security jurisdiction,[135] but there is no equivalent to the third power, as the SSAT has traditionally lacked the power to compel the production of documents by individual parties.[136] The last of these powers is also stronger than its equivalent provision in the British scheme. Tribunals there may issue directions and summons witnesses, but there is no real sanction to ensure that parties comply, other than the drawing of adverse inferences.[137] However, the SSAT's powers are still weaker than those that apply in ordinary civil litigation. Moreover, it is unclear whether evidence obtained by the SSAT from one party in the exercise of these powers has to be disclosed to the other party.[138] The existing internal review process within the agency has been criticised because, so it is said, 'either party can assert facts which are false, exaggerated or misleading but which cannot effectively be challenged'.[139] Much will therefore depend on the initiative shown by the SSAT in requiring disclosure of all relevant evidence, especially using its new power to compel attendance and the production of evidence. In the absence of a proactive stance by the SSAT, there is a serious risk, especially where parties are unrepresented, that factual assertions will not be properly tested under these procedures.

Striking out appeals

We should also note that the SSAT executive director has the power to dismiss an application for review in certain circumstances, including where the

132 Child Support (Registration and Collection) Act 1988 (Cth) s 103J.
133 Ibid, s 103L; see further ibid, s 120 and Child Support (Assessment) Act 1989 (Cth) s 161.
134 Child Support (Registration and Collection) Act 1988 (Cth) s 103K.
135 Social Security (Administration) Act 1999 (Cth) ss 165 and 166.
136 N Bedford and R Creyke, *Inquisitorial Processes in Australian Tribunals*, AIJA, Melbourne, 2006, p 17.
137 Decisions and Appeals Regulations 1999 (GB), above n 47, regs 38(2) and 43; and see Commissioner's decision *R(CS) 6/05*.
138 Note that at present evidence obtained by SCOs under Child Support (Assessment) Act 1989 (Cth) s 161 is not automatically disclosed to the other party.
139 Family Law Section, Law Council of Australia, above n 117, para 31.1.

application is 'frivolous or vexatious'.[140] This particular ground may only be relied upon where the executive director has 'received and considered submissions from the applicant . . . has otherwise communicated with the applicant in relation to the grounds of the application' or 'has made reasonable attempts to communicate with the applicant in relation to the grounds of the application and has failed to do so'.[141] In addition, all of the other parties must consent to the dismissal of the application. The purpose of this provision is said to be 'to ensure that people are given a right to be heard, and that a matter is not dismissed without the SSAT considering the matter before deciding that it is vexatious or frivolous'.[142] However, this right to be heard might be better characterised as a right to have one's submissions considered, which is not quite the same thing, as there is no presumption of an oral hearing to determine the matter. In contrast, the British scheme operates a two-tier system for the dismissal of certain applications. First, the rules provide for either tribunal chairs or clerks to strike out appeals on the basis that they are out of jurisdiction, for want of prosecution or for non-compliance with directions.[143] Secondly, tribunal chairs (but not clerks) may strike out 'misconceived appeals',[144] which are defined as those which are 'frivolous or vexatious' or one which is 'obviously unsustainable and has no prospect of success, other than an out of jurisdiction appeal'.[145] Any such misconceived appeal cannot be struck out in the British scheme without affording the applicant an opportunity to put his or her case at a preliminary oral hearing. There is no such guarantee in the Australian scheme.

The hearing before the SSAT

The Australian legislation encourages active case-management by making provision for pre-hearing conferences where the executive director 'considers that it would assist in the conduct and consideration of the review to do so'.[146] Such a pre-hearing conference may be used to narrow the issues for resolution and to give directions for the hearing of the review. Clearly this type of meeting would also provide the opportunity for the prospect of alternative forms of dispute resolution, such as mediation, to be explored. The British scheme does not operate pre-hearing conferences, although tribunal chairmen may and do issue directions on the further conduct of an appeal. The proactive use of such pre-hearing conferences will be important as a means of avoiding repeated adjournments, which are a serious problem under the British

140 Child Support (Registration and Collection) Act 1988 (Cth) s 100(1)(b).
141 Ibid, s 100(2).
142 House of Representatives, *Child Support Legislation Amendment (etc) Bill 2006, Explanatory Memorandum*, p 114.
143 Decisions and Appeals Regulations 1999 (GB), above n 47, reg 46. On reinstatement, see ibid, reg 47.
144 Ibid, reg 48.
145 Ibid, reg 1(3).
146 Child Support (Registration and Collection) Act 1988 (Cth) s 103.

arrangements.[147] As many as 30% of child support appeals are adjourned in Britain, almost twice the average rate (17%) for social security tribunals generally.[148]

So far as the hearing itself is concerned, SSAT panels will normally consist of two members.[149] Majority decisions are possible, but if the tribunal is evenly split the presiding member has the casting vote.[150] The procedure in the SSAT is meant to be informal; so, for example, the tribunal 'is not bound by legal technicalities, legal forms or rules of evidence'.[151] It is easy for politicians and policy-makers to champion the merits of the informality of tribunals over the undue legalism of the courts, but the reality is more complex.[152] As Genn has warned, analysis of the procedures and outcomes of informal tribunal and court hearings suggests that:

> despite procedural informality, the matters to be decided at hearings often involve highly complex rules and case law; that procedures remain inherently 'adversarial' and often legalistic; that the adjudicative function has not always adapted well to the new forums; that those who appear unrepresented before informal courts and tribunals are unable sufficiently to understand the proceedings to participate effectively; and that decision-making processes for many types of problem remain traditional. The result of these shortcomings is that, in the absence of the conventional 'protections' of formality, such as representation, and the rules of evidence, the cases of those appearing before informal tribunals and courts may not be properly ventilated, the law may not be accurately applied, and ultimately justice may not be done.[153]

Parties to the hearing are entitled to make oral and/or written submissions to the SSAT.[154] A party may also have another person make submissions on his or her behalf.[155] This would imply that a party may have a legal representative,[156] although the Law Council of Australia's argument that this option should be made explicit was rejected by the government. Officials clearly hope that parties will not engage lawyers 'as a review mechanism is a deliberate step away from adversarial court proceedings'.[157] This raises an important question as to how far SSAT proceedings may be regarded as genuinely inquisitorial, an issue which is explored further below. We should

147 Note also ibid, s 103R, implying that a maximum of two adjournments would be the norm.

148 Appeals Service, *Report by the President of Appeal Tribunals on the standards of decision-making by the Secretary of State 2005-2006*, Appeals Service, 2006, pp 47 and 49. On the principles governing adjournments generally, see N Harris, 'Adjournments in social security tribunals' (1996) 3 *Jnl of Social Security Law* 11.

149 The maximum size for an SSAT panel is four members, although the norm is two: Social Security Administration Act 1999 (Cth) s 139 and Sch 3, paras 10 and 11. See also Child Support (Registration and Collection) Act 1988 (Cth) s 103M on designation of SSAT chair.

150 Ibid, s 103U.

151 Ibid, s 103N(1).

152 See Riethmuller, above n 65, pp 106–12.

153 H Genn, 'Tribunals and Informal Justice' (1993) 56 *Mod LR* 393 at 398.

154 Child Support (Registration and Collection) Act 1988 (Cth) s 103C(1).

155 Ibid, s 103C(2).

156 See by analogy Social Security (Administration) Act 1999 (Cth) s 161. In fact only about 6.5% of SSAT hearings involve a legal representative: L Blacklow and R Matthews, 'The Rise and Rise of Tribunals', 8th Annual AIJA Tribunals Conference, Sydney, June 2005.

157 Senate, Standing Committee on Community Affairs, *Child Support Legislation Amendment (etc) Bill 2006 [Provisions]*, October 2006, p 44.

note, moreover, that although parties may make oral submissions, they have no express right to put questions directly to other persons.[158] Submissions may however be made by telephone or other electronic means, for example where a party lives in a remote area or is unable to travel because of illness or disability.[159]

The evident expectation is that hearings will be oral in nature, although hearings may be conducted without oral submissions if all parties agree and the executive director considers that the matter can be resolved fairly on the basis of written submissions.[160] The primacy of the oral SSAT hearing is in contrast to the British arrangements, under which a party must actively opt for an oral hearing, failing which the case will be dealt with at a so-called 'paper hearing'.[161] The SSAT may take evidence on oath or affirmation.[162] This power also exists in the British scheme,[163] although views differ amongst tribunal chairmen there as to the value of this procedure.[164]

There are a number of other differences between the Australian and British arrangements for tribunal review. Children, as well as not being parties to the review, may not give evidence to the SSAT in Australia.[165] The exclusion of children is said to be to protect them 'from being pressurised to support a particular parent's or carer's position'.[166] No such exclusion operates in the British scheme, but in practice children are very rarely, if ever, asked to give evidence. If they do, there are clear guidelines from the case law on whether, and if so how, children should give evidence.[167] The blanket ban in the Australian legislation on children giving evidence may be criticised as being unduly paternalistic and not in keeping with the principles of the UN Convention on the Rights of the Child.[168]

A further and fundamental difference between the two jurisdictions concerns the openness of the hearing. In Australia, SSAT review hearings on child support matters *must* be in private,[169] although the executive director may give directions as to those who may be present, bearing in mind the parties' wishes and the need to protect their privacy. The emphasis given to privacy is reinforced by the executive director's power to make an order requiring any person present not to disclose information obtained in the course of the hearing.[170]

The British approach is very different. At the outset of the child support

158 Contrast the provision in Decisions and Appeals Regulations 1999 (GB), above n 47, reg 49(11).
159 Child Support (Registration and Collection) Act 1988 (Cth) s 103C(3) and (4).
160 Ibid, s 103D; see also s 103E.
161 Decisions and Appeals Regulations 1999 (GB), above n 47, reg 39.
162 Child Support (Registration and Collection) Act 1988 (Cth) s 103G.
163 Decisions and Appeals Regulations 1999 (GB), above n 47, reg 43(5).
164 See E Jacobs and G Douglas, *Child Support: The Legislation, Edition Seven 2005/2006*, Thomson: Sweet & Maxwell, London, 2005, pp 485–7.
165 Child Support (Registration and Collection) Act 1988 (Cth) s 103H.
166 House of Representatives, above n 142, p 119.
167 See the detailed discussion in Jacobs and Douglas, above n 164, pp 483–5.
168 See especially UNCRC, Art 12(1).
169 This reflects the position in social security appeals: Social Security (Administration) Act 1999 (Cth) s 168.
170 Child Support (Registration and Collection) Act 1988 (Cth) s 103Q.

scheme, as in Australia today, tribunal hearings were in private, unless the chair directed otherwise.[171] The default position changed in 1999 with the introduction of a presumption that hearings should be in public — as is the case with social security appeals in Britain — unless the appellant requested a private hearing or the chair made a direction to that effect.[172] That presumption was further strengthened in 2002, when the appellant's absolute right to request a private hearing was abolished. The chair may still decide to convene the hearing in private, for example 'for the protection of the private or family life of one or more parties to the proceedings'.[173] The justification for this further change was to ensure full compliance with Art 6(1) of the European Convention on Human Rights, which provides for a person's civil rights and obligations to be determined by 'a fair and *public* hearing within a reasonable time by an independent and impartial tribunal established by law'. This degree of openness has not caused any problems in practice, as it is extremely unusual, if not unheard of, for members of the public (other than those closely connected with the parties) to attend a hearing. The real problem arises from the fact that any party before the tribunal in Great Britain has the right to be present and to be heard, and may be accompanied by a representative of their choice, whether or not he or she is professionally qualified.[174] This may result in considerable tension at the hearing, for example where a parent insists on being accompanied and represented by a new partner, who then has the right to put questions to the other parent. Whether or not the same phenomenon occurs in Australia, child support hearings inevitably generate strong emotions, so the Australian SSAT authorities are reviewing the security arrangements at hearing venues.[175]

The role of the agency in the SSAT hearing

Arguably the most significant difference between the two schemes lies in the role that the agency may play in SSAT hearings. In Australia, the default position is that the registrar may make written submissions and may *request* permission to make oral submissions, which will be granted if the executive director considers that these would assist the SSAT, given its statutory objective of providing 'a mechanism of review that is fair, just, economical, informal and quick'.[176] In the British scheme the agency always provides a written submission to the tribunal and has the right, along with any other party, to attend the hearing and make oral representations. Accordingly, the agency may send a 'presenting officer' to the hearing. The role of 'presenting officer' was developed in the social security jurisdiction, with such staff being expected to act as a type of lay 'amicus curiae',[177] so as to assist the tribunal

171 Child Support Appeal Tribunal (Procedure) Regulations 1992 (SI 1992/2641) (GB) reg 11(7) (now repealed).
172 Decisions and Appeals Regulations 1999 (GB), above n 47, reg 49(6) as originally enacted.
173 Ibid, reg 49(6)(b), as amended by SI 2002/1379, reg 14(a).
174 Decisions and Appeals Regulations 1999 (GB), above n 47, reg 49(7)(a) and (8).
175 Social Security Appeals Tribunal, *Annual Report 2005–06*, ACT, 2006, p 38.
176 Child Support (Registration and Collection) Act 1988 (Cth) s 103F; see also s 88.
177 Or 'friend of the court'; see N Wikeley and R Young, 'Presenting Officers in Social Security Appeal Tribunals: The Theory and Practice of the Curious Amici' (1991) 18 *Jnl of Law and Society* 464.

and the parties in understanding the relevant law and facts. This has proven to be a problematic role in social security appeals in Britain, given that presenting officers are departmental staff, but they face further difficulties in a child support appeal in that they may feel obliged to explain and defend the agency's decision in front of two warring parents.

It follows that seating arrangements for the child support hearings need to be carefully reviewed. For example in 2006 the Child Support Agency in Great Britain expressly asked the President of the Appeals Tribunals if the presenting officer (PO) could normally be allowed to sit in the position closest to the door. One Regional Chairman indicated to his judicial colleagues that 'the safety of a PO is neither more nor less important than the safety of anyone else in the tribunal room, and it must always be a matter for the discretion of the chairman as to who sits where'.[178] The child support commissioners have emphasised the importance of presenting officers attending tribunal hearings, given 'the tripartite nature of child support proceedings and the need for the tribunal to take account of every possible consideration that may affect the children themselves'.[179] In recent years, much to the irritation of both the appeal tribunals and the commissioners,[180] the norm has been for the department to fail to send a presenting officer to hearings of social security appeals, and non-attendance now appears to be a serious problem in child support tribunals as well. However, when such officers do attend, appeals service chairmen have specifically commended the standard of presentation in child support cases.[181] Their presence serves several purposes: their expertise in the agency's internal processes can assist the tribunal, and their availability for questioning can assist in demonstrating the tribunal's independence, so providing a degree of public accountability.

The decision of the SSAT

The SSAT's power on review is to affirm, vary or set aside the decision; in the last case the tribunal must either substitute its own decision or remit the matter to the registrar for reconsideration.[182] In doing so the SSAT is essentially put in the shoes of the registrar, so it may exercise the same powers and discretions and is subject to the same limits to those powers or discretions.[183] Unlike its British counterpart, the Australian SSAT may make a consent order, for example following settlement at a pre-hearing conference.[184] A written notice of the SSAT's decision must be sent to the parties within 14 days, which

178 Letter dated 1 August 2006 on file with author.

179 Commissioners' decision *CCS/2618/1995*, at [11] per Mr Commissioner Howell QC. This should include taking 'an active role in challenging the case put forward by the parties attending the appeal, and drawing attention to possible opposing arguments or interpretations of the facts'.

180 And also the Council on Tribunals: see *Annual Report 2003/2004*, House of Commons Paper 750, Session 2003/04, London, TSO, p 23.

181 Appeals Service President's Report, above n 148, p 36.

182 Child Support (Registration and Collection) Act 1988 (Cth) s 103S. This is effectively the same as with the British SSAT: see Child Support Act 1991 (GB) s 20(8).

183 Child Support (Registration and Collection) Act 1988 (Cth) s 103T.

184 Ibid, s 103W.

must also advise the parties of their right of appeal.[185] The tribunal must also either advise the parties orally of the reasons for its decision and inform them of their right to request written reasons or give the parties a written statement that sets out the tribunal's findings of fact, the evidence relied on and its reasons.[186] This is similar to the British procedure, under which the parties are informed of the decision and handed a summary typed decision notice on the day, with the right to apply for a full statement of reasons.[187] Although the Australian procedure is silent about any record of proceedings, it is understood as a matter of practice that all hearings will be tape-recorded and that parties will be able to request (on payment) a copy of the transcript. In Britain it is the chair's statutory responsibility to maintain a written note of the proceedings, and parties are entitled to apply for a copy of that note free of charge.[188] In practice this is often an important document for the appellate body (in Britain, the child support commissioner) to consider alongside the tribunal's decision and statement of reasons. As in Britain, however, there is no provision to make orders for costs as between the parties, although the SSAT may order that the Commonwealth pay travel costs associated with the review, typically in attending the hearing.[189]

Appeals from SSAT decisions

In social security matters decisions of the SSAT are subject to further merits review by the AAT.[190] The position is very different in child support cases: a party to a SSAT review of a child support decision has the right of appeal against the tribunal's decision, but on a question of law only, and to a court having jurisdiction, namely, the Family Court, the Federal Magistrates Court and certain state and territory courts.[191] In effect this is similar to the proposed regime for SSAT appeals generally to the AAT which the Senate rejected when the Administrative Review Tribunal Bill failed to pass in 2000. The appeal against a SSAT child support review decision must be brought within the relevant time limits.[192] The legislation does not define 'a question of law', but the term has been interpreted fairly expansively in Great Britain. It includes, therefore, decisions which disclose any of the following errors: false propositions of law, absence of jurisdiction, inadequate findings of fact, inadequate reasons and breaches of natural justice.[193] Although a challenge to the SSAT decision is by way of appeal to a court on a point of law, rather than merits review before the AAT, there is no requirement to seek permission to appeal, as applies in Great Britain. The Australian SSAT, again unlike its British counterpart, also has the power, of its own motion or on application,

185 Ibid, s 103X(1).
186 Ibid, s 103X(3).
187 Decisions and Appeals Regulations 1999 (GB), above n 47, reg 53 – the British rules operate a one month time limit, rather than 14 days, for such a request.
188 Ibid, reg 55.
189 Child Support (Registration and Collection) Act 1988 (Cth) s 103Z.
190 Social Security (Administration) Act 1999 (Cth) s 179.
191 Child Support (Registration and Collection) Act 1988 (Cth) ss 104 and 110B.
192 Ibid, s 110C.
193 Jacobs and Douglas, above n 164, pp 82–91. These are broadly mirrored as grounds for review in the Administrative Decisions (Judicial Review) Act 1977 (Cth) s 5.

to refer a question of law to a court having jurisdiction, but only with the agreement of the executive director.[194] When hearing any appeal, a court may admit further evidence and find facts,[195] subject to the restriction that any such findings of fact are not inconsistent with those made by the SSAT.[196]

The SSAT and child support reviews: an inquisitorial or adversarial procedure?

At this juncture we need to return to the case that was made for external merits review of agency decisions by a tribunal, and specifically review by the SSAT. It will be recalled that Wolffs advanced three arguments for child support decisions to be reviewed by a tribunal. The first two reasons were both associated with the avowedly inquisitorial approach of tribunals.[197] It was said that 'conflict between parents may be significantly reduced',[198] partly because tribunals would operate in a less adversarial fashion and partly because the agency (rather than the other parent) would be the respondent. Wolffs also contended that a tribunal's inquisitorial approach 'would mean that the process would be less formal and less costly'.[199] On further analysis, however, these arguments may be overstated for at least two reasons.

First, as a matter of principle, the notion of inquisitorialism itself is a contested and much misunderstood concept. In the context of Australian tribunals generally, Bedford and Creyke have already observed that:

> The term inquisitorial is misleading to the extent that it suggests that tribunals operate in a mode akin to that practised in civil law systems. The traditional European notion of what 'inquisitorial' means does not translate precisely to the Australian scene, not least because of the need in Australia to provide a more efficient and cost effective form of adjudication than the courts. Australia has set up a hybrid adversarial-inquisitorial process with distinct features.[200]

Bedford and Creyke's conclusion was that Australian tribunals do not operate in a truly inquisitorial fashion, as 'the culture of adversarialism in Australia is too strong for an alternative mode of procedure to be adopted'[201] (although, as ever, much will depend on the qualities of the presiding member). This is a particularly important observation in the context of vesting the SSAT with child support review powers. In short, social security appeals are by definition 'citizen v state' disputes, whereas most child support appeals are, by their very nature, tripartite and many are bitterly contested.[202] We may note in this context that the Law Council of Australia argued that the SSAT is not an appropriate forum to hear an inter partes dispute. The formal reply of

194 Child Support (Registration and Collection) Act 1988 (Cth) s 110H.
195 Ibid, s 110G.
196 Other than findings made by the SSAT as the result of an error of law: ibid, s 110G(1)(a).
197 The third argument relates to feedback to decision-makers — see further below.
198 Wolffs, above n 81, at 67.
199 Ibid, at 67.
200 Bedford and Creyke, above n 136, p 66.
201 Ibid, p 66.
202 This was reflected in commissioner's decision *CCS/2/1994*, where the commissioner advised tribunals to adopt a primarily inquisitorial approach to issues between the payer or payee and the agency, but a primarily adversarial approach to disputes between the payer and payee.

the Department of Families, Community Services and Indigenous Affairs was as follows:

> The SSAT is to review administrative decisions made by the CSA, not to adjudicate inter partes disputes. A parent is objecting to a decision by the Registrar or delegate of the Registrar — they are not actually disputing with the other parent, although the other parent may be joined as a party to the review.[203]

This response is, at best over simplistic and at worst disingenuous. Whatever the formal nature of the proceedings and the status of the various players, a child support review is typically a zero-sum game — any gain by one parent (eg, a successful application by a payer for a change of assessment) means a loss for the other (eg, a consequential reduction in income for the payee). In reality, therefore, the other parent's interests are directly in issue, so reinforcing the culture of adversarialism. Arguably, child support reviews are perhaps best seen as a form of hybrid process. As one British child support commissioner has observed: 'the proceedings may be adversarial as between the two parents but the role of the Secretary of State in child support cases is investigatory.'[204]

Secondly, the British experience has demonstrated empirically the severe practical and legal limits to the inquisitorial process in the child support context. In the same way as its Australian counterpart, the SSAT in Great Britain has traditionally espoused an inquisitorial approach, with an 'investigative function [that] has as its object the ascertainment of the facts and the determination of the truth'.[205] So the tribunal 'is not restricted, as in ordinary litigation where there are proceedings between the parties, to accepting or rejecting the respective contentions' of the claimant and the department.[206] Allied with the 'enabling role' identified by early researchers as a goal for such tribunals,[207] this has been a central tenet of the corporate philosophy of the social security tribunals in Great Britain since the early 1980s.[208] The child support commissioners were quick to reinforce this approach: thus child support tribunals were 'under a general duty to inquire into all material issues to which a case before them gives rise'; furthermore, they were 'there to determine the true entitlements and obligations of the people involved in the cases before them, and are not limited by the opposing contentions made to them'.[209] Indeed, in principle, at their inception, British child support tribunals had the potential to be more inquisitorial than their social security counterparts, in that they were given powers to summon witnesses and to order the production of documents, which originally had no

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203 Senate Standing Committee, above n 157, p 43.

204 *CCS/2861/2001*, at [7] per Mr Commissioner Rowland.

205 *R(S) 4/82*, at [25] per Tribunal of Commissioners. This approach has consistently been approved by the higher courts; see, eg, *R v Deputy Industrial Injuries Commissioner; Ex parte Moore* [1965] 1 QB 456 at 486; [1965] 1 All ER 81. See also *Kerr v Department for Social Development* [2004] 4 All ER 385; [2005] 1 WLR 1372.

206 *R(S) 4/82*, at [25].

207 See especially K Bell, *Research Study on Supplementary Benefit Appeal Tribunals*, DHSS, London, 1975.

208 See Wikeley, above n 45, at 494–5.

209 *CCS/12/1994*, at [46] per Mr Commissioner Howell QC.

parallel in the arena of social security.[210]

However, subsequent research has demonstrated that tribunal practice in relation to both social security and child support appeals has often fallen some way short of the inquisitorial ideal: despite the apparent informality of tribunals, 'procedures remain inherently "adversarial" and often legalistic'.[211] In addition, early research in the field of child support found that tribunals were reluctant to use their extra powers.[212] There is no doubt that in some cases the poor record of the agency in investigating cases at first instance has put the British tribunals in an impossible position. They must somehow reconcile a commitment to an inquisitorial approach, and so judicially 'determine the true entitlements and obligations of the people involved in the cases before them',[213] while striving to avoid the perceptions of bias that may arise if they appear to be doing the agency's job for it.[214] Moreover, as would be expected given the contested nature of such cases, the evidence from Great Britain demonstrates much higher levels of dissatisfaction amongst appellants with tribunals dealing with child support matters than with general social security appeals.[215] But, whatever the agency's performance, the tribunals' efforts to adopt an inquisitorial approach are hindered in practice by the adversarial stance that many parents adopt in child support appeals. The same culture of adversarialism may undermine efforts by the SSAT in Australia to operate in an inquisitorial fashion.

The SSAT and feedback: improving normative decision-making processes

In addition to the perceived advantages of the inquisitorial approach offered by tribunals, Wolffs argued that tribunals 'may also improve normative decision-making processes' in the agency.[216] In short, her contention was that a tribunal such as the SSAT may provide more timely and comprehensive feedback than review by the courts, given the more intensive degree of oversight provided by a tribunal-based appeals process. This argument has been echoed by the official assertion that the new arrangements 'will improve the consistency and transparency of decisions' in the child support scheme.[217] Yet the basis for this bold claim is by no means immediately obvious.

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210 The powers in the Decisions and Appeals Regulations 1999 (GB), above n 47, regs 38 and 43 are now of general application. See Child Support (Registration and Collection) Act 1988 (Cth) s 103K discussed above.

211 Genn, above n 153. See also J Baldwin, N Wikeley and R Young, *Judging Social Security*, Clarendon Press, Oxford, 1992, Ch 4 and H Genn, B Lever and L Gray, *Tribunals for diverse users*, DCA Research Report 1/2006, DCA, London, 2006.

212 See Davis, Wikeley and Young, above n 109, pp 148–52.

213 Above n 209.

214 See Mr Commissioner Powell's warnings in *CCS/61/2003*, at [8] and *CCS/4503/2003*, at [12].

215 See, eg, Davis, Wikeley and Young, above n 109, Ch 7; R Young, N Wikeley and G Davis, 'Child Support Appeal Tribunals: The Appellant's Perspective' in M Partington and M Harris, *Administrative Justice in the 21st century*, Hart Publishing, Oxford, 1999, Ch 13 and Wikeley et al, above n 41, Ch 7.

216 Wolffs, above n 81, at 67–8.

217 Department of Families, Community Services and Indigenous Affairs, *Reforming Australia's Child Support Scheme, Factsheet 4: Stage Two — Changes to the Scheme from January 2007*.

The goal of consistency will be achieved only if tribunals attain high standards in evaluating evidence, finding facts and recording their reasons, and if these standards are then communicated to agency decision-makers. Although SSAT members will be familiar with both the intricacies of social security law and the realities of living on low incomes, they may not necessarily be specialists in the field of child support law. The British experience suggests that an intensive and substantial program of training for SSAT members will be required. Feedback from tribunals also depends on a sufficient volume of cases making it as far as the SSAT as well as an effective system for reporting and promulgating decisions. It is questionable whether transparency will necessarily be improved, given that the agency's senior case officers, who handle change of assessment applications, and objection officers already provide reasons for their decisions.[218]

Indeed, the contention that external review is automatically the best way to improve internal decision-making is a large and contestable claim.[219] While the force of this argument may seem self-evident to the lawyer, there is a considerable body of empirical and theoretical literature relating to administrative justice which suggests the matter is not so simple.[220] There is, for example, a respectable school of thought that internal quality control mechanisms are a more effective tool for improving adjudication standards in government agencies than the availability of external review, whether that be by a tribunal or a court.[221] Furthermore, the decision-making of 'street level bureaucrats'[222] may be influenced more by factors such as their agencies' internal performance indicators than the (relatively remote) prospect of external review. Finally, it would be a serious mistake just to assume that the existence of external review (whether by a tribunal or a court) necessarily results in those standards being communicated to agency decision-makers.[223] Research in Great Britain has shown that the presence and involvement of an agency officer at the hearing is one of the most important means of facilitating such feedback.[224] Thus, the absence of such a role for the CSA in Australia in SSAT hearings may be a formidable obstacle to improving first-instance decision-making. Furthermore, the decision simply to bolt on the SSAT review jurisdiction to the existing CSA procedures means that the opportunity

218 Undoubtedly there is always scope for improvement: see, eg, *W & W* (2005) 34 Fam LR 115 as an example of inadequate reasoning by an objections officer.

219 M Adler, 'Tribunal Reform: Proportionate Dispute Resolution and the Pursuit of Administrative Justice' (2006) 69 *Mod L Rev* 958 at 984.

220 See M Adler, 'A Socio-Legal Approach to Administrative Justice' (2003) 25 *Law & Policy* 323; N Wikeley, 'Decision-making and the New Tribunals' (2006) 13 *Jnl of Social Security Law* 86; G Richardson and H Genn, 'Tribunals in Transition: Resolution or Adjudication?' [2007] *Public Law* 116 at 125.

221 J L Mashaw, *Bureaucratic Justice: managing social security disability claims*, Yale University Press, New Haven, 1983. On the impact of judicial review in the United Kingdom, see S Halliday, *Judicial Review and Compliance with Administrative Law*, Hart Publishing, Oxford, 2004 and M Hertogh and S Halliday (Eds), *Judicial Review and Bureaucratic Impact*, Cambridge University Press, Cambridge, 2004.

222 See M Lipsky, *Street-level bureaucracy: dilemmas of the individual in public services*, Russell Sage Foundation, New York, 1980.

223 See further M Partington and E Kirton-Darling, *Developing the Tribunals Service: Research Issues and Research Lessons — Paper (1): Feedback*, Tribunals Service, London, 2006.

224 Ibid. See also Baldwin, Wikeley and Young, above n 211.

to rethink the respective roles of the senior case officers and objections officers has been missed. However, fine-tuning these existing arrangements, as some commentators have advocated,[225] was never likely to satisfy politicians' demands for external accountability.

Conclusion

The decision to enlarge the jurisdiction of the SSAT to include merits review of decisions of the Child Support Agency is not as unproblematic as it has been presented, as can be demonstrated by reference to the experience in Great Britain. From its very outset in 1993, the British scheme has involved external merits review of Child Support Agency decisions by independent child support tribunals. This has undoubtedly been beneficial in several respects. It has provided a low cost system of scrutiny of agency decisions by expert appeal tribunals. Tribunals also offer a relatively accessible appellate forum when compared with the courts. The further right of appeal in Britain from the tribunal to the child support commissioners has resulted in the development of an important body of precedent in child support law.

There are, however, a number of problems with the child support appellate arrangements in Great Britain. Some of these may be unique to the British scheme and so may not be replicated in the context of the SSAT in Australia. For example, there are significant delays in hearing child support appeals in Great Britain, which are in part due to the unduly complex and cumbersome legislative structure for decision-making and appeals in child support cases and in part because of operational problems in both the Child Support Agency and the tribunal system. Moreover, the absence under the British scheme of any power for tribunals to consolidate all matters relating to those parties in one hearing is a serious problem in practice. This provides ample scope for either party in a child support dispute to wage a campaign of obstruction and prevarication through manipulation of the decision-making and appeals system.

There are, however, important similarities between the two schemes. The most significant is the decision to adapt the SSAT model to accommodate child support reviews. Yet there is a fundamental difficulty with applying the social security model of an inquisitorial procedure to child support appeals. In this context the British experience suggests that the notion that the SSAT will be able to counteract the pervasive culture of adversarialism in family disputes is a vain hope. For many parents the tribunal simply offers them yet another forum in which to have their 'day in court' — with the added bonus that there are no court fees or legal costs. Indeed, there are several features of the new review arrangements in Australia which may actually exacerbate the tendency to revert to adversarial postures in child support disputes. For example, as we have seen, the default position is that the agency will not have an officer present at the SSAT hearing to explain the decision under review. This may simultaneously both reinforce the parties' inclination to see the matter in adversarial terms and undermine the potential for effective feedback to be communicated to agency decision-makers. There are also other structural

225 See Riethmuller, above n 65, p 96 and Henderson-Kelly, above n 72, p 40.

similarities between the two schemes, such as the fragmentation of proceedings in terms of the parties' appeal rights. In particular, tribunals deal with appeals on assessment issues but have no jurisdiction to determine enforcement matters, which remain firmly in the domain of the courts. This raises the spectre of parallel proceedings in tribunals and courts. But the fundamental difficulty remains the tension between the SSAT's purportedly inquisitorial role and the adversarial nature of the great majority of child support disputes. On this issue the lesson from the British experience is very clear — the inquisitorial ethos of social security tribunals translates poorly into the context of child support disputes. In short, you can take an adversarial horse to the inquisitorial water, but it may refuse to drink.

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Shifting the gaze: Will past violence be silenced by a further shift of the gaze to the future under the new family law system?

Zoe Rathus[*]

In 2006 the Australian Government instituted a major transformation of the family law system with the roll out of family relationship centres across the country and changes to the Family Law Act. This article argues that the new system will shift the gaze away from the history of the 'intact family' in ways that may be dangerous for women and children who have left domestic violence. It will suggest that influences on the practice framework of family relationship centres may unconsciously exclude discussion of past violence. Key features of the 2006 Act are also examined and it is suggested that some of these shift the gaze away from evidence of past violence towards post-separation events and a new ideal future. The possible limited effectiveness of the provisions and processes which deal with protection and family violence is explored. If past violence is not fully ventilated the mother's ability to protect the children post-separation will be compromised and inappropriate and unsafe parenting plans, agreements and orders may be made.

. . . forget the past, do a deal, go on for the future, the child must have a father . . .[1]

Introduction

Since 1 July 2006, the Australian family law system has experienced legal and institutional transformation by starting the roll out of 65 family relationship centres and the commencement of the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) (the 2006 Act) — an amendment of the Family Law Act 1975 (Cth). The Federal Government described the 2006

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1 M Hester and L Radford (with M Føgh, J Humphries, A Mette Kruse, C Pearson, K Qaiser and K Woodfield), *Domestic violence and child contact arrangements in England and Denmark*, The Policy Press, Britain, 1996, p 23. The full quotation is from a welfare officer interviewed about her or his experiences with the new Children Act 1989 (UK) which had become operative in 1991:

> . . . it was very optimistic, it was Children Act mode forget the past, do a deal, go for the future, the child must have a father, the highest concept was the child must have contact with its father, anything, any fears were seen as blocking, as ruling the party.