because the determining officer would know the file and the RO would not. This vetting process runs counter to the purposes of the RO concept as defined by Appeals Procedures Instruction 2.4.

3.056 It is perhaps inevitable that, where the claimant does not expressly ask for the RO, his business will be handled first by the counter staff and then by the determining officer or assessor. This may, however, result in depriving claimants of the important services of the RO if they do not know their rights or cannot express their claims. The manager of one Melbourne regional office pointed out that many of the claimants in the area were illiterate or did not understand their rights, and that most RO contacts came either through the DSS social worker or from local welfare organisations.

3.057 Procedures for Handling Contacts by ROs. ROs attempt to provide a decision the same day, but this is not always possible. The claimant explains his complaint, the RO then reads the file to ascertain the basis for the decision made and explains it. The claimant is then able to advance further material relevant to the matter. Depending on the problem, the RO either gives a decision then or indicates when a decision may be expected. In some cases there may be a delay of several days before the RO makes his decision, for it may be necessary to follow up or double-check information. Delayed decisions are given in writing with more detailed reasons than are given for primary decisions, and are accompanied by a statement of appeal rights. Decisions given orally are often not confirmed in writing, though reasons are given and appeal rights explained.

3.058 The Effect of ROs - Do they Reduce Appeals? DSS has taken the view that the institution of ROs has resulted

in the substantial drop of appeals which appears in Exhibit 3.5 (see answer by Director-General to Senate Estimates Committee C, Commonwealth Parliamentary Debates (Senate), Estimates Committees A, B, and C, 18 September 1979, p.94). There is, however, reason to doubt this view and it would be safer to conclude that the activity of ROs has had only a limited effect on the flow of appeals.

3.059 Conditions having a particular effect on appeals have changed substantially during the period since ROs first began to be introduced. 71.6% of appeals in New South Wales 88.8% in Queensland, 67.9% in South Australia, 72% in Tasmania, 76.5% in Victoria, and 73.9% in Western Australia in 1978-79 were on unemployment benefit matters. Many of those appeals related to "work tests" (see paragraph 3.020 et seq. above), but the number of adverse work test reports transmitted to DSS by form SU44 has decreased. It is not known what percentage of unemployment benefit appeals relate to work testing, but in Queensland during November 1977 to March 1978, 49.7% of unemployment benefit appeals (996 out of 1938) were work test appeals (figure taken from submission to Public Service Board in support of increased staffing for Specialist Benefits Unit). Attachment 3.3 sets out the figures on adverse SU44s and then graphs them against the flow of appeals to SSATs in the six States. The correlation suggests that the decrease in appeals may owe much to the decrease in adverse SU44s. ROs cannot reverse a CES assessment in terms of U and SB Instruction 14.101. Exhibit 3.6 indicates that appeals in other areas have increased in accordance with the general growth in claimant population, but unemployment benefit appeals have dropped substantially. There is a clear statistical conclusion that the drop in appeals is a drop in unemployment benefit appeals. Had RO activity been the cause of the overall drop in appeals, this would have been reflected in a drop of appeals in non-unemployment benefit areas. The fact that

the drop is concentrated in unemployment benefit appeals - which ROs are not permitted to influence (save by explaining the reasons for the decision) - plus the drop in adverse SU44s makes it very difficult to agree with the DSS view, cited above. On the information available the ROs can be seen as having had an uncertain though still possibly significant effect on appeals. The significance of such activity will become clearer as further experience of RO activity is gained. It may be inferred from Attachment 3.2 that if all challenges went first to the RO (and if the RO could also reverse SU44 assessments), well over half of the potential appeals would not proceed beyond that point. One important question is, however, to what extent claimants failing before the RO would be discouraged from appealing as distinct from accepting that the RO's decision was the correct or preferable decision (see further, paragraphs 3.080-3.084 below).

3.060 The Effect of ROs - Decisions. Attachment 3.2 shows a varying rate of concession by ROs where decisions are challenged: 45.9% in New South Wales, 34.8% in Victoria, and 52% in Brisbane (unemployment, sickness and special benefit). That Attachment also indicates only a small percentage of RO cases being appealed: 16.2% in New South Wales, 5.0% in Tasmania, and 5.1% in Western Australia. However, only in New South Wales and Tasmania can the latter figure be regarded as reasonably accurate, since the Western Australian figure is only of those cases where an appeal was lodged immediately after RO contact - it does not include claimants who subsequently decided to appeal.

3.061 The Effect of ROs - Do Appellants Go to them? Statistics were kept in Brisbane between 21 April and 12 October 1979 of the number of appellants seen by the RO and the total number of U and SB appeals lodged. 45.2% of appellants had previously contacted the RO. The New South

Wales figures also enable one to estimate the percentage of appeals in which the RO is by-passed - 66.1% of all appeals. This figure is determined by comparing the number of appeals in respect of decisions of individual regional offices in the period subject to the RO statistics with the number of cases appearing in the RO statistics as ones where appeals were lodged. Reasons which may lead a claimant to by-pass the RO would appear from discussion with ROs to include those of distrust of DSS and knowledge of appeal rights. Distrust may result from identification of the RO with the determining officer or a feeling that there is "no change" to be obtained from the regional office or from DSS as a whole. Knowledge of rights might well lead claimants to think first of tribunals, and many welfare organisations appear to encourage their clients to go directly to the SSAT. No empirical study has, however, been made of the reasons for by-passing ROs and further discussion would be speculative.

3.062 Total "challenge-handling" in New South Wales (RO contacts + appeals - RO decisions appealed) from May 1978 to September 1979 was 4774 on an annual basis, compared with 3447 appeals in the preceding 12 months (July 1977 - June 1978 (the two periods overlap by May and June)). In theory, institution of ROs should result in an apparent if not actual increase of challenge-handling compared with the number of appeals previously. There is no information of the extent to which an actual increase in challenge-handling has occurred. There is an apparent increase in New South Wales, but it is uncertain what proportion of challenges handled by ROs would otherwise have become appeals. Are the claimants included in the apparent "challenge-handling" increase new "complainers" or not? An empirical study might be in order here. The available data does not provide an answer to this question.

3.063 Conclusion. One RO consulted by the Secretariat defined the criteria for a good RO as being, and being seen to be:

- apart from and independent of DSS decision-making
- expert in social security
- empathetic with people who seek the RO's decision.

These criteria might often not be met at present.

3.064 Because RO work is such a small part of the substantive position to which it is attached, the aptitude of an officer to provide the quality of RO service sought cannot be expected to be a major element in appointing a person to that position. Because the person actually functioning as RO varies so much, the development of expertise is limited and this increases the chance that a claimant might not receive the desired service. Where the name of the RO is not advised to claimants, the effectiveness of the RO concept is lessened. Filters placed between claimant and RO also reduce the chances of attaining the object of the concept and may further alienate claimants from the Department. It might also be added that since ROs are part of the office which made the original decision, there are pressures on them which might also be contrary to the object of the RO concept. The fact that such little time is spent on RO activity makes it more likely that the function will be seen as a sideline, again tending against the objective of the RO concept.

3.065 The views of ROs ascertained by DSS's survey support the proposition that some of the above criteria are

not being met in a significant number of offices. Few ROs consulted by the Secretariat appeared to lack expertise or empathy, but the need to be and appear to be apart from and independent of decision-making was met only by the two full-time ROs and, to a lesser extent, by regional managers who were ROs. It should be noted that if RO contact is a practical pre-requisite to external review, time spent on RO work would be trebled (on the basis of the New South Wales statistics which indicate that two-thirds of appellants by-pass the RO). This might reduce the risk of the criteria for a good RO not being met. However, the existence of this risk to some degree might well be a concomitant of seeking to have an RO in every office.

Specialist Benefits Units

3.066 Where a claimant is not satisfied with a decision (whether or not the RO has considered it) he may lodge an appeal to an SSAT. This appeal is first re-considered within DSS. Re-consideration is controlled by a Specialist Benefit Unit (hereafter "SBU") in each State. The Victorian procedure for reconsideration differs from that in other States.

3.067 In Victoria, when an appeal is received, it is notified to the SBU in State Headquarters. The SBU then notifies the relevant regional office which forwards the claimant's file. All re-consideration of the appeal tends to be made by the SBU but, where the subject-matter of an appeal has not already been considered by an RO, the Council has been informed by the Director-General that the matter is to be referred to the RO in the claimant's regional office (minutes of meeting of Director-General with Council, 10 August 1978). Further investigations are undertaken and evidence obtained, but this is not done personally by SBU officers, nor is the claimant normally seen by SBU officers

prior to the Department's submission being prepared. The SBU may re-determine the claim. If there is not complete concession, a submission is prepared and (with the file) sent on to the SSAT. The SBU submission sets out the basis of the appeal and the facts as found by the SBU, refutes the claimant's allegations, and sets out brief reasoning supporting the conclusion.

3.068 The Victorian system avoids the failings previously encountered in a number of instances (inadequate re-investigation, re-determination, and submission) and the Victorian SSATs have found that submissions under this system are of a higher general quality than previously. The process promotes achievement of the other roles performed by SBUs (see paragraph 3.073 below) and avoids inconsistencies among ultimate decisions. A number of DSS officers consulted criticised the Victorian process on the basis that it was desirable that determining officers should be required to prepare submissions on their own cases, because if so required, they would be made to think more carefully and would be educated by the process. It was also suggested that further investigation would have to be made locally anyway, so that centralised reconsideration might often involve double handling.

3.069 In other States, the SBU acts as a final co-ordinator or "keyhole" through which all submissions to the SSATs must flow. The appeal used first to be referred back to the regional office and usually the original determining officer, but it is now common for the RO to reconsider the matter. Investigations are conducted at this point and a submission prepared. This comes to the SBU which re-determines the matter or settles a submission for the SSAT. In all SBU processes, particularly difficult cases may be seen by more senior officers. One problem with this process is that reconsideration is largely confined to

the original determining officer or the RO as the case may be. "Checking the file" by senior officers is in principle less likely to result in weaknesses of the case being revealed than is review in toto by the SBU.

3.070 Prior to the introduction of the SBU system, the submission prepared by the determining officer at local level was passed up through the chain, in some States to the Senior Assistant Director (Benefits) or the State Director. It was checked at each level with an eye to its completeness, and whether the claim should be re-determined or an order for further investigation made. In some States, prior to the introduction of an SBU, the submission usually rose no higher than the Assistant Director for the relevant benefit. In other States every submission was considered by a single officer who fulfilled the role of a "keyhole". Under the old system, the submissions varied in quality and informativeness. This variation in turn affected the quality of SSAT review.

3.071 At present there are few face-to-face interviews at the pre-SSAT re-consideration stage. While such interviews are given to some extent throughout the country (particularly where a matter has not previously been to a RO), only in Western Australia does it appear that interviews have been conducted regularly in the past. There, the Executive Officer Appeals (Unemployment Benefit) estimated that he interviewed ten to fifteen per cent of appellants, usually where there was a cohabitation question or conflicting allegations. These interviews resulted in many appeals being conceded. The RO will often have spoken to the claimant face-to-face but this may not be as effective as an interview held at a later stage.

Appeals Conceded Prior to SSAT Consideration

3.072 Where an appeal is lodged and the decision changed prior to the matter's being considered by an SSAT, the new decision is transmitted by DSS to the claimant. Appeal Procedures Instruction 3.20 states that this process "should at no time be described as 'upholding an appeal', particularly in correspondence with the client, it is to be called a lapse of appeal". Where the decision is changed, the file still proceeds to the SSAT which has a responsibility to ensure that the decision is wholly in favour of the claimant or, if not, to consider the case as if the appeal was from the varied decision. The function of checking these appeals is left to the DSS Tribunal member. It is difficult to determine whether a varied decision is wholly in favour of the claimant since checking is wholly from the file and the Tribunal member is hard pressed by his other duties. One DSS Tribunal member felt that the exercise was of very limited value.

3.073 SBUs fulfil other functions beyond reconsidering decisions appealed to SSATs. They are organised into three sub-sections in the larger States: policy and standards, appeals and representations, and benefits control (i.e., detection and prosecution of fraud). A detailed statement of the functions of these sub-sections is set out in Attachment 3.4.

CES Role in Review

3.074 U and SB Instruction 14.101 governs the review of "work test" decisions (see para. 3.020 above). The appropriate procedure was outlined by the Acting Director-General in a letter to the Council's President dated 12 October 1977:

> "Procedures have been agreed upon which will ensure that in these cases the reasons for the appeal are discussed

with the appropriate Employment Officer and that efforts are made to resolve the situation. If the Employment Officer is prepared to amend his decision a new determination will be made so that in effect the appeal will be conceded at that stage.

On the other hand, where the Employment Officer is not prepared to vary his decision, the appeal will be sent to the Appeals Tribunal from the Department with a statement of the position and giving the comments of the relevant Employment Officer. Where the Director agrees with the recommendation of the Tribunal that an appeal should be upheld he may approve that recommendation."

3.075 In practice, a claimant may or may not have been advised that he or she should approach CES to have a decision changed before coming to the RO. Where no such advice was given, the claimant will be told that DSS cannot help until he or she has seen CES, and that he or she should return to the RO if the CES will not alter the adverse decision. Upon the claimant's return, the RO can do little but advise the claimant of his or her right of appeal to an SSAT. Advice of the role of CES shortens this journey by one step. Because the RO role is seen to be largely, if not wholly, futile in work test cases, it is the practice of a number of DSS offices to send out appeal forms to claimants with the adverse primary decision, or advise claimants of their appeal rights and provide them with appeal forms when they first attend on the RO.

3.076 The extent to which CES officers are prepared to change their decisions varies. In one office visited, where a large number of adverse SU44s were issued, a high percentage of decisions were changed on review. It would be logical to expect that where a CES office issues adverse SU44s only upon very clear facts, there would be few

alterations of decisions. Where adverse SU44s are issued on less certain grounds, however, decisions should in theory be changed more frequently. The relationship of local DSS and CES offices also affects the level of CES concession. Where the relationship is close, telephone discussion between the RO and CES officer is often fruitful of change. One DSS office visited did not appear to apply Instruction 14.101 at all but the RO took it into his own hands to determine, after consultation with CES, whether the decision should be changed.

3.077 Officers at most levels in DSS and CES, asked by the Secretariat for their view of the roles of DSS and CES in work test appeals, regarded the present situation as unsatisfactory. The division of responsibility increases confusion as to the roles of the two agencies and has a discouraging effect on claimants even when their challenge is sound. Divided responsibility reduces the likelihood that internal review will fulfil its proper functions. Instruction 14.101 (irrespective of its lawfulness) also goes against the purposes of internal review because it tends to force decisions into external review which could properly be resolved internally.

SOCIAL SECURITY APPEALS TRIBUNALS

3.078 Procedures of SSATs will be discussed in a number of sections. First, the mechanism for invoking review will be outlined. Next, delay in reaching finality and continuation of social security payment pending finalisation of an appeal will be discussed. Thirdly, the constitution of the Tribunals will be considered in detail. Fourthly, the powers and procedures of SSATs will be set out. Fifthly, reconsideration within DSS of the recommendations of SSATs will be described. Finally, an assessment of the "external"

review process will be made.

MECHANISM FOR INVOKING REVIEW

3.079 Appeals Procedures Instructions 2.1 and 2.2 provide

> "2.1. Appeals forms (form TRI.4) should be available at all inquiry counters. The appeals leaflet (see paragraph 1.8) contains a "tear off" request for the appeals form. Clients should be encouraged to use the appeals form, but there is no strict requirement to do so.
>
> 2.2. Appeals may be lodged as follows:
>
> (a) by telephone;
>
> (b) by personal attendance at an inquiry counter;
>
> (c) by letter; and
>
> (d) on an appeals form.
>
> In categories (c) and (d) the letter or the appeals form will be accepted as an appeal without further action on the part of the client being requested."

The new appeals leaflet (see Attachment 3.1) does not have a "tear off" appeal form.

3.080 The introduction to Instruction 2 provides that "the only pre-requisite to lodging an appeal, from the client's point of view, is dissatisfaction with a determination". As a result, there is a small but continuing number of matters coming to SSATs which are not really challenges to decisions at all. It is better that non-appeals should be erroneously regarded as appeals rather than that proper appeals not be recognised.

3.081 It is relevant that one form of advice of appeal

rights widely used in DSS no longer states that claimants have a right to appeal to an SSAT but only that if dissatisfied with the RO's decision, they may ask that he refer the matter to an SSAT (see the notifications reproduced in paragraphs 3.038 and 3.039 above). The present system involves two positive stimuli to bring a matter before an SSAT (one only, if the RO is by-passed contrary to the object of that concept's institution), and it is important that claimants should be aware that it is their right to proceed to an SSAT and should not be left with the impression that appeal is in the gift of the Department.

3.082 A number of respondents to the Council's Consultative Papers expressed concern that ROs might dissuade claimants from appealing to an SSAT. There are many shades of dissuasion, particularly when claimants are unlikely to be assertive of their rights. While it would be seldom if ever that blatantly improper advice against appeal would be proffered by a DSS officer (there is no benefit to him or her in doing so, as one senior DSS officer put it), dissuasion can occur by:

- expressing an opinion as to the likelihood of success before the Tribunal

- raising matters of opinion into findings of fact

- presenting Instructions in Manuals as equivalent to enactments (failure to distinguish between the two is not uncommon in DSS as in other Departments)

- stating the reasons for the decision erroneously.

3.083 It may have occurred by inadvertence, but the change in phrasing of the introduction to Appeals Procedures Instruction 2 from "it is wrong" to dissuade persons from appealing, to "Officers ... should not" so dissuade persons could influence officers to be bolder in expressing views which might have the effect of dissuading claimants from appealing. Instruction 2.4 of the present Appeals Procedures reduces but does not wipe out the effect of the above statement when it provides that "Under no circumstances should the Review Officer attempt to dissuade a client from lodging an appeal". The departmental emphasis on ROs as a means of "filtering out" appeals might also have an effect in leading officers to paint a picture to claimants which would tend to dissuade them from appealing.

3.084 Explanation of the reasons for decisions is closely linked to challenge of decisions; a claimant might decide to appeal only after the reasons have been explained. If the reasons are not explained by the officer who made the decision concerned, but by a more junior counter officer, then there is a danger that claimants inadvertently may be dissuaded from appealing by inaccurate presentation of the reasons. This is an area where particular care is necessary.

DELAY IN FINALISING APPEALS
AND CONTINUATION OF PAYMENT

Delay

3.085 Exhibit 3.7 sets out the average time taken from lodging of appeals to their being finalised.

Exhibit 3.7

AVERAGE TIME TAKEN TO FINALISE APPEALS

(in days)

Period Quarter ended	State							
	NSW	Vic	Qld	SA	WA	Tas	NT	ACT
9/77	73.9	74	41.7	63.2	45.75	29.75	170.5	115.07
12/77	68.2	47	34.0	55.9	37.74	24.57	141.3	99.45
3/78	75.42	50.73	39	50.2	41.72	26.58	96.7	84.42
6/78	91.6	34.10	33.3	51.06	46.29	19.22	85.4	79.77
9/78	75.63	28.16	28.4	54.5	55.62	21	97.9	92.15
12/78	70.21	25.66	37	52.5	43.22	27.19	106.1	63.65
3/79	56	38.8	47.3	36.1	57.48	25.58	39.9	56
6/79	63.01	41.78	27	31.4	43.9	23.8	41.7	80.33

Finalisation might occur immediately (where the department concedes the claim without SSAT consideration), or within a few weeks (where the SSAT rejects the appeal), or some weeks (where a recommendation is accepted at State Headquarters) to months (where DSS central office is called in to decide whether to accept or reject an SSAT's recommendation favourable to the claimant) later. Average figures are therefore misleading; a few cases have taken almost a year to finalise and this distorts the average. Exhibit 3.7 does, however, yield some conclusions.

3.086 Leaving aside the New South Wales SSAT (a large percentage of whose favourable decisions are referred to DSS Central Office for consideration), the delay is generally 6 weeks or less. That is a period which is undesirably long for impecunious claimants, but represents fairly rapid decision-making given the physical requirements of obtaining

files, checking information, preparing submissions, and consideration by the Tribunal and, where necessary, reconsideration by DSS. The frequency of holding telephone or attended hearings with claimants does not appear to add more than a week to the delay (save in New South Wales and the A.C.T. where the Tribunal's reluctance to reject an appeal without hearing from the claimant often adds two weeks to the time during which the matter is before the Tribunal).

3.087 There are three stages in the appeal process. First, preparation of the case for the SSAT by DSS, secondly, time before the Tribunal, and thirdly, reconsideration of the Tribunal's favourable recommendation by DSS. DSS aims at completing preparation of the case within 3 weeks of lodgment of an appeal and actual periods in the States are approaching or have reached that time. An SSAT can review a case on the file the day after it is received from DSS. However, the mode of operation of all Tribunals means that a decision whether to hear the claimant cannot be made until the file is received from DSS, thus adding at least a week to delay where there is to be a hearing. As is stated in paragraph 3.107 et seq. below, the mode of SSAT fact-finding causes delays which a process more committed to hearings might avoid by enabling fact-finding to be organised in advance of DSS completing preparation of the case. Finally, delay caused by DSS reconsideration of SSAT recommendations is inevitable given the present powers of the SSATs but would be eliminated by conferring on SSATs a power of decision (though other delays while appeals are before the Tribunals might be engendered thereby). There would appear, therefore, to be room for expediting finalisation of appeals, particularly by changing the role of the Tribunals.

Continuation of Payment

3.088 Appeals Procedures Instruction 1.9 provides as follows:

> "1.9. In certain circumstances payment of pension, supporting parent's benefit, sheltered employment allowance or handicapped child's allowance may be continued pending the hearing of an appeal. Where the payment is to be reduced or cancelled as a result of a decision which is based on the formulation of an opinion or in the exercise of a discretion payment may continue at the existing rate if an appeal is lodged within 14 days of the date of the advice to the pensioner/beneficiary/allowee."

Instruction 1.10 states that claimants should be advised of the power to continue payment when a decision falling within Instruction 1.9 is notified. 1.10 is inconsistent with 1.9 in that it states that payment "will" continue whereas 1.9 uses "may". The procedural instructions (Instruction 75/8199 of 16 September 1975) make it clear that payment is continued whenever an appeal is lodged within 14 days in respect of a decision falling within Instruction 1.9 above. There are, however, likely to be variations in appreciation of the situations in which the conditions of 1.9 are met. Thus, Instruction 75/6908 of 11 September 1975 provides that there is to be continuation of payment where the adverse decision is based on cohabitation, but not when cohabitation is admitted. Where payment is not continued pending finalisation of an appeal, there is special need for proceedings to be dealt with swiftly.

3.089 There are five social security payments (other than funeral benefit) which are not covered by Instruction 1.9: family allowance, unemployment, sickness and special benefits, and rehabilitation allowance. Family allowance is not a subsistence income so that continuation of payment might not be so important, but the amount of the allowance

and the fact that it replaced tax deductions for dependent children suggests that it is nonetheless an important income for the underprivileged. Unemployment and sickness benefits are excluded from the continuation provision because they are short-term payments for which eligibility must be continually established. It was considered that to extend the scheme to them would be to encourage appeals merely in order to remain on benefit. Special benefit is discretionary and it was considered that continuation would be inappropriate because there would be cancellation of payment only when the circumstances giving rise to the grant had changed. Rehabilitation training allowances are subsistence payments, though it would ordinarily be the case that people in receipt of an allowance would otherwise have been eligible for another social security payment, e.g., invalid's pension. The Department automatically assesses persons whose rehabilitation training allowance is reduced or cancelled for another pension or benefit for which he or she is eligible.

3.090 Two questions arise. First, should the power to continue cancelled, suspended or reduced payments be restricted as to payments which may be the subject of continuation? Secondly, should there be a power to make interim decisions which would, inter alia, authorise commencement of payment (this is currently beyond the Appeals Procedures Instruction)? (Both questions are considered in paragraphs 5.017-5.019 of the Council's Report).

3.091 Reference is made to Canada where automatic continuation of payment is provided in certain circumstances (see Part 4, paragraph 4.038). Reliance upon discretionary powers to continue payment or to make interim decisions to commence payment is an alternative to automatic payments pending finalisation of appeals. Discretionary powers

enable consideration to be given to the particular situation of the appellant and his or her need for payment.

ORGANISATION AND CONSTITUTION OF SSATs

Structure

3.092 SSATs were established as a result of Ministerial decision and commenced operation on 10 February 1975. They have no legislative basis and their "constitution" is the Appeals Procedures Instructions already referred to. There is an SSAT in each State and in the two internal Territories. They have no national organisation, though meetings of Tribunal members have been held. Within each State or Territory there is a Chairman of the Tribunal, though there may be several SSATs in the State operating with different chairmen. A permanent division of members into Tribunals occurs in New South Wales, Victoria, and Western Australia. In Queensland, the Tribunal is made up ad hoc of members available on a given day and selected by the Chairman. Though there are members for two full Tribunals in South Australia one of the members seldom sits, so ad hoc Tribunals are formed. Tasmania and the Territories have only one Tribunal each.

Constitution

3.093 An SSAT is constituted by a full-time officer seconded from DSS and two part-time members; one with experience in each of the legal and welfare fields. There is no instruction as to who is to be Chairman of the State or individual Tribunals; Tribunals elect their own Chairmen. Initially, the Departmental member was elected Chairman in Queensland and Western Australia, and a lawyer was elected in other States and the Territories. When the Western Australian Chairman retired, the Tribunal elected one of its

lawyer members Chairman. The Departmental member remains the Chairman of the Queensland Tribunal.

3.094 Originally, members were simply appointed to the Tribunals for no fixed term. Accordingly, members held office at pleasure of the Minister, though there was no case of dismissal. More recently, members have been appointed for, or placed upon, two year terms. Processes of appointment have been formalised and it is now customary for local law societies to be consulted and assist in selecting legal Tribunal members. Departmental members have in a number of cases returned to the Department on promotion, in two cases to head the appeals sub-section of the Specialist Benefits Unit of the State.

3.095 The presence on the Tribunal of a full-time DSS officer has led to controversy. It has been variously argued that his presence means that justice is not seen to be done, that he is biased against appellants, and that it is only through his presence that the Tribunal can come to grips with the difficulties of the social security jurisdiction.

3.096 The Departmental member is in a position to influence the other Tribunal members, though the experience of the Tribunals is that influence has operated both ways. The possibility of the DSS member influencing the other members is greater if the DSS member is the Chairman.

3.097 The Law Council of Australia's Report on Social Security Appeals (op. cit.) noted the lower proportion of cases in which the Queensland and Western Australian Tribunals (both then under DSS Chairmen) recommended favourably to the appellant and in which their favourable recommendations were rejected by DSS, compared with other Tribunals with legal Chairmen (see p.11 of the Report). The

Committee traced this difference to the influence of the Chairmen (ibid.), accepting the findings of Professor Mossman ("Review Procedures" in Essays on Law and Poverty: Bail and Social Security (A.G.P.S., 1977), p.77) that the Queensland and Western Australian Tribunals perceived their role as one of correcting errors within the framework of the Act and Manuals of Instructions rather than ensuring that the Act is administered fairly and properly. This was seen to reduce their factual independence from DSS.

3.098 While the above observations may have been correct, the views of Tribunal members as well as the observations of the Secretariat agree that the DSS members maintain an independent position and have not seen their role as being to persuade other members to uphold the Department's decisions. Just as a member with social welfare experience brings an understanding of how a claimant came to act in the way he or she did, the Departmental member brings an understanding of how the determining officer came to act in the way he or she did. Consequently, the way in which a DSS member may approach an issue or fact situation differs from that of other members. On the other hand, the mere fact that the Tribunal includes a Deparmental member does give the impression of injustice and is undesirable for this reason.

3.099 Presence of a DSS member might be appropriate despite the appearance of injustice, if it were necessary for the proper functioning of the Tribunal. This is doubtful. In so far as the DSS member is there to impart information on the rules and processes of DSS, this information might well be given as well by a Departmental advocate or, if all aspects of adversary procedure are to be avoided, by an officer acting as Tribunal clerk in the same manner as Justices' Clerks in England, i.e., the clerk would offer advice as to relevant matters but leave it to the

Tribunal to discuss and determine the result. This is more or less the present role of the CES liaison officer (see paragraph 3.115 below).

3.100 The presence of legal and social welfare expertise is generally seen to be desirable on social security tribunals (see the constitution of Tribunals in the United Kingdom, Canada, and New Zealand (Part 4, paragraphs 4.020, 4.040, 4.045 and 4.072 below). Because issues often turn on value judgments, a multi-member tribunal is seen to be valuable. Because there are issues of law of some complexity arising, legal expertise is important. Because appellants in social security appeals are likely to be of a very different class from legal and DSS members of the Tribunal and live in situations which often are beyond the experience of those members, there is need for a member with an affinity for and understanding of the situation of claimants. Apart from substituting a "general" member for the DSS member, the only suggestion made to the Secretariat for a variation of membership was that on occasions it may be enough that the Tribunal consist of one person, though persons suggesting this differed both on whether that person should be a lawyer or a "social worker", and on when there should be one-member tribunals.

Administration

3.101 The full-time DSS member is responsible for the administration of the Tribunal. Originally, the Tribunals were staffed to enable them to undertake fact-finding by inquiry or correspondence as well as to monitor the progress of cases and maintain files on appeals. At the beginning of 1977 there were 21 staff members for the Tribunals throughout Australia. In September 1977 the division of functions between Tribunals and DSS was changed and most of the staff brought back into the Department proper. There

has been some later increase in SSAT staff which at December 31, 1979, numbered 19 plus the full-time members. In general today, all investigation of facts is undertaken by DSS staff at the request of the Tribunals. Only a very brief file is kept by the Tribunals on each case, so obviating the need to maintain staff for filing. This represents a shift of responsibility for work rather than an elimination of work and reduction in staff.

3.102 It may be that the accuracy with which the Tribunals find facts has not been changed by this shift of responsibility, but in limiting the ability of the Tribunals to conduct their own investigation of the facts, DSS has reduced the independence of the Tribunals.

THE POWERS OF SSATS

3.103 The SSATs are not established by enactment. They have no legal power to decide the cases coming before them. In the absence of such power, the Tribunals can only make recommendations and so are exposed to the danger of becoming little more than another level in the process of "passing up" decisions through the Department.

3.104 The Tribunals have been given one de facto right to decide. Appeals Procedures Instruction 3.12 authorises SSATs to advise claimants of their decisions where they decide to recommend dismissal of appeals. SSAT recommendations that appeals be allowed are considered by DSS, which has the ultimate power of decision (for a further discussion of this reconsideration see paragraphs 3.130 - 3.135 below). The percentage of cases where DSS rejects SSATs' recommendations favourable to claimants has varied from time to time and from Tribunal to Tribunal. Statistics on rejection of recommendations appear in Part 2 Exhibit 2.4 referred to in paragraph 2.011 above. Overall, these

statistics indicate that favourable SSAT recommendations have been substantially accepted by DSS, though rates of rejection as high as those in 1978 and for the New South Wales and Australian Capital Territory Tribunals, cast doubt on the effectiveness of the Tribunals within the Departmental context and give substance to views that SSATs are merely another level in "passing up" decisions. These factors again suggest the absence of independence of SSATs from the Department.

3.105 The variations among Tribunals can be seen as reflecting the assessment made by Mossman of the goals set by the various SSATs for themselves (see paragraph 3.097 above) and the further element that, once it is clear that the Director-General will not accept a favourable recommendation in a particular type of case, many Tribunals cease to make recommendations of that type. Once more independence is shown to be compromised. With the introduction, as from 1 April 1980, of limited jurisdiction for the AAT (see paragraph 1.001 of the Council's Report), it may be expected that those Tribunals will reverse their practice and make favourable recommendations in the knowledge that the Director-General's decision is not final. The variation in percentage of recommendations rejected might also be related to the practice of some SSATs of hearing every claimant (see paragraphs 3.108 to 3.110 below). Where the file does not reveal all that is understood by the SSAT as a result of a hearing (as is generally the case), it might be that DSS would reject the recommendation on a supposed inconsistency with the facts. The marked reduction in rejections in the December 1978 quarter and since then is significant. Continuation of this lower level of rejection cannot be assumed.

Documentation

3.106 The Tribunal Chairman has before him the full DSS file on the claimant, while the other members have only selected documents. In Western Australia and South Australia, the other members have the appeal form, the Department's submission, and other relevant documents taken from the DSS file. In other States only the appeal form and DSS submission are provided to other members. Only two copies of the appeal form are available to the Queensland Tribunal members, so that one member does not have it before him (although it can be passed to him to see). Where a member requests, or where it appears to be valuable for reaching a decision, the DSS file will be passed to other members. It is usual for the Chairman to read out extracts from the file relevant to the case in hand.

Consideration of Appeals

3.107 The manner in which Tribunals are to consider appeals is not prescribed by the Appeals Procedures, though Instruction 4.3 sets out some parameters as follows:

> "4.3. The procedures of the Appeals Tribunals are entirely at the discretion of the Tribunals themselves. However, the following points should be noted:
>
> (a) The Tribunal is not required to hold a hearing in any particular case unless the claimant insists on such a hearing.
>
> (b) Where a hearing is conducted, it is at the discretion of the Tribunal as to who is permitted to attend the hearing. (See also paragraph 4.9 below).
>
> (c) The Department and the claimant may be represented before the Tribunal at hearings, but not by a legal practitioner. (See also (d) below).

(d) If a Member of Parliament (State, Federal or Territorial) wishes to represent a constituent before the Tribunal he should be permitted to do so even if he is a legal practitioner.

(e) Normally an appeal should be lodged within six months of the date of the determination under appeal. However, the Tribunal has the discretion to decide to hear an appeal lodged outside the six months period if it regards the reasons for the late lodgment to be reasonable.

(f) The Tribunal attempts to ensure that a "court room atmosphere" does not exist at hearings.

(g) Where for reasons such as illness or conflict of interests, one member of the Tribunal is unable to participate in a particular case, the Tribunal operates as usual with the two remaining members. If, in such cases, the Tribunal members cannot agree on a common recommendation, the views of both members will be forwarded to the Director-General."

The Tribunals fall into three general patterns of procedure: New South Wales and the Australian Capital Territory, Queensland, and other Tribunals. The conduct of attended hearings of all Tribunals but that of the Northern Territory (which has not been observed) is discussed in paragraphs 3.108 to 3.114 below.

3.108 NSW and ACT. The New South Wales and A.C.T. Tribunals have distinct stages in their consideration of appeals. First, the file is reviewed and a decision is made on how to contact the claimant and what to tell him or her. All claimants are written to and invited to contact the Tribunal by telephone (reverse charges) or attend for a hearing on a specified day and time, usually ten days later. At one stage the Tribunals used to set out the full case put

by DSS in its submission, but it was found that this was too daunting to claimants and so now only a truncated statement of the case is made. The Tribunal might at this stage initiate further investigation of the facts either by using DSS officers or, less frequently, by making their own inquiries.

3.109 When the claimant contacts the Tribunal by telephone, the full case against him or her is explained and the claimant is invited to comment upon and rebut it. The conversation is normally in a question and answer form. The telephone call may take place when all the Tribunal is together, in which case it is heard by the whole Tribunal per conference telephone. Where the call is at another time, it will be received by the DSS member or, in his absence, by an officer of the Tribunal's staff, and the content of the conversation will be reported to the whole Tribunal. An estimated 80% of claimants respond to the Tribunals' letters.

3.110 Having received the claimant's response, the Tribunal may discuss and decide the appeal immediately or at the next meeting (where none was in session when the call was received) or instigate further investigation of the facts. Where the claimant does not respond to the Tribunal's letter, the Tribunal allows a further week to elapse after the nominated day before disposing of the appeal on the record. There are occasions where the Tribunal will persevere in its attempts to obtain the claimant's views, for it is generally reluctant to decide on the record alone.

3.111 Queensland. Appeals are considered by the Tribunal almost the day after they are received from DSS. The Tribunal's procedures are the most heavily file-oriented of all the SSATs, and attended hearings are comparatively few.

Consideration of an appeal commences with the Chairman setting out in brief the claimants contacts with DSS appearing on the file, and the transaction subject to appeal. The Tribunal proceeds immediately to discuss the merits of the appeal. In the course of discussion it may become apparent that the facts need further investigation or that there should be a hearing, and consideration of the appeal is then adjourned. The situations in which the Tribunal will hold an attended or telephone hearing are discussed in paragraph 3.120 below.

3.112 Other Tribunals. Proceedings in the other Tribunals fall between the New South Wales and Queensland models. Like Queensland, the Tribunals do not automatically write to claimants to seek their submissions and the decision whether to give a hearing to the claimant (whether attended or telephone) is made in the course of considering the DSS file. Unlike Queensland, the Tribunals do not advert to the whole of the DSS file as a matter of course, but only where the claimant's history may be relevant to the decision, e.g., there may be pattern of CES telegrams or courier messages failing to reach him or her. Like the New South Wales Tribunal, the Tribunals are reluctant to decide on the record alone, though they do not see a hearing as necessary for every case.

3.113 Generally. All Tribunals work towards their decisions by discussion. Because there is no adversary element in the procedure, the issues are not well defined and discussion can often be ill-directed and time-consuming. Because in many Tribunals every member does not have all the relevant information, discussion can often be disjointed and sporadic as members read pages on a file being handed round. Because there is no personal input from DSS and claimant, the time taken to reach a decision is often extended as information is sought separately and consecutively on

various points.

3.114 Some Tribunals do not always seek further information where there might be uncertainty as to the facts. The potential dangers of this practice are alleviated by the relevant Tribunal's notifying their decision (where it is contrary to the claimant) with the advice that should the claimant have further material to place before the Tribunal, it would reconsider its decision. This was done in South Australia and Victoria prior to their change of approach to hearings. On occasions, the Queensland Tribunal dismisses an appeal where there is a conflict of evidence without advising the claimant that he may submit further material, so leaving it to his or her initiative to come forward. The approach in the above instances may be compared with that of the New South Wales and Australian Capital Territory Tribunals where an onus of proof is in effect imposed on the Department and the Tribunals recommend in favour of the claimant where there is uncertainty or conflict on the facts but the claimant has submitted enough to make his claim tenable. On the other hand, the presence of an argued DSS submission tends to place a practical onus on the claimant. The Act imposes no general onus of proof, though the phrasing of particular provisions may place the onus of proving particular matters on either the claimant or the Department.

CES Liaison Officer

3.115 One recent innovation has been the institution of a CES liaison officer for each Tribunal. The liaison officer acts as a "resource person" to provide information for the Tribunal on the way in which CES operates and the employment aspects of unemployment benefit appeals. The liaison officer also performs functions analogous to the appeals sub-section of the SBU. He examines the case, seeks further

information from CES regional offices, discusses the case with regional managers, and may concede the appeal by withdrawing an adverse SU44. Alternatively, the regional manager may withdraw the SU44 after discussion with the liaison officer. Originally, the liaison officers in the larger States were engaged full time with the Tribunals, but the drop in adverse SU44s has meant that there has been less for them to do and, save in New South Wales, the liaison function now accounts for only a small part of the relevant officer's work. DSS, CES and the Tribunals all regard the presence of liaison officers as valuable and are of the view that they have contributed to an improvement in Tribunal decision-making.

Claimant's Input to Appeal Decision

3.116 The claimant's input to an SSAT varies from State to State and case to case, but is always very limited. Input arises in four ways:

- Information given or documents provided to DSS or CES prior to the adverse decision being made, primarily by filling forms and answering questions addressed by DSS or CES officers by questionnaire, interview, or field officer inquiry. The information given is reduced to writing by an officer, and the claimant may or may not sign the statement as correct. The purpose of the questions and the consequence of the answers may often not be known to the claimant.

- Information given or documents provided to DSS or CES after notification of an impending or actual adverse decision. Here the claimant has some knowledge of the case against him or her and of

the consequences of any information provided. Information is reduced to writing by a DSS or CES officer and is usually signed as correct by the claimant.

. The appeal form submitted by the claimant. This identifies the decision appealed against and the reasons for appealing. Many appeal forms seen by the Secretariat were inadequate in that reasons were either not advanced or inadequately stated. The completed form is often no more than a statement of a wish to appeal; it is neither a pleading nor an expression of the case which the claimant wishes to develop and the material in support of the case. Unless there is a telephone or attended hearing, this is the last opportunity the claimant has in practice to influence the outcome of the appeal.

. Telephone or attended interview (see paragraphs 3.120 to 3.127 below).

Support for the claimant from a welfare group will result in better input.

Claimant's Access to Material

3.117 The preceding paragraph sets out the situations in which a claimant may have input into the appellate decision. The effectiveness of his input is determined in large measure by the understanding he or she has of the case to be met and his or her access to both the basis of the decision (the Manuals of Instructions) and the material upon which the decision was taken. The Manuals are not public, though they would have to be made public under the Freedom of Information Bill 1978 clause 7(1)(a) upon that legislation

being enacted.

3.118 Not all relevant documents are made available to the claimant automatically (c.f. AAT Act Section 37). Access to documents is defined by Appeals Procedures Instruction 5 which provides:

> "In keeping with the principle of equality before the Appeals Tribunals, any issue relevant to a determination should be brought to the appellant's notice so that he may have the opportunity of presenting his case. Consequently if any document relevant to the case is not made available to the appellant by the Department, the Appeals Tribunal may - if it so desires - give the appellant the opportunity to give his case on the particular question raised in that document.
>
> 5.1. The appellant has the right to receive a copy of any document he has produced or any statement he has made to the Department e.g. a claim form, medical certificate and statement before an officer of the Department.
>
> 5.2. If any information was obtained by the Department and it contains details which may be distressing to the client, this should not be disclosed, but the facts should be drawn to the Tribunal's notice in the Departmental statement mentioned in paragraphs 3.8 and 3.18.
>
> 5.3. As the Appeals Tribunals do not process appeals which are strictly of a medical nature it is not proposed that medical reports obtained from Australian Government Medical Officers should be made available to clients.
>
> 5.4. Attention is also drawn to paragraph 1.3 above. Care should be taken to protect persons who inform the Department of a de facto marriage relationship, employment of clients etc. That is, the names of such people should not be disclosed. In any event, the information provided by such people should be verified before any action is taken which might affect entitlement. If at all possible the client should be given the opportunity to refute the allegations of

informants. In reaching its decision on such matters the Tribunal will take into account the views of the client, the informant and any reports on the issues which are prepared by departmental Social Workers or Field Officers."

3.119 Claimants other than those advised by computer form are not routinely told of their right to have access to the documents set out in Instruction 5, and it appears that documents are seldom requested in fact. Instruction 5 grants access to only part of the documentation contrary to the claimant, and even that part is significantly limited by the restriction of "distressing" material or material which may identify an informer. Suppression of "distressing" material might on occasions negate the purpose of releasing documents, and might more often result in inaccurate statements of the reasons for decisions being provided to claimants in an endeavour to keep that material secret. It would usually be possible for documents, which either contain "distressing" material or reveal an informer, to be summarised or "blue pencilled" and the resulting document released (c.f. AAT Act Section 35). This is not done. The claimant, therefore, may be severely limited in his or her ability in practice to meet the case against him or her.

Incidence of Hearings

3.120 As was stated in paragraph 3.108 above, the New South Wales and A.C.T. Tribunals attempt to provide a telephone or attended hearing to every claimant. The incidence of hearings in other Tribunals varies. The following is a table of the situations in which hearings will be granted by Tribunals:

. Where the claimant so requests - all Tribunals, cf. Appeals Procedures Instruction 4.3(a) which

refers to hearings being provided where the claimant "insists".

- Where it is apparent that the claimant lacks sufficient education or literacy for the appeal form to be relied on - all Tribunals.

- Cohabitation appeals - all Tribunals, but Queensland only when it appears from the file to be desirable.

- Where an allegation of fact by DSS has been expressly differed from by the claimant - South Australia, Tasmania, Victoria, and Western Australia.

- Where the Tribunal is uncertain of the facts after reading the file material - South Australia and Victoria.

- Where there is any suggestion at all that the applicant might have a good case - South Australia.

- Where the result of the case turns upon findings of fact - Victoria.

3.121 In reply to a question without notice in 1978, the Minister for Social Security stated, "I will be happy to see that more publicity is given to the fact that a personal attendance [at an SSAT] may be requested. If further publicity is required to do this I will see that the Department gives attention to it" (Commonwealth Parliamentary Debates (Senate), 24 May 1978, p. 1723). The DSS pamphlet on appeals is not as definite as the Minister's statement: "In most cases people do not have to go to a

meeting of the Tribunal. If it is necessary you may put your case in person to the Tribunal". Appeals Procedures contain no instruction for ROs to inform claimants of their right of personal attendance on the Tribunal. It is not known to what extent ROs do so advise.

3.122 The issuing of invitations to attend a Tribunal in person is constrained by a number of factors, e.g., the availability of time for the Tribunal to conduct hearings and complete its workload of cases, the place of residence of the claimant and the availability of funds to pay country claimants' costs of attending. The Director-General has informed the Council that he would instruct SSATs not to hesitate to offer a telephone or attended hearing should the Tribunal wish to do so (Minutes of meeting of Director-General with Council 10 August 1978 p.7). Most Tribunals have experienced a steady increase in the number of appeals in which telephone or attended hearings have been given. That this has not involved an increase in resources may be attributed to the lower total number of appeals which have been lodged recently.

Costs of Attending Hearings

3.123 Payment of the reasonable cost of a claimant's attending a Tribunal may be made in the discretion of the Department. Costs are reimbursed or travel warrants are provided in advance for suburban, intra- or interstate travel (Appeals Procedures Instruction 4.5). Overnight accommodation may also be paid (Instruction 4.5B). The Departmental member of the Tribunal holds a delegation to authorise travel and accommodation reimbursements or warrants other than for interstate travel. A full report of the circumstances where interstate travel is necessary, must be prepared for consideration and determination at Central Office (Instruction 4.5E).

Travel by Tribunals

3.124 Instruction 4.11 provides:

> "4.11. When the Tribunal finds it necessary to hold a hearing in any case it considers the respective costs of (a) bringing the appellant to the Tribunal, or (b) taking the Tribunal to the appellant. As far as is practicable, the Tribunal chooses the more economical method. However, the Tribunal still retains the discretion to travel where there would be hardship for the appellant in coming to the Tribunal e.g. where the appellant has difficulty in travelling because of an incapacity."

All mainland State Tribunals have used this facility on occasions. The Victorian Tribunal experimented by sending the Chairman of one of its Tribunals to a number of country centres to take evidence and report back to the other members. This was found to be unsatisfactory.

3.125 In 1978-79 no travel costs were incurred by the A.C.T., Queensland, and Northern Territory Tribunals, i.e., no claimant was assisted to attend a hearing and the Tribunals did not travel to another centre to hear any appeal. A total of $1674.44 was spent by the other Tribunals, accounted for by the New South Wales Tribunal (43.3% of total cost), South Australia (21.5%), Victoria (16.1%), Tasmania (14.5%), and Western Australia (4.6%). This does not include telephone charges incurred in telephone hearings.

Conduct of Attended Hearings

3.126 Attended hearings proceed in much the same way in all Tribunals. The claimant is brought into the Tribunal room and introduced to the members. The members' positions on the Tribunal are explained. The claimant is seated on

one side of the Tribunal table with the members seated on the other side or spread around on two or three of the sides. The chairman then explains the role of the Tribunal and its powers. He outlines the issues involved and the case against the claimant. The claimant is then requested to tell the Tribunal his or her side of the matter. Depending on the competence and articulateness of the claimant, the Tribunal may either leave the claimant to put his or her case and simply ask questions to test what has been said or to fill in gaps, or it may turn the hearing into an informal "chat" in which the relevant information is obtained from the appellant in an unforced way. Relevance is never strictly enforced, in the hope that the claimant will "open up" and provide the Tribunal with the necessary material. Questions directed by the Tribunal vary from prompting or enquiry to cross-examination. Where the claimant is inarticulate, it is generally the social worker member who takes the lead in speaking to the claimant. Again, where the claimant has little hope of success, it most often falls to the social worker to explain the situation and reconcile him or her to it. The atmosphere engendered is a "supportive" one.

3.127 The parameters within which hearings are conducted may be summed-up as ranging from a "discussion with questions" of a "nice" conciliatory tone on the one hand, to an "interview/discussion" which subjects the claimant to inquisitorial examination on the other. There is no hint of a court-like process, and the demands of the hearings attended by the Secretariat were generally less severe than those of many Small Claims Tribunals hearings (see G.D.S. Taylor, "Special Procedures Governing Small Claims in Australia" in 2 Access to Justice (Cuiffré, Milan, 1979), pp. 641-648).

Use of Manuals of Instructions By SSATs

3.128 The approach of the Tribunals varies. The Queensland and Western Australian Tribunals generally use the Manuals along with the Act as the basis for their decisions. Although there are occasions where they (as would senior public servants) depart from the relevant Instruction, their general approach emphasises the character of these Tribunals as internal to DSS. The South Australian Tribunal regards the Manuals as "stronger than guides", from which the Tribunal may depart where there is some special reason so to do. The Victorian and A.C.T. Tribunals base themselves upon the Act and regard themselves as in no way obliged to apply Instructions in the Manuals. The New South Wales Tribunal regards itself as not even bound by the thrust of the policies embodied in the Manuals. It was observed, however, that that Tribunal tended to advert to and cite the Manuals in decisions where their content supported the conclusion the Tribunal wished to reach. One DSS officer described the New South Wales Tribunal's approach to policy as "uneducated", but supported the Tribunal's view that the Manual was not binding upon it.

3.129 While SSATs remain subject to being overruled by DSS, their disregard of the Manuals has its value. However, any tribunal with power of decision must form a considered and constructive approach to the Manuals. A tribunal with power of decision would be in the position to determine policy within the limits of the legislation. As is mentioned in Part 1, paragraph 1.045, the Administrative Appeals Tribunal can be expected to be reluctant to interfer with broad government policy, especially if that policy has been subject to Parliamentary scrutiny.

DSS RECONSIDERATION OF SSAT RECOMMENDATIONS

3.130 Where a Tribunal decides to recommend favourably to the claimant, it prepares a recommendation with reasons for

the State Director of Social Services. The Tribunal also notifies the claimant that it has made a recommendation to the Department, though "[the] Tribunal should not inform the appellant of the substance of their recommendation for the reasons that some appellants wrongfully gain the impression that their appeal has been upheld and such action can only raise the appellant's hopes and, subsequently if the recommendation is not approved, cause distress" (Appeals Procedures Instruction 3.13). If the State Director agrees with the Tribunal, the Tribunal is so advised and it notifies the claimant of the outcome of the appeal. Where "because of special circumstances or the action recommended would involve a departure from departmental procedures and instructions" (Instruction 3.14), the State Director decides that the recommendation should be rejected, the file must be sent to DSS Central Office. Only the Director-General or a Deputy Director-General are permitted to reject Tribunal recommendations, though senior officers in Central Office may approve recommendations. The Central Office decision with reasons is notified to the State Director with copy to the Tribunal. The Tribunal then informs the claimant.

3.131 Where the State Director decides not to accept a Tribunal recommendation, he is instructed to discuss the merits of the case with the Tribunal before sending the file to Central Office. That Instruction has not been commonly applied. When the Instruction was issued to State Directors by letter of 17 November 1976, the purpose of discussion was said to be to "assist in lessening gaps between the views of Tribunal members and departmental officers". The Instruction has, however, been seen by some Tribunal members as a veiled attempt to influence members to change their recommendations and to accept departmental practices of which the Tribunals might disapprove. In so far as discussions might go beyond fleshing out reasons for the differing views on the merits, the view of members can be

appreciated. The concept of discussion of differences is indicative of the place of SSATs as internal and not external review.

3.132 Instruction 3.14 implies that DSS is not to reject a Tribunal recommendation merely because the Department differs from the Tribunal's appreciation of the facts. This has not always been adhered to. In South Australia in 1978, Tribunal recommendations were rejected at State level where it was considered that the determining officer had adequately considered the matter and the Tribunal view was in the nature of second guessing. This type of local variation should no longer exist, but it cannot be said that there are no cases where Tribunal recommendations are being rejected because of a differing appreciation of the facts.

Rejection of Appeals for New Reasons

3.133 On many occasions, Tribunal recommendations have been rejected by DSS on the basis of grounds other than those on which the primary decision or SSAT recommendations were made. Shifting to another ground of decision can also occur when DSS is reconsidering a decision prior to the Tribunal hearing. When an appeal comes before a Tribunal, it may also appear from the file that the claimant is not entitled to payment for a reason other than that on which the primary decision was based. In the latter two situations, the claimant is not informed of the new jeopardy unless he is in any case to be given a hearing. However, the practice of the Tribunals is that where they themselves notice a further ground of disentitlement, they do not base their decision on it.

3.134 Where the change of ground for disentitlement is made after the hearing, there is no opportunity for the claimant to be heard. Current procedure is that where it

appears that an appeal which has been subject to a favourable SSAT recommendation should be dismissed on a new ground, a decision is not made but the matter is referred back to the Tribunal, drawing attention to the new ground. This enables the claimant to be heard.

3.135 It would be contrary to natural justice for either the Department, in reviewing Tribunal recommendations, or the Tribunals to decide an appeal adversely to the claimant upon a ground not previously notified to the claimant.

Assessment of the SSATs

3.136 The Director-General has expressed the view that while the existing SSAT procedures leave much to be desired in point of absolute legal standards, it is only because of their abbreviation of standards that they are able to cope with the number of appeals flowing to them, and the abbreviation of procedures itself is only possible because the Tribunals are advisory (letter to Director of Research, of 7 February 1980). This observation is correct to the point that Tribunal members also accept that if the SSATs had power of decision they would have to be more rigorous in their fact-finding. It does not necessarily follow, however, that more rigorous procedures should not be introduced or that to do so would unreasonably increase the resources committed to appeals (though there would be a significant increase). Professor Mossman, in "Decision-Making by Welfare Tribunals: the Australian Experience" (1979) 31 University of Toronto Law Journal 218, would appear to agree with the Director-General in his assessment, though she also criticises Tribunal procedures. Her view is that the absence of these elements of procedural fairness appeared to be less serious in the Australian tribunals due to the presence of a lawyer. "Less serious" they might be, but serious none the less.

3.137 Of greater moment is the absence of factual, let alone legal, independence of SSATs from the Department. This has been noted in a number of paragraphs above. It would appear that the Director-General himself sees the SSATs as internal to the Department, for he has informed the Council that (letter to Director of Research, of 7 February 1980):

> "We are able to live with this situation [the abbreviated procedures and weak fact-finding of SSATs] simply because the tribunals' reports are not legal determinations but administrative advisings helping the Director-General to come to the final decision under the provisions of the Social Services Act." (emphasis added)

Advisory bodies which include some non-departmental members may be appropriate in some areas of some government agencies. It will be apparent from observations elsewhere in this paper that there are strong grounds for the view that the grant of social security payments is not an area where advisory bodies are appropriate as the final means of review of departmental decisions.

Defects in SSAT Procedures

3.138 In reply to the Council's first survey of Tribunal procedures in 1976, the Chairman of the New South Wales SSAT identified five defects in procedures which prevented claimants obtaining a fair hearing:

- lack of full information as to the case to be met
- lack of an opportunity to answer the Department's case
- use of anonymous hearsay evidence against the claimant

- lack of access to documents in DSS files

- "the claimant's main disadvantage is that he does not understand the issues, he has no knowledge of the Department's instructions or policy and he does not know his rights. He does not know how to present arguments or facts which would assist his case and he is not permitted to have legal representation."

3.139 The various Tribunals' procedures for providing telephone or attended hearings, and the conduct of those hearings, are aimed at meeting the above disadvantages. While they mitigate the disadvantages suffered by the claimants, they cannot provide a hearing sufficient to meet either the standards of justice applied in other areas of tribunal review or those applied to social security appeals by tribunals in the United Kingdom, Canada or New Zealand. They are defective and only a radical reworking of the existing system can cure those defects. In particular, evidence before the Tribunals is unbalanced. If a hearing is not provided, the Tribunal has from the Department a set of material in support of the decision and a reasoned submission, which is met by a typically unreasoned and bald statement of the claimant on the appeal form. Where a hearing is provided, there is an oral statement (which is effectively untested save by likelihood and internal consistency) with the advantages of immediacy and the opportunity to establish a rapport with the Tribunal, opposed by the written DSS material referred to in the preceding sentence. Several SSAT members have remarked upon the difficulties in which these imbalances place the Tribunals. Because of these imbalances, there is no reasonable assurance of justice being given in any particular case.

3.140 The position of the Tribunals in fact-finding is particularly weak where there is no hearing. Upon the Secretariat's observation of Tribunal meetings it appears that members are obliged to try to imagine arguments which a claimant might have wished to advance had he or she been able to take advantage of a hearing. Written material is often tested against hypothetical scenarios of the events in question, based upon typical patterns of behaviour and any indications which may appear from the file itself. Because the fact-finding processes available to the Tribunals are unlikely to bring assurance that the facts so found are correct, conclusions are drawn from the material available even though the Tribunal concerned might recognise the likelihood of some of the conclusions being incorrect.

3.141 Four cases illustrate the ways in which the abbreviated SSAT procedures apply to cases. The first case involved cancellation of unemployment benefit for failure to respond to a CES telegram requiring the claimant to attend for a job interview with a prospective employer. The claimant's case was that he had never received the telegram. The Tribunal made inquiries of Australia Post which had confirmed that the telegram was delivered. Delivery was to a box in the foyer of a Housing Commission complex. The social welfare member of the Tribunal outlined the conditions in those complexes, the frequency of mail boxes being broken into and mail being stolen. Her view was that there was no certainty of delivery, so the claimant should be given the benefit of the doubt. There was disagreement in the Tribunal on this point. The Tribunal then examined the claimant's file to see if there were other instances of non-response (there were none) and finally adjourned consideration until further information had been obtained from the claimant as to his efforts to find work. In this case, the Tribunal refused to decide on a factual issue where there was real doubt and attempted to find another

issue upon which the appeal could be resolved.

3.142 The second case involved cancellation of unemployment benefit for lack of reasonable attempts to find work. The claimant (who lived in the country) was invited to attend a hearing by the SSAT. He did not make contact, but his mother rang to discuss her son's attempts to find work. She was unable to provide details; he had not kept a written record of his attempts. It was pointed out to her that without detailed information, the Tribunal could not recommend against the Department. The claimant's attendance had been sought because it was considered that, with questioning, the claimant might be able to give sufficient details of his work efforts for an assessment to be made. The Tribunal did not persevere with its request that the claimant attend the Tribunal, and dismissed the appeal with the note to the claimant that if he was able to produce further evidence the Tribunal would reconsider the matter. In this case, the Tribunal recognised that it could not reach a clear conclusion without a hearing, but did not press the claimant to attend; consequently, the decision was made without adequate information, though a reasonable opportunity was given the claimant. This type of situation would be likely to arise regularly even were social security tribunals to operate with oral hearings being scheduled for every appeal.

3.143 The third case was also one of cancellation of unemployment benefit, this time for refusal of a job. The job was as a dark room attendant. The claimant's reasons for refusing the job were that her parents were shifting house, that her car was unregistered, and that she was pregnant. The appeal was upheld on the grounds that the job offer was unsuitable because of the danger to the foetus from radiation in the dark room. This danger was raised by one member but was not further investigated by the Tribunal;

the assumption was untested, though some level of testing would not have been difficult.

3.144 In the fourth case, the claimant had been refused unemployment benefit. He had come to the area in question some time prior to the events leading to the appeal and had been self-employed there. He had then moved to Darwin. When he returned, he was refused benefit. One member suspected that the claimant was self-employed attempting to gain benefit between jobs; he doubted the claimant's veracity and drew attention to inconsistencies in his story. The Tribunal was divided on this point with one member for, one against, and the third having doubts. It was decided to adjourn the case and ask DSS to make field officer enquiries. This course of action was preferred to offering the claimant a hearing because of the credibility issue, it being felt that a field officer would be more likely to arrive at the truth by enquiry of neighbours, etc. This case emphasises the milieu in which SSATs operate which is very different from courts or traditional tribunals. The absence of normal fact-finding processes and of cross-examination makes cases such as this difficult to resolve with confidence in the decision.

The Effect of the SSATs

3.145 In terms of the aims of administrative review, the SSATs have had a number of beneficial effects in some measure. First, they have led to the alteration of about half of the decisions appealed (see Exhibit 2.4 referred to in paragraph 3.104 above). It must be assumed that an improvement in individual justice results from those alterations. Secondly, their decisions appear often to have led to changes in approaches to decision-making. It is apparent from discussion with officers in DSS and CES regional offices that in a number of offices, it is assessed

before adverse decisions are made whether the decisions would be sustainable on appeal. Assuming that SSAT decisions are likely to be the correct or preferable decisions and assuming that the officers concerned accurately understand the principles used by the SSATs and can apply them to cases in hand, this should result in more correct or preferable decisions being made and an increase in justice. It is not known how widespread is the above approach but the effect might well be significant. Thirdly, SSAT decisions have brought to light practices and policies which might be unlawful, unjust, or not be conducive to the making of correct or preferable decisions. Changes to DSS and CES policies and practices have been made as a result. Fourthly, in the view of a number of DSS officers, standards of work have improved - though this effect cannot be attributed solely to the SSATs.

3.146 The breadth of the above effects depends in large measure upon the frequency with which DSS alters primary decisions in the course of preparing appeals for the Tribunals, and the frequency with which SSAT decisions are rejected by the Department. These are indicative of the decision-making power wielded by the SSATs in point of fact. It is significant that Tribunals whose decisions are frequently rejected feel that they have not been effective (one member described the appeal system as a "sham"). One senior DSS officer in a State where the Tribunal has been overruled frequently shared that view. On the other hand, where SSATs very seldom disagree with the Department, Departmental officers' opinions of the Tribunals are often low. The effect of the Tribunals, therefore, is partly related to the extent to which they are the decision-makers, and the extent to which they exercise judgment independently of the Department. It might also be suggested that where a Tribunal's reasons for its decisions are articulated in such a way as to command respect, the Tribunal's authority is

enhanced.

Conclusion

3.147 The various criticisms of the SSATs made in this section are interrelated. They are:

- the absence of independence from DSS (paragraphs 3.097, 3.104, 3.105, and 3.131)
- the constitution including a DSS officer (paragraph 3.098)
- the procedures involving lack of hearing (paragraph 3.106 et seq.)
- the absence of rigorous fact-finding (paragraphs 3.113 and 3.140)
- SSATs comparative lack of authority (paragraphs 3.130 and 3.137).

The Myers Inquiry (Report, op. cit., paragraph 5.3.64) summed-up the problems of the Tribunals thus:

> "While the tribunals operate as informally as possible in an open, fair and impartial manner, and no doubt bring another perspective to a client's grievance, the reality of the situation is that the appeal is still adjudged by Caesar. The Inquiry views this as far from satisfactory, and believes that not only must justice be done, it must be seen to be done also."

The Inquiry's solution was to propose (paragraph 5.3.70):

> "... that the Director-General should decide an appeal on his department's assessment and if the appeal cannot be allowed, then the matter should proceed to an independent tribunal. In the present scheme of Government arrangements, the

Administrative Appeals Tribunal is the final arbiter on appeals against decisions made by Commonwealth public servants. Accordingly, the Inquiry recommends that the present Social Security Appeals Tribunals be replaced by the Administrative Appeals Tribunal or that they be constituted as statutory entities under the authority of the Administrative Appeals Tribunal."

The Inquiry's conclusion is strongly supported.

MEDICAL APPEALS

3.148 Applicants for and recipients of social security payments (other than those under Part VIII of the Social Services Act (Rehabilitation)) against whom an adverse decision is made based on a recommendation by a Commonwealth Medical Officer, may appeal against the decision. The relevant instructions are in the Appeals Procedures Part 6.

3.149 Medical appeals are not handled by the SSATs. When an appeal is made, the determining officer forwards the appeal, along with all the medical material on the file, to the State Director of Health. The Director may recommend whether the appeal should be upheld or not. If he recommends that it not be upheld, or if the DSS determining officer decides not to follow the Director's recommendation that the appeal be upheld, the matter is referred to an external medical practitioner (who is usually a specialist) chosen by the Director of Health on the basis of the expertise and knowledge required to consider the particular case. The external medical practitioner reconsiders the case, usually following physical examination of the claimant, and reports to the Director of Health. The Director forwards the report to the determining officer together with his own comments. A recommendation is made by the determining officer to the Senior Assistant Director (Benefits) in DSS State Headquarters, and a decision is made

on the appeal. This process cannot be described as involving a "medical tribunal" (the description used in the DSS Annual Report for 1977-78, p.2) but only a second opinion. It lacks the characteristics of a satisfactory external review process. In 1978-79, 2744 "appeals" were lodged against medical assessments, 1128 were allowed, 1094 were rejected, and 273 lapsed (figures provided by DSS).

ADVICE AND ASSISTANCE

3.150 There is no formal provision for advice and assistance in the present social security appeal system. There is, however, a large number of social welfare organisations on local, State, and national bases which provide assistance. Those organisations do not appear to be sufficiently widespread to enable more than a small proportion of claimants to enjoy advice and assistance.

3.151 Advice and assistance can contribute to the review process at every stage, from the time of claiming payments through the RO stage, to the SSATs. The present official avenues for advice and assistance are through DSS social workers, the help counter officers or assessors give as a courtesy, and the assistance which ROs are directed to afford to claimants wishing to appeal (Appeals Procedures Instruction 2.4.), namely, to "provide any necessary assistance in the preparation and completion of a formal appeal". Provison of advice and assistance by all the above officers is desirable, but cannot substitute for advice and asistance oriented towards commitment to the claimant's interest.

3.152 One hundred and one of the 134 DSS regional offices have social workers and/or social welfare officers (Exhibit 3.8). However, those officers seldom number more than three

in any office and are so heavily committed to their main function of attending to the social welfare needs of their clients that their ability to provide advice and assistance is limited. They necessarily have an orientation more committed to claimants' interest than other DSS officers, so that they appear to be more trusted by claimants.

EXHIBIT 3.8

DISTRIBUTION OF SOCIAL WORKERS AND WELFARE OFFICERS IN DSS REGIONAL OFFICES AS AT JULY 1979

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	TOTAL
3 SW + 2 WO				1					= 1
3 SW		1							= 1
2 SW + 3 WO				1					= 1
2 SW + 1 WO		3		1	1		3		= 8
2 SW		9		7	3				= 19
1 SW + 1 WO					4		18		= 22
1 SW	1	18	2	5	2	5	6	5	= 44
1 WO				1	2		1		= 4
No officers	1	15	2	5	3	0	2	6	= 34
TOTAL	2	46	4	21	15	5	30	11	134

Social Workers can and do provide advice and assistance as part of their general welfare responsibilities.

3.153 Apart from the RO for Brisbane office (unemployment and sickness benefits) who frequently provided assistance,

ROs are not often asked for their assistance in preparing appeals. Where requested, the assistance is given. It appears from discussion with ROs that they assist mainly by ensuring that the decision being appealed against is accurately described, and that arguments put to the RO are not inadvertently omitted from the appeal form. This falls short of advising on how to put and emphasise the various arguments advanced, but it is hard for an officer who has made a conscientious decision adverse to a claimant properly to fulfil such a function and be accepted by the claimant as acting fairly. ROs appear to be conscious of their position as independent decision-makers on review who must remain objective and fair to both claimant and Department when providing assistance for an appeal. Thus, one RO sent a claimant who had requested assistance to another officer because she was convinced that the claimant was not entitled to payment and doubted her ability to do justice to the claimant's appeal statement. RO assistance is valuable, but it cannot involve a full commitment to claimants' positions. It is the absence of knowledgeable commitment to claimants in assisting the preparation of the claimants' cases for appeal which exacerbates many of inadequacies and inefficiencies of current SSAT procedures.

3.154 Claimants are entitled to be represented before SSATs but not by legal practitioners (unless the practitioner happens also to be the claimant's Member of Parliament - as happened once) (Appeals Procedures Instruction 4.3(c) and (d)). In practice, few claimants are represented before Tribunals, and, if they are, representation tends to be by relations and friends. Relations and friends usually know no more of the issues than does the claimant, so that form of representation may provide the claimant with a sturdier formulation of his or her case, but often not with a knowledgeable presentation. Welfare organisations in a number of capital cities have

built up small but knowledgeable nuclei of advisers, e.g. the Unemployment Rights Service (run by a social worker with legal qualifications) and the Action and Resource Centre (run by persons who are or have been in receipt of social security payments and have developed a self-help system) both in Melbourne. The United Kingdom evidence is that representation, particularly by knowledgeable social workers, makes it much more likely that the claimant will succeed (see Part 4, Exhibit 4.2). This is not because tribunal members lose their objectivity, as one respondent to the Council's First Consultative Paper suggested, but because, often for the first time, all the relevant material available to the claimant is put forward in an organised and relevant fashion. Representation by knowledgeable persons from social welfare organisations would in the generality of cases overcome many of the defects in SSAT procedures identified by the New South Wales Tribunal Chairman (see paragraph 3.138 above), but would not overcome the inherent defect that there is no provision for testing the evidence nor would it provide a balance in the evidential positions of the Department and the claimant (see paragraphs 3.139 to 3.144 above).

APPEALS BROCHURE

REVIEWS OF DECISIONS & RIGHTS OF APPEAL

PR 44 April 1979

REVIEW AND APPEAL ARRANGEMENTS

If you are dissatisfied with a decision made by the Department of Social Security about a pension, benefit or allowance you have claimed there are a number of things you can do.

This leaflet explains them in general terms — the information was correct at 1 April 1979. Further information may be obtained from any office of the Department of Social Security.

The first step

The first thing to do is to tell the Department of Social Security you are dissatisfied with the decision.

You can do this by coming into one of our offices and asking to see the Review Officer; by telephoning or writing to the Review Officer at the office which dealt with your case. The address and telephone numbers of the offices of the Department of Social Security are in the Commonwealth Government section of the telephone book.

The Review Officer will be a person who has a great deal of experience in Social Security but who has not been involved in your case before. This means the Review Officer can take a completely fresh look at your case. The matter will be examined without delay. If it is important to you, the Review Officer should be able to examine your case on the day you make contact.

The role of the Review Officer is to:

- clear up any misunderstandings that may have occurred,
- arrange for any mistake to be corrected if an incorrect decision has been made, or
- explain the situation if the Department was correct in its original decision.

If you are not satisfied with the Review Officer's decision this is not the end of the matter.

e next step

Review Officer will tell you how you may al to the Social Security Appeals Tribunal u are still unhappy with the decision by the rtment. There are tribunals in each State al.

als can be lodged on forms available from ffice of the Department of Social Security. Review Officer or other departmental oyees can help you fill in these forms.

ever, you do not have to use an appeal form letter or even just a telephone call explain- he reason for your appeal will do.

a should be made as soon as possible the original decision was given.

w the system works

ls go to the Social Security Appeals Tri- immediately. The Tribunal is an indepen- body consisting of three people able to an independent assessment of your case. are two part-time members, who are not servants, and a technical expert second- n the Department of Social Security.

Tribunal is also advised by an officer of ommonwealth Employment Service in relating to the unemployment benefit

ases people do not have to go to a g of the Tribunal. If it is necessary you ut your case in person to the Tribunal. n take a friend or relative to help you if sh.

re asked to appear before the Tribunal, able travel and accommodation costs refunded.

arrangements may be made to hear se if you are unable to travel to meet the l because of illness or injury.

When the Tribunal has examined your case it will decide whether to recommend that the Department change its original decision or to agree with the Department. While the Tribunal is an advisory body, in most cases its recommendations are accepted by the Department.

The Chairman of the Tribunal will advise you of the outcome of your appeal.

Medical Appeals

Appeals of a medical nature should be addressed to the Director, Department of Social Security, in your State. The Director will normally refer the appeal to the State Director of the Commonwealth Health Department. Pension or benefit changes will be made immediately if the appeal is upheld.

Further steps

The Commonwealth Government has announced that there will be a right of appeal to the Administrative Appeals Tribunal in cases where the Director-General of the Department of Social Security is unable to accept a decision of the Social Security Appeals Tribunal.

This proposal will be implemented as soon as the necessary expansion of the capacity of the Administrative Appeals Tribunal can be made.

The Commonwealth Ombudsman is also able to investigate, informally and in private, complaints about actions of Commonwealth departments. Complaints to the Ombudsman must be made in writing. You will find his address in the capital city telephone directories.

Appeals can be made concerning decisions on:
Age and Invalid Pensions
Wifes Pension
Widows Pension
Supporting Parents Benefit
Funeral Benefit
Family Allowance
Orphans Pension
Unemployment, Sickness and Special Benefits
Sheltered Employment Allowance
Supplementary Assistance
Ha[illegible]capped Childs Allowance
Rehabilitation Allowance

SOCIAL SECURITY APPEALS TRIBUNALS —

SYDNEY
5th Floor, 36-38 Clarence Street,
G.P.O. Box 4630,
Tel. (02) 29-6633

MELBOURNE
Wales Building, Cnr. Swanston & Collins Sts.,
G.P.O. Box 868J,
Tel. (03) 63-4031

BRISBANE
7th Floor, 138 Albert Street,
P.O. [illegible]x 493,
Tel. [illegible]) 229-5279

ADELAIDE
14th Floor, 45 Grenfell Street,
G.P.O. Box 1846,
Tel. (08) 87-3526

PERTH
2nd Floor, 220 St. Georges Terrace,
P.O. Box 7047,
Cloisters Square,
Tel. (09) 320-3360

HOBART
Shop 1, Ground Floor, Continental Building,
Macquarie Street,
G.P.O. Box 63A,
Tel. (002) 23-2634

CANBERRA
Level 4,
Lombard House,
40 Allara Street,
CANBERRA CITY 2601

To the Director,
Australian Department of Social Security,

Please send me a form for the lodging of an appeal to the Social Security Appeals Tribunal.

NAME.....

ADDRESS.....

.....

.....Post Code.....

Printed by Ambassador Press Pty. Ltd. 51 Good Street, Granville, N.S.W. 2142.

ATTACHMENT 3.2

STATISTICS ON REVIEW OFFICER WORK
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These statistics relate only to New South Wales, Tasmania, Victoria, Western Australia and Brisbane (Unemployment Sickness Special Benefit)

Statistics for South Australia are insufficiently detailed to shed light on Review Officer work for the purposes of this paper. Statistics are not kept generally in Queensland. The statistics are derived from information received from DSS.

NEW SOUTH WALES

REVIEW OFFICER CONTACT STATISTICS FOR MAY 1978 to SEPTEMBER 1979

OFFICE	NO. OF R.O. CONTACTS	AV. TIME (MINUTES)	% OF CONTACTS WHERE CLAIM CONCEDED	% OF CONTACTS LATER APPEALED TO SSAT	% OF SSAT APPEALS PREVIOUSLY REVIEWED BY RO
STATE TOTAL	5011	30	45.9	16.2	33.9
STATE HDQTS	253	38	41.5	15.0	5.9
ALBURY	48	36	70.8	23.0	28.5
ARMIDALE	78	44	37.2	17.9	28.9
BANKSTOWN	129	29	55.8	5.4	11.4
BATHURST	11	30	36.4	18.1	New Office
BI CKTOWN	57	25	33.3	12.3	45.4
BONDI JUNCTION	119	31	56.7	13.3	38.1
BROKEN HILL	27	30	40.7	22.3	New Office
BURWOOD	63	34	47.6	28.5	15.4
CAMPBELLTOWN	10	24	40.0	50.0	New Office
CAMPERDOWN	16	31	50.0	12.6	New Office
CANBERRA	290	29	56.6	8.9	26.0
CARINGBAH	84	23	62.0	29.7	70.4
CESSNOCK			New Office		
CHATSWOOD	19	37	26.3	21.0	New Office
CHARLESTOWN	17	17	17.7	0.0	New Office
COFFS HARBOUR	124	29	34.7	45.2	71.8
CROWS NEST	152	37	48.0	23.7	63.1
DEE WHY	105	36	41.0	28.6	80.0
DUBBO	117	26	49.6	12.8	New Office
FAIRFIELD	46	21	50.0	13.0	New Office
GO FORD	179	32	43.0	6.2	33.3
GOULBURN	41	40	31.7	14.6	46.1
GRAFTON	27	21	48.1	29.7	New Office
GRIFFITH	233	32	36.5	9.0	33.3
HORNSBY	125	18	61.6	17.6	59.0
HURSTVILLE	126	57	34.9	64.7	77.0
KEMPSEY	81	26	19.8	22.2	8.0
LISMORE	476	39	54.4	6.7	62.8
LITHGOW	95	25	62.1	6.3	17.4
LIVERPOOL	56	33	55.4	10.7	36.4
MAITLAND	109	35	17.4	4.6	40.0
MANLY	122	50	29.5	13.9	42.4
MAROUBRA	57	40	26.3	26.3	16.2
MARRICKVILLE	3	40	66.7	0.0	New Office
MAYFIELD	24	20	62.6	14.6	New Office
MOREE	14	30	71.4	28.6	New Office
MT. DRUITT	26	31	42.3	7.7	New Office

REVIEW OFFICER CONTACT STATISTICS FOR MAY 1978 to SEPTEMBER 1979

FFICE	NO. OF R.O. CONTACTS	AV. TIME (MINUTES)	% OF CONTACTS WHERE CLAIM CONCEDED	% OF CONTACTS LATER APPEALED AT SSAT	% OF SSAT APPEALS PREVIOUSLY REVIEWED BY RO
TATE TOTAL	5011	30	45.9	16.2	33.9
EWCASTLE	79	30	35.4	19.0	14.3
OWRA	117	38	47.0	17.1	54.8
NGE	78	16	38.5	19.2	34.6
ARRAMATTA	291	23	42.3	33.3	94.7
ENRITH	18	20	55.6	27.7	New Office
T. MACQUARIE	19	47	42.1	37.6	New Office
EDFERN	7	30	42.9	0.0	New Office
YDE	44	29	75.0	11.4	36.4
AMWORTH	33	41	72.7	12.1	New Office
AREE	40	21	37.6	7.4	--
HE ENTRANCE	55	10	71.0	7.2	50.0
AGGA	100	36	46.0	10.0	43.7
OLLONGONG	571	15	45.0	6.5	97.2

VICTORIA

REVIEW OFFICER CONTACTS FROM MAY 1978 TO SEPTEMBER 1979

REGIONAL OFFICE	NO. OF CONTACTS	NO. OF CLAIMS CONCEDED	% CLAIMS CONCEDED
Average			34.8
State Headquarters	24	11	45.8
Ballarat	43	21	48.8
Bendigo	106	48	45.3
Box Hill	205	92	44.9
Camberwell	40	23	57.5
Cheltenham	13	7	53.8
Dandenong	155	34	21.9
Footscray	66	24	36.4
Frankston	37	14	37.8
Geelong	254	106	41.7
Glenroy	115	19	16.5
Greensborough	14	10	71.4
Hamilton	75	30	40.0
Hastings	92	46	50.0
Horsham	0		
Mildura	23	4	17.4
Moonee Ponds	235	43	18.3
Morwell	60	7	11.7
Northcote	55	18	32.7
Oakleigh	57	24	42.1
Prahran	79	20	25.3
Preston	30	12	40.0

REGIONAL OFFICE	NO. OF CONTACTS	NO. OF CLAIMS CONCEDED	% CLAIMS CONCEDED
Average			34.8
Richmond	43	14	32.6
St Kilda	116	44	37.9
Sale	52	28	53.8
Shepparton	43	17	39.5
Sunshine	63	39	61.9
Wangaratta	125	10	8.0
Warnambool	30	13	43.3
Waverley	4	3	75.0
Werribee	36	15	41.7

BRISBANE OFFICE

REVIEW OFFICER (UNEMPLOYMENT SICKNESS AND SPECIAL BENEFIT) CONTACT STATISTICS FROM JANUARY TO OCTOBER 1979

PERIOD	NO. OF CONTACTS	% OF CONTACTS WHICH WERE ENQUIRIES	MODE OF CONTACT			NO. APPEALS PREV. LODGED WITH SSAT AND REVIEWED LATER BY R.O.	NO. 'CONCEDED' BY R.O.	% CONTACTS 'CONCEDED.'	NO.OF CHALLENGES CONCEDED	% OF CHALLENGES CONCEDED
			Phone	Letter	Interview					
1.1 to 26.1	311		201	26	84	18	143	46.0		
27.1 to 16.2	335		223	34	78	14	184	54.9		
17.2 to 23.3	421	39.2	306	34	81	31			128	44.6
24.3 to 27.4	247	51.0	180	19	48	12			76	57.1
28.4 to 25.5	254	46.6	179	30	45	20			89	57.1
26.5 to 22.6	236	47.7	169	27	40	19			76	53.5
23.6 to 20.7	212	47.2	146	26	40	10			55	45.1
21.7 to 17.8	154	51.4	108	20	26	19			55	58.5
18.8 to 14.9	229	47.4	161	19	49	8			61	47.5
15.9 to 12.10	168	59.9	117	20	31	12			42	53.0

N.B.

1. Only after 17 February 1979 were statistics kept on which contacts were enquiries and which were challenges.

2. It appears from comparing percentages of contacts 'conceded' and all challenges conceded that enquiries were all included within the heading of 'conceded' previous to 17 February 1979.

3. "Appeals previously lodged with SSAT reviewed later" consists only of appeals which by-passed the R.O., i.e., which were on matters not previously considered by the R.O.

WESTERN AUSTRALIA

REVIEW OFFICER CONTACTS
FROM JULY 1978 TO SEPTEMBER 1979

	Quarters ended					
	Sept 1978	Dec 1978	March 1979	June 1979	Sept 1979	Av.%
Number of cases seen by Review Officer	645	801	819	1182	660	100.0
Decision changed by Review Officer	202	242	276	357	173	30.4
Decision stands	443	561	543	825	487	69.6
Appeals lodged after decision	28	43	47	31	57	5.1

N.B. The number of appeals lodged are those lodged immediately after RO contact and do not include appeals lodged later.

TASMANIA

REVIEW OFFICER CONTACTS
FROM OCTOBER 1978 TO SEPTEMBER 1979

Number of contacts - 696

Number of Claims conceded - 124

Number of claimants appealing to SSAT after RO review - 35

Number of appeals lodged with SSAT - 160

N.B.

1. The Review Officer covers all Tasmanian regional offices.

2. Most pensions contacts are enquiries. Hence, the number of challenges to decisions would have been substantially less than the number of contacts shown.

ATTACHMENT 3.3

ADVERSE WORK TEST REPORTS (SU.44)

BY STATE AND MONTH

	N.S.W.	VIC.	QLD.	S.A.	W.A.	TAS.
JULY 1978	1017	252	754	261	485	124
AUG.	1229	294	790	187	407	89
SEPT.	1061	236	672	100	276	69
OCT.	856	135	557	171	372	89
NOV.	819	126	470	187	280	94
DEC.	507	55	158	75	209	49
JAN. 1979	633	52	337	103	298	145
FEB.	588	312	368	249	236	147
MAR.	771	96	392	235	168	151
APRIL	599	96	281	98	145	76
MAY	586	66	549	142	161	64
JUNE	451	65	461	83	NA	63
JULY	NA	85	516	143	NA	39
AUG.	401	93	609	110	186	12
SEPT.	466	156	555	121	275	31

OCT.)
NOV.) Due to labour difficulties in CES figures for those months
DEC.) not available.

N.B. Records on adverse work test reports were not assembled by CES prior to July 1978

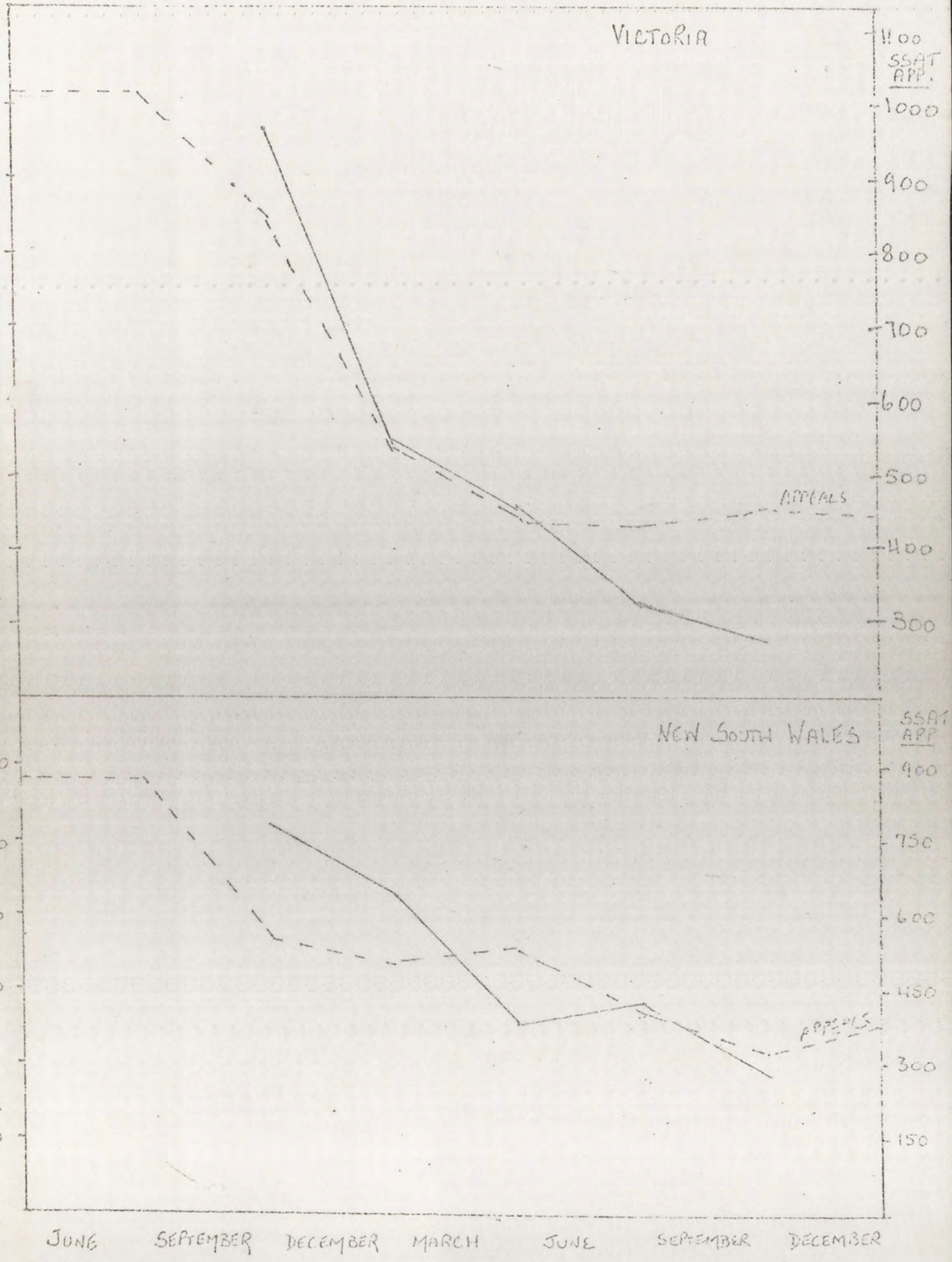
The following graphs attempt to trace the effect of SU44's on appeals. The line for SU44's is adjusted to take account of the gap between issuing an SU 44 and lodging an appeal with an SSAT. Thus, the figure appearing for December 1978 represents appeals lodged in October to December but SU 44's issued in September to November.

SSAT LODGMENTS BY QUARTER June 1978 - December 1979

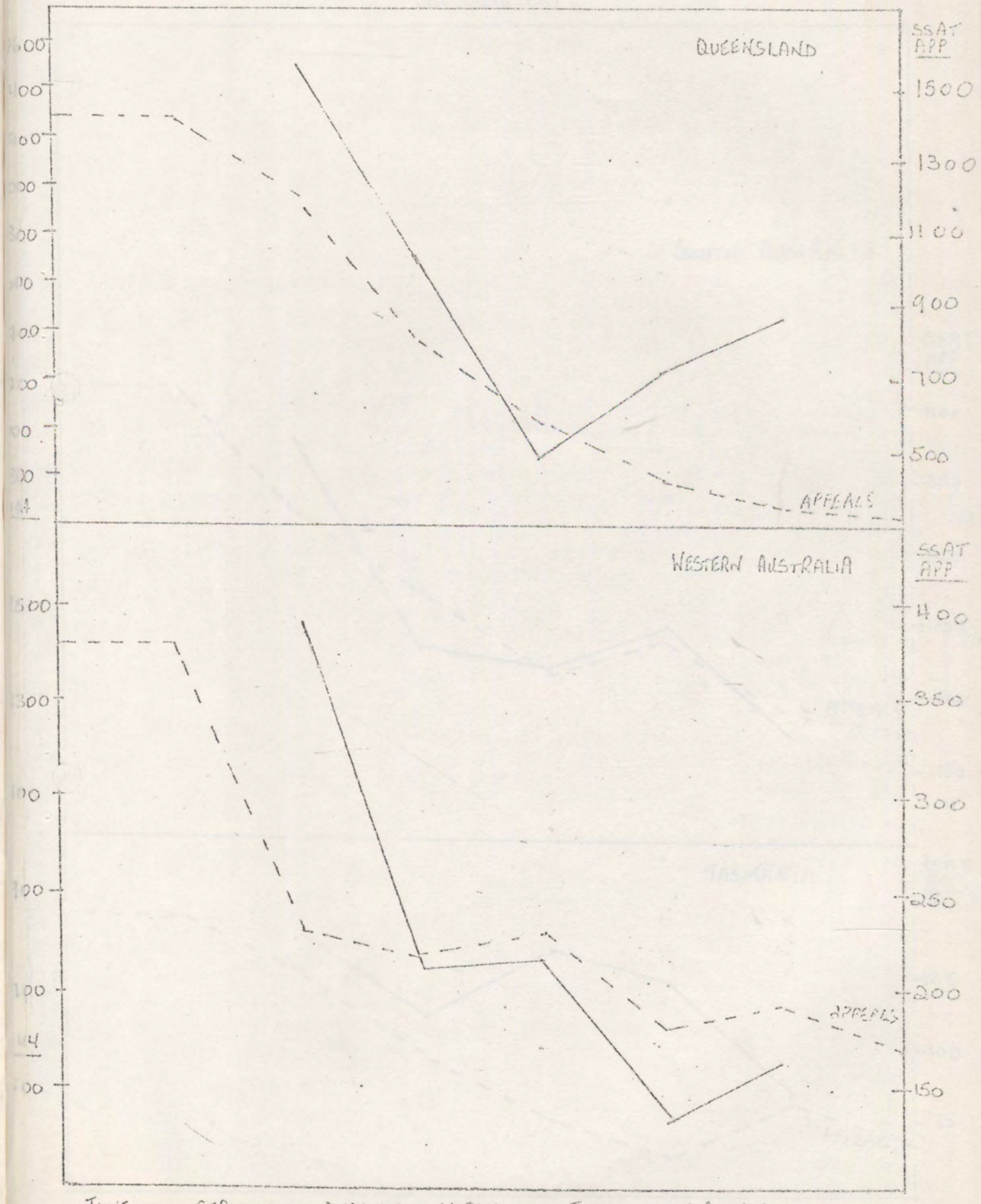
1978	June	Sept	Dec
NSW	899	479	456
Vic	1028	830	537
Qld	1440	1170	748
SA	403	329	257
WA	376	235	227
Tas	140	124	88

1979	Mar	Jun	Sept	Dec
NSW	466	359	324	374
Vic	446	428	461	443
Qld	530	456	448	434
SA	203	244	194	178
WA	240	174	201	169
Tas	72	66	93	68

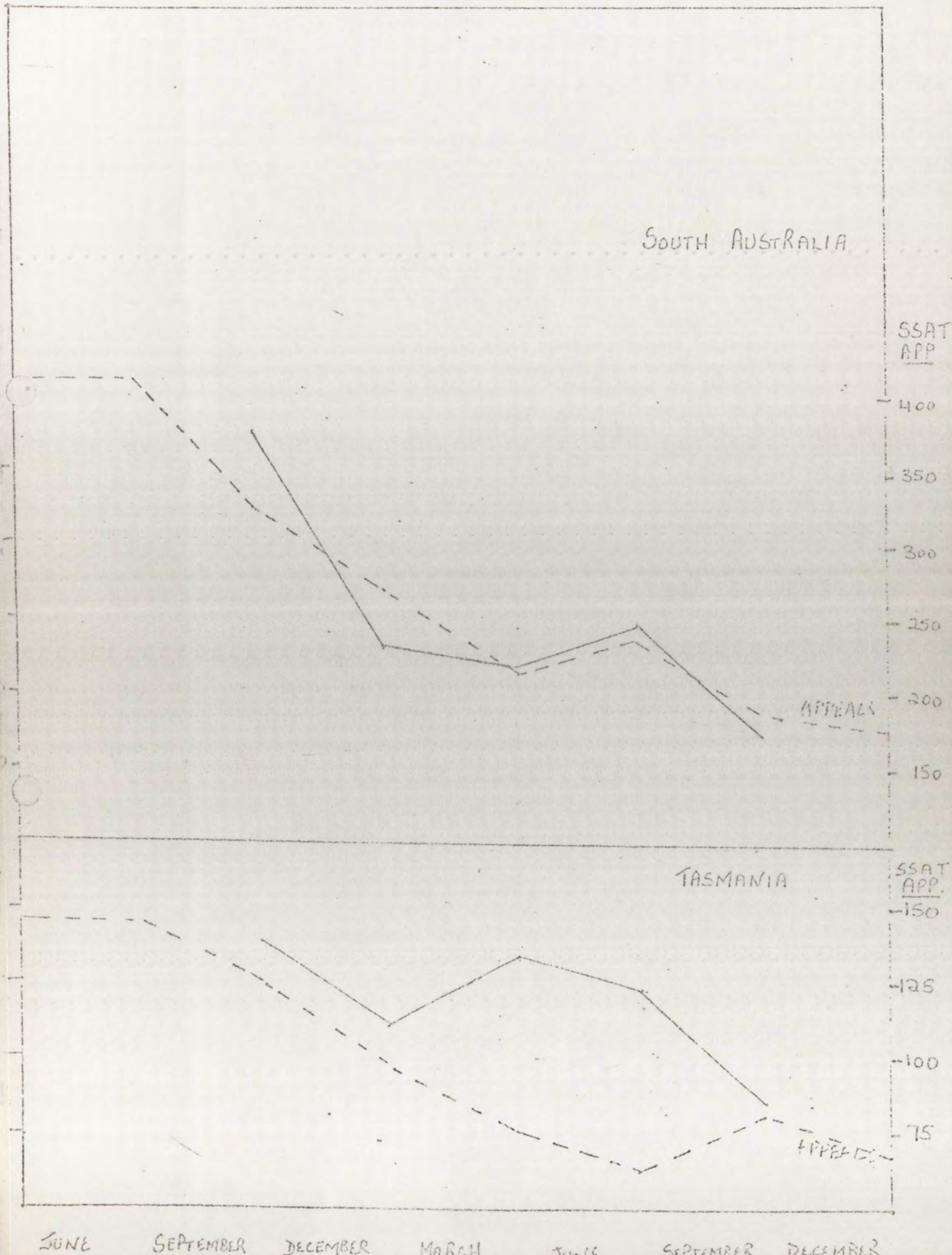
COMPARISON OF ADVERSE SU44s
WITH SSAT LODGMENTS
(BY QUARTER)



COMPARISON OF ADVERSE SU44s
WITH SSAT LODGMENTS
(BY QUARTER)



COMPARISON OF ADVERSE SU44s
WITH SSAT LODGMENTS
(BY QUARTER)



ATTACHMENT 3.4

NEW SOUTH WALES
SPECIALIST BENEFITS UNIT

[Statement of functions provided by the Director of Social Services in New South Wales]

(a) Policy and Standards Sub-Section

Functions

(i) Policy

1. Maintain liaison with Central Administration on matters of benefits policy; and collaborate in joint studies on complex legislative provisions and policies.

2. Undertake projects and surveys aimed at evaluating the adequacy, comprehensiveness and cost effectiveness of benefits policy and practice in meeting community needs.

3. Provide an advisory service within the Department, and to other Commonwealth and State Departments and other organisations, on the application and interpretation of benefits policy.

4. Issue internal instructions on the implementation of new legislative provisions and other more complex benefit matters.

(ii) Standards

1. Monitor the quality of performance throughout the State to ensure that consistency of understanding and correctness of application of benefits policy is achieved and maintained.

2. Review, by means of regular surveys, the technical procedures being used in benefits casework to ensure that satisfactory service is being provided to the community.

3. Set standards for benefits casework.

(b) Appeals and Representations Sub-Section

Functions

(i) Appeals

1. Examine and submit recommendations on those cases where appeals have been lodged against decisions or determinations made under the Social Services Act.

2. Examine and analyse the pattern of appeals to identify situations in which appeals are particularly self-evident and recommend appropriate remedial action.

3. Provide management with appraisals on those appeals where current benefits philosophy and policy is being challenged, and where decisions may result in follow-on effects of considerable proportions and importance.

(ii) Representations

1. Research and prepare detailed replies to Ministerial and Parliamentary representations and other high level Departmental correspondence and requests.

2. Examine and prepare detailed replies to requests for information from the office of the Commonwealth Ombudsman and the Administrative Appeals Tribunal.

(c) Benefits Control Sub-Section

Functions

1. Undertake the investigation of all cases involving offences against the Social Services Act and recommend as to whether prosecution proceedings should be instituted or not.

2. Examine other benefit matters with a legal content and obtain appropriate legal opinion where necessary.

3. Liaise with other Sections, Deputy Crown Solicitor's Office, Commonwealth Police and others to ensure that investigations are achieving effective results.

EXHIBIT 3.5

SSAT LODGMENTS BY QUARTERS

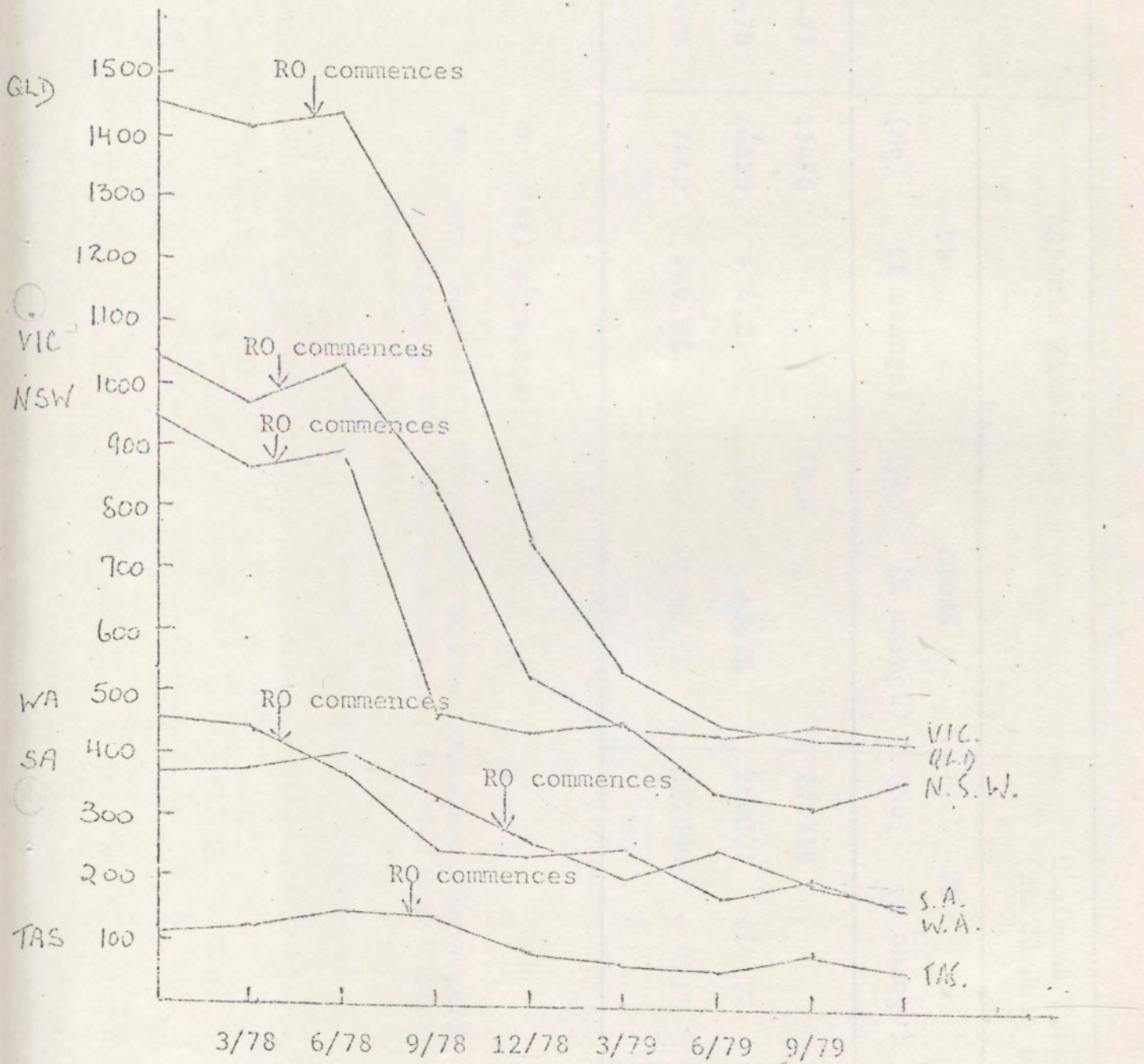


EXHIBIT 3.6

COMPARISON OF TYPES OF APPEAL AND CLAIMANT POPULATION

	Appeals Finalised				Claimant Population (at 30 June each year)			
	UB		OTHER *		UB		OTHER **	
	(No)	(% change)	(No)	(% change)	(No)	(% change)	(No)	(% change)
1976-77	15476		2614		250319		1665722	
1977-78	14825	- 4.2	2697	+3.2%	286091	+14.3%	1748330	+5.0%
1978-79	7443	-49.8%	2757	+2.2%	312000	+ 9.1%	1809513	+3.4%

* All payments

** Age, Invalid, Wives and Widows, Pensions, Supporting Parents, Handicapped Childrens', Sickness, Special and Sheltered Employment Benefits.

APPENDIX 5 - PART 4

CHARACTERISTICS OF SOME OVERSEAS SYSTEMS

INTRODUCTION

4.001 As part of the program of research on proposals for a social security appeals system, a study was made of overseas systems. It was thought that such a study, limited to jurisdictions which had a similar social welfare system (including philosophy and legislation), would assist the Council in its consideration of general principles as well as bring to light the manner in which certain basic problems as to the procedures of social welfare tribunals had been dealt with in those jurisdictions. The systems of Great Britain, Canada and New Zealand were identified as being especially relevant.

4.002 Although those countries have different emphases in their social welfare appeals processes it was possible to deduce from those systems a significant uniformity in basic approach and structure in the relevant legislation and the appeal processes themselves.

4.003 A major point to be noted is that each of the three countries considered has had, for some time, a completely independent specialist review body determining appeals from the relevant Government Departments administering social welfare legislation.

4.004 The Summary at the end of this Part lists the characteristics of a social welfare tribunal and the procedures it might be expected to adopt, if an "average" tribunal were to be created.

BRITISH SYSTEM

Introduction

4.005 Social Welfare in Britain is based on the twin concepts of social insurance and national assistance. Social insurance entails legal entitlement arising from contribution. National assistance has as its objective the provision of subsistence needs and is not concerned at all with the question of contribution.

4.006 In relation to national insurance, claims are determined in the first instance by an insurance officer, who is appointed by the Secretary of State for Health and Social Security. He decides the application entirely on documents sent to him by the claimant and branches of the Departments of Social Services or Employment. His duties may be regarded as administrative in that he is not adjudicating between the contentions of the claimant and Departments. When he finds it impossible to determine a case he may refer it to a National Insurance Tribunal for

determination (see below para 4.025). Benefits under national insurance legislation cover such things as retirement benefits, widows' pensions, sickness, invalidity, unemployment and maternity benefits and death grants.

4.007 A supplementary benefit is payable under the Supplementary Benefits Act 1976 (the Act) to people in Great Britain, aged 16 or over, whose resources are less than their requirements. Most people who get supplementary benefit are in one of the following groups - people over pension age (65 for a man, 60 for a woman); people who cannot work because of sickness or disability; people who are unemployed and registered for work; single parents and people who stay home to look after elderly or disabled relatives.

4.008 The Supplementary Benefits Commission, under the authority of the Act, administers the scheme and has certain discretionary powers under the Act. These powers include the power to adjust the amount of benefit where there are exceptional circumstances and to award lump sum payments for exceptional needs. The Supplementary Benefit Appeal Tribunals were set up under the Ministry of Social Security Act 1966. A tribunal may confirm a decision "or substitute therefor any determination which the Commission could have made" - section 18(3).

4.009 In relation to the appeals processes in each system, marked differences exist. National Insurance Tribunals are relatively formal bodies and can be equated with lower courts, although the adversarial process is less marked. However, in the decision-making process the modus operandi of the National Insurance Tribunals and the Courts is very similar - application of precedents in the form of published case law, with determination of legal entitlement based upon statutory rules. The area of discretion is thus

fairly confined.

4.010 In contrast the Supplementary Benefit Appeal Tribunals have wide discretionary forms. They are also more informal than the National Insurance Tribunals both procedurally and, particularly, in the decision-making sense. The informality can generally be attributed to the lack of precise legal entitlement under the supplementary benefits scheme. The informality of procedures is evident in private hearings, general lack of legal representation and a failure to give comprehensive reasoned decisions based upon published principles or precedents. There is a general similarity between the supplementary assistance scheme and appeals structure and the existing Australian social security scheme and appeals structure.

4.011 The existence and extent of discretion in the British supplementary benefits system has been a matter for much argument. The Beveridge Report on Social Insurance and Allied Services (1942) Cmnd. 6404, which laid the foundations of the present system, did not envisage that national assistance would form a major part of the whole system of social welfare. In fact the level of national insurance benefits has been set consistently below the subsistence standards established by the national assistance and supplementary benefits schemes. As a result the national minimum level of income has been provided not through social insurance as proposed by Beveridge, but by the means-tested national assistance and supplementary benefits.

Supplementary Benefits

4.012 The National Assistance scheme was reorganised in 1966 to become the supplementary benefits system. The basis for the system is set out in Section 4 of the Ministry of

Social Security Act 1966:

"Every person in Great Britain of or over the age of sixteen whose resources are insufficient to meet his requirements shall be entitled, subject to the provisions of this Act, to benefit as follows, that is to say,

(a) if he has attained pensionable age, to a supplementary pension,

(b) if he has not attained pensionable age, to a supplementary allowance,

and, in a case falling within section 6 or 7 of this Act, to such a benefit as is mentioned therein."

4.013 Section 4 can be regarded as the high water mark of legal entitlement; other sections in the Act move the basic floor of entitlement by exercise of discretionary power, either upward or (in the case of supplementary allowance) downward according to the existence of "exceptional circumstances" which make such a movement "appropriate" (paragraph 4(1) Schedule 2).

4.014 Further discretionary modifications are to be found in Sections 7 (single payments to meet exceptional needs), 11 (power to impose conditions that recipient be registered for unemployment), 13 (overriding discretion in cases of urgency) and 14 (payment in kind "by reason of exceptional circumstances"). In addition it is left to the Supplementary Benefits Commission to determine what a person's "requirements" are and whether, under Section 4(1), his resources are insufficient to meet them. The area of discretion implicit in such general criteria as requirements and sufficiency is clearly very large.

4.015 In relation to the "implementation" of these discretions, the Commission had issued a manual of

instructions on administrative rules and directions to departmental officials as to how the various discretionary powers outlined above were to be exercised and as to how questions of requirements, resources and sufficiency were to be determined. This code became the subject of much criticism; for example, on the subject of exceptional needs arising from emergencies, the code simply stated that "the Commission's officers will be anxious to help in the task of relief" and that in particular the Commission could "make use of its overriding discretion to make payments in cases of urgency to people who would normally be excluded from receiving supplementary benefit, e.g. because they are in full-time work." (Supplementary Benefits Handbook: (April 1971) page 2).

4.016 In 1977 the Department set up a small team to rewrite the code in clear simple language, separating questions of entitlement from questions of procedure, so that the revised code could be a simple procedural guide and everything connected with policy on entitlement to supplementary benefit could be published in the Handbook, or in some other readily accessible form. Those two documents would assist staff and claimants who should both be able to refer to a common source of policy with no grounds for suspicion by claimants that secret instructions exist to thwart claims for benefit.

Operation of Supplementary Benefit Appeal Tribunals

4.017 At present there is a right of appeal against:

(a) the amount of an award, the refusal of supplementary benefit, and the withdrawal of benefit;

(b) refusal to review an existing award;

(c) payment of benefit to a person other than the claimant;

(d) payment of the whole or part of benefit in goods or services;

(e) recovery of the whole or part of any benefit paid on an urgent basis to a person in employment;

(f) recovery of supplementary benefit when a claimant was receiving more than one benefit;

(g) a requirement to register for employment as a condition of receipt of benefit.

Appeal Tribunals can also consider:

(h) a report by the Commission seeking a direction that supplementary benefit should be paid subject to a condition that the person attends a re-establishment or other training course;

(i) whether, as a result of misrepresentation or failure to disclose a material fact, benefit has been overpaid and, if so, the amount that is recoverable.

4.018 At present the method of enquiry is characterised by an absence of what might loosely be called "legalism". Legal representation is rare; in a substantial proportion of cases the claimant himself does not appear.

4.019 The appeal is by way of re-hearing and there are no formal pleadings. Procedures are very informal and can easily fall into a round-table type discussion in which the

members of the tribunal, the claimant (if present) and the departmental presenting officer freely participate.

4.020 Each tribunal consists of a Chairman and two other members. The Chairman is not required to be legally qualified and no policy has been pursued of trying to secure the appointment of legally qualified chairmen. In regard to the other two members; one is a person nominated by the local County Association of Trades Councils, the other from a panel appointed by the Secretary of State as persons with knowledge of the problems encountered by claimants. When a claimant does not appear and is not represented, hearings are normally very perfunctory. The procedural rules in general leave the procedure in connection with the consideration and determination of any matter to be determined by the Appeal Tribunal in such manner as the chairman determines. There are currently about 300 chairmen and 2000 members appointed to these tribunals.

4.021 The claimant is entitled to be present, to be heard, to call persons to give evidence and to put questions to any other interested person present and to any person who gives evidence. He may be accompanied by not more than two persons, either or both of whom may represent him at the hearing. Hearings are not open to the public although the rules (Supplementary Benefit (Appeal Tribunal) Rules 1971) do allow attendance of not more than two persons who are genuinely engaged in research connected with appeals to Appeals Tribunals or who have other good and sufficient reasons for being present. Tribunals must record every determination and provide a statement of the reasons therefor in writing. Exhibit 4.1 shows results of appeals to Supplementary Benefit Appeal Tribunals for the calendar years 1973-77.

EXHIBIT 4.1

SBAT Appeals 1973-77

Year	Appeals	Withdrawn or not admitted	Revised and not heard by tri-bunals	Cases heard by tri-bunals	Decisions revised by tribunals	Decisions confirmed by tribunals
1973	50,752	8,686	17,580	24,486	4,854	19,632
1974	55,743	9,289	20,843	25,611	4,493	21,118
1975	68,975	12,029	24,187	32,759	6,568	26,191
1976	101,112	22,131	23,856	55,125	10,450	44,675
1977	114,734	23,531	28,307	62,896	12,071	50,825

4.022 Exhibit 4.2 Shows for 1977 the number of appeal hearings at which the appellant was present, accompanied or represented, and the proportion of tribunal decisions in favour of appellants.

EXHIBIT 4.2

SBAT cases where Appellant represented

Accompanied and/or represented	Appeals heard (i)	Appellant attended (ii)	Appellant absent (iii)	Favourable Decisions: Appellant attended (iv) (as % of col. (ii))	Favourable Decisions: Appellant absent (v) (as % of col. (iii))
Solicitors	302	255	47	104(41)	8(17)
Social or welfare workers	2,288	2,055	233	1,048(51)	112(48)
Friends or relatives	9,507	7,606	1,901	2,398(32)	627(33)
Claimants' unions, trade union or voluntary organisations	2,207	2,009	198	844(42)	69(35)
Neither accompanied nor represented	48,592	18,074	30,518	4,714(26)	2,081 (7)

Exhibits are taken from the Supplementary Benefits Commission Annual Report 1977.

The success rate was highest where the appellant both attended the hearing and was represented by somebody with a professional qualification or relevant experience. It was lowest where the appellant was neither present nor represented. About two-thirds of those accompanying or representing appellants were classified as "friends or relatives" and, while some (it is not known how many) may have been able to provide skilled representation, others probably lent moral support but did not participate actively in the hearing. It is therefore not possible to say precisely what proportion of appellants were represented in any real sense and what proportion were merely accompanied by a friend. It is worth noting, however, that in the 1,901 cases where a friend or relative appeared in the appellant's absence and presumably spoke on his behalf, the proportion of favourable decisions was as high as 33%, compared with only 7% where the appellant was neither present nor represented. The exhibit as a whole suggests that, while it is generally to the appellant's advantage to attend the hearing himself, if he cannot do so it is well worth trying to get somebody else to attend.

4.023 In the Supplementary Benefits Commission's Report for 1976 the Commission expressed support for development of facilities for advice, assistance and representation for appellants.

Review of Decisions

4.024 Under the Act the Supplementary Benefit Appeal Tribunals' decisions are normally conclusive for all purposes. The Supplementary Benefits Commission has limited powers under which it can review its own decisions - if the Commission is satisfied that the decision was taken in ignorance of a material fact or on the basis of a mistake as to fact or law. As from 1 January 1978 both an appellant

and the Commission have a right of appeal against a decision by a tribunal to the High Court on a point of law. The Court will be able either to substitute its own decision for that of the tribunal or refer the case back to the tribunal with directions for the appeal to be reheard. It is understood that appellants are informed of this right of appeal when the tribunal's decision is notified to them, and are advised that if they wish to consider appealing they should seek the advice of a solicitor. Legal aid may be available for the purpose and for the conduct of any proceedings.

National Insurance Tribunals

4.025 National Insurance Tribunals consist of a chairman (nearly always a barrister or solicitor) and 2 members, one representative of employers and the other of employed persons. Unlike Supplementary Benefit Appeal Tribunals, National Insurance Tribunals generally conduct hearings in public. Often there is no attendance by either the claimant or the insurance officer (i.e., the government officer who makes the initial decision and who also prepares the case and appears as the respondent on appeals).

4.026 It is the duty of the insurance officer to forward to the tribunal before the hearing, full written submissions on the decision he has made, together with copies of information upon which his decision was based. This expedites the hearing (i.e. tribunal already has a good idea of the issues). The Tribunal may also seek a report from a local referee. The claimant although entitled to be, will most likely not be represented. Procedures are informal though the decision itself is very formal. This is partly because of the emphasis which is put on the written case which is submitted by the insurance officer beforehand, partly because of the effect of the precedent decisions of

the National Insurance Commissioners has (see below) and partly because of the detail of the legal rules of the jurisdiction itself.

Review of Decisions

4.027 The National Insurance Commissioners constitute an appeal tribunal from the local insurance tribunal decisions. There is no further appeal from the Commissioners' decisions on questions of law, as is provided generally in the Tribunals and Enquiries Act 1971. This was the result of a direct recommendation to that effect by the Committee on Tribunals and Enquiries (the Franks Committee), (1957) Cmnd. 218, which was impressed by the high legal standing of the Commissioners.

4.028 In relation to procedure, Commissioners often ask the Insurance Officer's representative (a senior legal officer from the department appears in his stead) to obtain any additional information that is required. Commissioners also use other fact-finding methods, e.g., they write to employers for information, use assessors or obtain an extra report from a specialist at the close of the hearing.

4.029 Legal representation is not uncommon, as points of law are often raised. Only when a case appears to the Commissioners to be clear-cut or completely unarguable is a hearing refused. In cases involving difficult questions of law, the Chief National Insurance Commissioner or an appointed deputy may direct that the appeal shall be heard by a tribunal of three Commissioners.

4.030 Selected decisions of Commissioners are printed and published as a series of reports, and they are binding on insurance officers and local appeals tribunals. It has already been noted that this has effectively helped to

establish the national insurance jurisdictions as being fairly formal in respect to their decisions, notwithstanding informal procedural methods.

4.031 The supplementary benefits machinery has received more criticism than the National Insurance Tribunals. Undoubtedly the discretionary nature of the jurisdiction has been a contributing cause and it has been suggested that their reputation has not been assisted by their sitting behind closed doors. Legal representation, or representation of any kind has been rare. By contrast National Insurance Tribunals composed as they are at Commissioner level of experienced barristers (at least 10 years experience) have received more praise than criticism.

CANADIAN SYSTEM

Introduction

4.032 In Canada the responsibility for social welfare is divided between the Provinces (including Territories) and the Federal Government. The Federal Government has exclusive jurisdiction in unemployment insurance matters and major involvement in Old Age Security matters. General Assistance for persons in need is provided mainly under Provincial assistance programs.

4.033 The Federal Canada Assistance Plan Act 1966 (hereafter CAP) provided for a single administrative framework for the Federal Government to share with the Provinces the costs of assistance. The CAP authorised the Federal Government to assume 50% of the costs of the assistance. The provincial departments of public welfare set rates of assistance and conditions of eligibility. The CAP encouraged Provinces to implement an appeal system which would allow any person aggrieved by a decision affecting

either the granting of assistance or the actual amount of assistance to require a review of such a decision. Each Province now has its own appeal system to deal with all areas of assistance under its control. Although there are differences among the appeals systems adopted by the Provinces a general overview is provided below reflecting the most common features. The Federal unemployment appeal system is considered separately.

Provincial Social Security Appeals Systems

4.034 Most Provinces (including Territories) specify in legislation that applicants are to be informed of the reasons for rejection of their applications and of their right of appeal. The Provinces which do not have specific legislative provisions requiring such notification, have clear policies to the same effect.

4.035 Appeals may be made to Social Assistance Boards with respect to granting, suspending or varying a benefit. A person who is dissatisfied with delay in the processing of an application or with the treatment received by welfare staff is generally considered to have a complaint rather than an appeal and may complain to whom he wishes. Some Provinces provide that an appeal per se may rest on such dissatisfaction.

4.036 In all Provinces a person may be represented. Quebec allows for representation by a lawyer; in 2 other provinces the representative is specifically referred to as "lawyer or counsel".

4.037 In all but one Province, there are provisions for accessibility. An appellant may be awarded expenses resulting from the appeal hearing. Provinces have varying degrees of assistance; some limited to travelling expenses,

EXHIBIT 4.3 - STRUCTURE FOR SOCIAL SECURITY APPEALS IN CANADA

Province or Territory	Administrative 1st Tier	Independent Review 2nd Tier	Judicial Review 3rd Tier
Newfoundland	Regional Admin Review Committee	Social Assistance Appeals Board	Supreme Court of Newfoundland (law or mixed law and fact)
Prince Edward Island	Ministerial Review	Welfare Assistance Appeals Board	
Novia Scotia	Welfare Committee (municipal) Provincial Review Board (provincial)	Social Assistance Appeal Board	
New Brunswick	Supervisor plus worker to review, then to Area Reviewer	Social Welfare Appeal Board	
Quebec	Admin review by regional office of any local office decision	Social Affairs Commission	Superior Court (natural justice or ultra vires)
Ontario		Social Assistance Appeal Board	Supreme Court of Ontario, Supre Court of Canada
Manitoba		Social Services Appeal Board	Court of Appeal and Supreme Cou
Saskatchewan	Unit Administrator	Unit Appeal Committee then to Social Services Appeal Board	
Alberta	Admin review	Local Appeal Committee	Courts of Alberta and Canada
British Columbia	Admin review	Tribunal	Courts on ultra vires
N.W. Territories	Social Assistance Appeal Committee	Social Assistance Appeal Board	Courts on ultra vires
Yukon	Social Assistance Appeal Committee	Social Assistance Appeal Board	

others allowing for witnesses expenses, loss of wages, etc.

4.038 Generally, assistance pending the hearing of an appeal is given to the applicant only if he is in receipt of a benefit at the time of appeal. This is provided for either by express provisions in legislation or adopted as a matter of policy. Assistance ranges from provision for retrospective payments where the applicant satisfies the statutory criteria for such assistance, to such payments being made at the discretion of the Board. Only one Province does not provide for any assistance. Saskatchewan, on the other hand, provides "client advocates" in each region.

4.039 The Provinces differ as to the appeal structures they have adopted, nevertheless a basic feature is that there is (at least) a two-tier structure not including review by the Courts. Exhibit 4.3 on the following page indicates the various approaches adopted, where they are known.

4.040 Because of the different approaches in relation to appeal structures adopted by the Provinces, it is only possible to give a general view of the composition of the sundry review boards. The independent review authorities comprising the second tier of review as set out in the Exhibit consist, with few exceptions, of three members, none of whom may be public servants. Terms of appointment are for a stipulated period (3 years). Some Provinces have no eligibility criteria for Board members, others specifically allow a recipient of a benefit to be a member.

4.041 The differing appeal structures contain a wide range of time limits for review e.g. in Prince Edward Island, Ministerial review must be completed within 7 days, after that, if the appeal is continued, the Appeal Board has

30 days to reach a decision. In Newfoundland the applicant has 60 days within which to appeal against a adverse decision (to the Regional Administrative Review Committee) - a further appeal to the Appeals Board must be lodged within 30 days. In contrast in Saskatchewan, where, although on the information available it is not clear how soon one has to appeal, the Regulations provide that decisions of the Social Services Appeal Board should be arrived at within 3 days after receipt of a notice of appeal.

4.042 Apart from statistics in relation to appeals appearing in the relevant annual reports, there is no general requirement for publication of appeal decisions. Some Provinces do distribute copies of decisions, with names deleted, to interested parties and agencies.

4.043 The costs of the Appeals Boards are part of the relevant Provincial Department of Social Services' budget.

4.044 In Alberta, local Appeal Committees have the authority to countermand any departmental policy not specifically stated in the relevant Act and Regulations. The Committees may make recommendations for the information and consideration of the Department, as a supplement to their decision. There is no known express power in other Provinces to allow this function to be performed.

Federal Unemployment Insurance Appeal System

Board of Referees

4.045 The first level of appeal against an adverse decision of the Unemployment Insurance Commission (the statutory body responsible for the unemployment insurance scheme in Canada) (hereafter UIC) is to a Board of Referees, established under the Unemployment Insurance Act 1971. Each

Board is composed of a Chairman, appointed by the Governor in Council, a representative of "employers or representatives of employers" and a representative of "insured persons or representatives of insured persons". The constitution of the Boards resembles that of the British National Insurance Tribunals.

4.046 There are comprehensive Regulations governing the procedure of the Board. The following is a brief summary.

4.047 An appellant may be accompanied by a spouse, parent, union agent, lawyer or any other representative whom he may have asked to "plead his case". The Board may question the appellant and the Chairman or the decision-maker may summon a person whose presence he deems useful. Evidence does not have to be given under oath. When the appellant is not present the questioning is replaced by an analysis and discussion of the decision-maker's submission among the three referees. Proceedings are not normally recorded. If facts came to light at the hearing which the decision-maker did not or would not have taken into account, the Chairman may refer the matter back to Unemployment Insurance Commission.

4.048 The Board has power to confirm , rescind or amend a decision. The Act requires written decisions. The Board's decision should be based on legal reasoning applying standards taken from the Act, the Regulations and caselaw. The UIC has adopted a form which includes the elements of the decision, being, normally:

- an indication of the sections of the Act applicable
- a description of the evidence - letters from appellant, statements during hearing, information gained by telephone in the course of proceedings etc.
- a summary of the facts
- an assessment of the facts in the light of the law, and a decision confirming rescinding or amending the decision.

4.049 An appeal may be lodged with an Umpire against a decision of the Board. Exhibit 4.4 indicates the number of appeals to the Board of Referees during the period 1968 to March 1975 and Exhibit 4.5 shows the distribution of appeals heard in 1974 according to the question at issue.

EXHIBIT 4.4

Appeals to Boards of Referees

January 1968 to March 1975 inclusive

Year	Number of Appeals
1968	16,524
1969 (estimated)	13,500
1970 (estimated)	12,250
1971	15,306
1972	26,221
1973	45,289
1974	40,758
1975 (1st quarter)	10,831

EXHIBIT 4.5

Issues on Appeal to Boards of Referees - 1974

Issue	Applicable Section	% of Appeals
Availability of the claimant	sec. 25(a)	48
Voluntary leaving	sec. 41(1)	16
Job Search	reg. 145 (9)	9
Antedate	reg. 150	5
Misconduct	sec. 41(1)	3
Not employed	sec. 17 & 21	2.5
Job refused	sec. 40(a) & (b)	2
Capacity for work	sec. 25(a)	1.5
Labour dispute	sec. 44	1.5
Formalities in submitting claim	sec. 53	1.5
Miscellaneous		10
		100

Of the 40,758 appeals heard in 1974, 5,824 were upheld by the Boards of Referees (14.3%). Exhibit 4.6 indicates the success rate for appeals against UIC since 1968.

EXHIBIT 4.6

Success Rate of Appeals to Boards of Referees

1968	9.6%
1969	9.4% (approx)
1970	9.2% (approx)
1971	10.7%
1972	11.8%
1973	15.2%
1974	14.3%
1975 (1st quarter)	16.2%

The Exhibits are taken from Canada Law Reform Commission, "Unemployment Insurance Benefits: a Study of Administrative Procedure in the Unemployment Insurance Commission" (Ottowa, 1977).

Umpire

4.050 The office of the Umpire constitutes the second tier of appeal in unemployment insurance cases. The Umpire can be regarded as injecting a specifically legal contribution into the appeal process. The right of appeal to an Umpire is conditional; it is contingent on one of the following conditions being fulfilled: the decision of the Board of Referees must be merely a majority and not unanimous, or the Chairman must grant leave to appeal

against a unanimous decision. A right of appeal in a majority decision applies only to questions on which the minority member has disassociated himself from his colleagues.

4.051 Decisions of Boards are usually unanimous (about 95% in 1975) and as a result the vast majority of claimants whose appeals are dismissed by the Board of Referees must obtain leave from the Chairman before they can appeal to the Umpire. Section 91 of the 1971 Act stipulates that the Chairman can grant leave only "if it appears to him that there is a principle of importance involved in the case or if there are other special circumstances by reason of which leave to appeal ought to be granted". In 1974 all Umpires were judges, although the possibility of appointing persons other than judges exists.

4.052 Regulations set a limit of 60 days for the UIC to make up the appeal papers and forward them to the Umpires' office. Benefits paid to a claimant in accordance with a decision of the Board are in principle considered as having been duly paid, whatever the outcome of the appeal. The Registrar of the Umpire writes for the Umpire a summary of facts and legal questions arising from them. When the legal questions are complex he gives an account of current thinking and Umpires' case law on the subject. If he thinks a particular solution is called for on the basis of the file, he indicates this, without prejudice to any new elements which might emerge as a result of the statements of the parties of the hearing. The Registrar's summary and the UIC file is then forwarded to the Umpire.

4.053 Procedures for hearing the appeal are at the discretion of the Umpire. The "basic" section states:

> "An Umpire is not bound by any legal or technical rules of evidence in conducting hearings for the

purposes of the Act and all appeals shall be dealt with by him as informally and expeditiously as the circumstances and considerations of fairness will permit." (Unemployment Insurance Act, section 93(1).

Hearings are not compulsory, they are held if the affected or interested party so requests (in which case the Umpire must accede). Where no hearing is applied for, the Umpire is empowered to render a decision on the basis of the documents filed. In 1974 about one third of appeals were decided without hearing.

4.054 Hearings, when they are held, have a judicial flavour. It has been the practice of Umpires to sit in the courtroom of the Federal Court. The judicial effect is strengthened by the presence of the Registrar of the Umpire's Office, the Deputy Registrar (whose functions are those of the Clerk of the Court in a Court of law) and an usher. In most cases a claimant is represented by a lawyer, union representative or "peoples advocate" from an organisation helping the unemployed.

4.055 The examination of the appeal follows a procedure broadly similar to the corresponding phase before a court of law, with the statements and cross-examination of the appellant, the respondent and their respective witnesses, the 'summing up' of the issues by the Umpire, the pleadings and answers of both parties.

4.056 The Umpire's written decision may hold one of the following conclusions with regard to each question raised by the appeal: upholding, rescinding or amending the Board's decision, or sending the case back to the Board. Reference has already been made to payments made if the Umpire rescinds the Board's decisions in favour of the UIC. When the Umpire rescinds a decision of the Board and substitutes a decision in the claimant's favour, the latter's rights are

reinstated with effect from the date of the initial decision which had been upheld by the Board. The most common reason a case is sent back to the Board is that new facts have appeared on the file after the Board's decision. Two other common grounds are the Board's failure to rule on questions brought to its attention in the submission and inadequacy of the evidence obtained by the Board in support of its decision.

Review by the Federal Court

4.057 By the Federal Court Act 1971 jurisdiction is conferred on the Federal Court as far as federal administrative authorities are concerned. Theoretically, therefore, as far as unemployment insurance benefits are concerned, the three major holders of decision-making powers - the Unemployment Insurance Commission, the Board of Referees and the Umpire are subject to the power of review and supervision exercised by the Federal Court. To these three authorities must be added the Chairmen of the Board of Referees, who enjoy decision-making power with regard to the right of claimants and employers to appeal to the Umpire. In practical terms, it should come as no surprise that the Federal Court had not up to 1975 been required to review a decision of the UIC: from the claimant's standpoint, appeal to the Board of Referees is obviously simpler, quicker and less expensive than any recourse to the Federal Court. Since its creation, however, the Court has heard appeals against a decision by a Board of Referees, against one by a Chairman of a Board of Referees and against several decisions by the Umpires (up to end of 1974).

4.058 The review by the Federal Court of decisions of the UIC, the Boards of Referees and the Chairmen of Boards of Referees is based entirely on the Common Law tradition of judicial review and on the Federal Court Act. In the case

of the Umpires, however, the Unemployment Insurance Act itself expressly provides for the intervention of the Federal Court. This intervention is presented as a departure from the principle that the Umpire's decision is final.

NEW ZEALAND SYSTEM

Introduction

4.059 The principal New Zealand Act dealing with Social Services is the Social Security Act 1964. Under that Act benefits are payable in respect to the following: Superannuation, Age, Widows, Domestic Purposes, Orphans, Family, Invalids, Miners, Sickness, Unemployment and Emergency Benefits, Dependent Children, Death and Additional Benefit.

4.060 On 1 May 1974 the Social Security Appeal Authority ("Tribunal" or "Authority") was created by amendment to the principal Act. That Tribunal has power to determine appeals against any decision or determination of the Social Security Commission in respect of the above payments. The Tribunal does not have power to review decisions in relation to appeals on medical grounds for Invalid or Miners' benefits.

Social Security Appeal Authority

4.061 Before an appeal may lie to the Tribunal a person affected by a decision must, within three months of the communication of the decision, apply to the Commission for a review of the decision, and the Commission must have given its decision following that review.

4.062 The following is a summary of the procedural provisions together with discussion as to their practical

application.

4.063 Applications for appeal must be in writing and lodged with the Authority within three months of notification of the Commission's decision. The Authority may allow for later lodgments. The notice is required to state with particularity the grounds of appeal and the relief sought. A copy of the notice is sent by the Authority to the Commission which is required, as soon as possible, to send to the Authority all relevant documents including a report setting out the considerations to which regard was had in making the decision or determination. A copy of the above information is provided to every party to the appeal.

4.064 A day for hearing is set by the Tribunal "unless it considers that the appeal can be properly determined without a hearing".

4.065 Sittings of the Authority are required to be held in private and in such places as it considers convenient having regard to the nature of the matters to be decided. However the Authority may, in any case if it considers that the interests of the parties to the appeal and of all other persons concerned will not be adversely affected, order that the sitting or any part of it shall be held in public.

4.066 At the hearing the Commission and any party may be represented by Counsel, Departmental officer, or duly authorised representative. The number of appellants represented by counsel is small; likewise the Commission is seldom represented by counsel. New Zealand's legal aid scheme covers proceedings before the Tribunal and many of the appellants who are represented by counsel have legal aid. The Authority prefers the appellant to appear, and reasonable expenses of attendance of the appellant are met

by the Commission.

4.067 A large number of appeals is dealt with on the papers presented by the Department, with written submissions by appellants or solicitors acting on their behalf. The Department is usually represented by a senior officer able to respond to any queries the Tribunal may have. When it is known by the Tribunal that an appellant will be represented by counsel, or substantial questions of law are involved, the Authority expects the Commission to be represented by legal counsel.

4.068 The Act provides that the procedure of the Authority shall, subject to the Act, be such as the Authority determines. The appeal is by way of rehearing but where a question of fact is involved in any appeal the evidence taken before or received by the Commission bearing on the subject shall be brought before the Tribunal in a particular way: as to evidence given orally, by the production of a copy of the notes of the Commission or other material as the Tribunal thinks appropriate; as to evidence by affadavit and other exhibits, by the production thereof.

4.069 The Tribunal may rehear the whole or any part of the evidence, and shall rehear the evidence of any witness if it has reason to believe that any note of the evidence of that witness made by the Commission is, or may be, incomplete in any material manner.

4.070 The procedure before the Tribunal is kept as informal as possible where appellants are not represented. Where counsel appear, ordinary court procedure is followed strictly. When an appellant appears the Tribunal ensures he has adequate opportunity and encouragement to place before it all matters which are relevant to enable a decision to be reached. Evidence is given on oath by appellants and

witnesses (if any) with cross-examination and re-examination, if considered necessary.

4.071 The Tribunal is not bound by the rules of evidence and may receive any statement document etc. which in its opinion may assist it to deal with the matter. The Tribunal has power to confirm, modify or reverse the decision appealed against. It also may refer a matter back to the Commission for further consideration and give directions as it thinks fit as to that reconsideration.

4.072 A Tribunal is constituted by three members, one being the Chairman, but two are sufficient for a sitting; there is no prescription of qualifications for members or Chairmen. Appeals lie to the Supreme Court on questions of law only. On determination of the appeal the Authority is required to send to the Commission and the appellant a memorandum of the decision and the reasons for the decision.

4.073 The numbers of appeals lodged with the Authority on a calendar year basis since its introduction has been as follows:

1974 (commenced May 1974)	64
1975	143
1976	196
1977	154
1978	132
1979 (est)	90

4.074 Exhibit 4.7 indicates the number of cases up to 14 December 1979 actually determined by the Tribunal in respect of selected types of benefit over the same period (i.e., May 1974 - December 1979):

EXHIBIT 4.7

Cases determined by Tribunal

Type of Benefit	No	Major Issue
Unemployment	60	Work test (41)
Sickness	30	
Supporting Parents	50	de facto (28)
Family Allowance	25	
Age, Invalid, Widows	64	Superannuation
Special	46	

4.075 In addition about 160 appeals were heard in relation to Family benefit capitalisation. To promote family welfare, the Family Benefits (Home Ownership) Act 1964 enables family benefit to be capitalised to help, for example, to buy a house, or pay for additions or alterations to the family home. To be enabled to capitalise the family benefit the applicant has to satisfy an income test. About 120 of the 160 appeals involved an income test.

4.076 The average number of cases lodged with the Tribunal in New Zealand per year has been 130. This figure appears to be low. This may be explained by the small numbers, compared to Australian standards, involved overall (average number of unemployment benefits in 1978-79 was 18,045; sickness 8336; the number of invalids and widows at 31 March 1979, was 28,445) plus the fact that Departmental review is compulsory before a person may proceed to independent review by the Tribunal. Of the 173 appeals dealt with from March 1978 to March 1979, 27 were withdrawn, 52 were upheld and 54 were dismissed, none were returned to the Commission for reconsideration, and 40 remained outstanding. The withdrawal rate for 1978 was therefore about 17.5%; success and failure rate each about 30%, and

the remaining percentage of appeals (22.5%) were outstanding. Exhibit 4.8 sets out the Tribunal's decisions for the last five years (excludes cases outstanding):

EXHIBIT 4.8

	Cases received	Allowed	Dismissed
1975	73	9 (12.6%)	23 (31%)
1976	166	31 (18.5%)	84 (50.5%)
1977	183	35 (19%)	71 (49%)
1978	138	33 (24.6%)	84 (60%)
1979	124	52 (42%)	54 (43.5%)

Tables collated from information supplied by New Zealand Department of Justice, and from the Annual Report of the New Zealand Department of Social Welfare for year ended 31 March 1979.

SUMMARY OF OVERSEAS SYSTEMS

4.077 It can be seen that there are basic similarities in relation to the existing social security appeals systems in the three countries considered. Below is a brief identification of the most common attributes in the various appeals systems.

4.078 The typical tribunal is constituted by 3 members and proceeds by way of rehearing. It deals with a large number of cases and has wide discretion as to its procedures. In particular it:

. has power to inform itself as it thinks fit

(including power to call witnesses and question them).

. hears appeals in private

. has power to set aside, vary, revoke or refer the decision back to the decision-maker

. has power to decide in the absence of the parties

. gives written reasons for its decision

. is subject to appeal on a point of law.

The parties are entitled:

. to be represented (but will probably not be in practice)

. to present witnesses.

The party appealing will often not appear in person at the hearing.

APPENDIX 5 - PART 5

COSTS AND BENEFITS OF REVIEW

Introduction

5.001 This paper considers the costs and benefits of instituting a general right of review by the Administrative Appeals Tribunal of decisions by DSS which are contested by social security claimants. A review process of this kind will necessarily cost more than the present process if the defects of the latter are to be remedied. Any system of review must be an effective and not disproportionate use of resources.

5.002 In its Second Annual Report the Council observed (paragraph 9):

> "The improvement in administrative justice which is the principal object of a system of review is not secured without cost, a factor which becomes apparent as the system of review develops. The costs may be set off to an extent by savings achieved by improved procedures. Although the question whether a particular reform should be implemented or not is ultimately, of course, a matter for Government, Council recognises that the benefits for the citizen and to the operation of government which a particular reform would secure should bear some reasonable relationship to the costs of implementing the reform."

5.003 The review system assumed in this paper may be expected to bring about a material improvement upon the standard of decisions under the current appeal process and

to have some advantageous impact on Departmental processes. As a consequence it would provide significant tangible and intangible benefits to both the claimants concerned and the community as a whole, which, it is suggested, would far outweigh the costs concerned.

5.004 It is not possible to apply a cost-benefit analysis in the strict sense to administrative review for a number of reasons, particularly because many of the benefits are not capable of being reduced to monetary terms. Furthermore, in the present case, some costs and benefits, though in principle able to be expressed or indicated quantitatively, cannot, with the resources available to the Council, be estimated with any precision. Thus, for example, the cost to DSS of existing review processes has not been ascertained in the past and cannot at this stage be ascertained by the work of the Council alone. This does not mean that a systematic attempt to isolate the relevant costs and benefits of the proposed process should not be undertaken. Within the limits of the resources and information available to it, the Secretariat has done that. The balancing of costs and benefits is made between costs to the Commonwealth budget, and benefits to the community (including the applicant) and the Department.

5.005 A draft of this paper has been considered by officers of the Public Service Board and their comments have been taken into account. Advice has been received upon the degree of precision with which a statement of costs and benefits should be made, and on the cost categories identified in this section and their possible magnitude. They have advised that further precision as to costs within the DSS would not be possible. Hence, where necessary, calculations have been made on the basis of assumptions as to the likely situation. Those assumptions are in turn based on what are considered to be reasonable estimates.

Exact costing, even in relation to AAT costs, is not possible and would, in any event, not ensure that the right decision on the desirable review process is made.

5.006 Number of Cases and Time Involved. In 1979, 7,197 appeals were lodged with SSATs. Many of these were conceded by the Department prior to hearing; the Tribunals gave decisions in 4,250 cases. The figures for lodgments with the Tribunal in each quarter of 1979 indicate that the level of appeals has now stabilised and it is taken that this number would continue into the future. Taking the New South Wales figures on Review Officer contacts as being the most accurate, namely, that 66.1% of appeals have not been previously seen by a Review Officer and that 16.2% of claimants contacting Review Officers go on to appeal to an SSAT, and assuming that all those who have in the past appealed without seeing a Review Officer would see a Review Officer under the proposed system, the total number of lodgments with the Tribunal under the proposed system may be calculated to be 3,211. [7197 - 66.1% of 7197 (1 - 0.162) = 3211]. To these must be added the medical appeals which are not at present subject to the SSATs. It is assumed that 50% of the 1094 persons who still were subject to adverse decisions following review by an external practitioner, would appeal to the AAT. This makes a total of 3758 lodgments. Assuming that 10% of applications to the Tribunal are conceded by the Department before the hearing, and that a further 5% lapse for other reasons, the number of hearings per annum would be approximately 3200.

5.007 It is further assumed that under the new and limited AAT jurisdiction introduced in April 1980, 150 cases per annum will go to the AAT (the Director-General's estimate is lower). Not all of these will involve important questions of principle. Many (e.g. cohabitation cases after the initial ones) will turn only on their facts. It is

estimated that under the scheme at present being considered by the Council some 100 cases per annum would go to a presidential bench of the AAT as involving important principles of wide application.

5.008 It is estimated that the 3,200 hearings will be heard as follows:

- 60% consisting of parties only, taking one half to one hour each
- 25% consisting of parties plus one witness only, taking 45 minutes to one and a half hours
- 10% consisting of parties plus three or more witnesses, taking one and a half hours to a full day
- 5% consisting of parties plus three or more witnesses, taking one and a half hours to a full day.

It is estimated that the cases involving important principles of wide application would take one to two days to hear. The time taken in hearings depends more on the issues than on the number of witnesses, hence the wide variation between minimum and maximum estimations. The percentage above assumes that there will be no cases where the applicant does not either attend or telephone. There will be a percentage of cases where there is no hearing or claimant input. The shorter time involved in those cases would offset any underestimation in the times set out above. It should be noted, however, that AAT experience is that the times for cases with witnesses are not underestimated. Members of SSATs consulted also indicate that the percentages and times set out above are reasonable estimates

given the nature of current cases and the kind of procedures the AAT is likely to adopt. Finally, it is estimated that 90% of hearings would give rise to immediate decisions (the delivering of which would add twenty minutes to the time for rehearing) and the other 10% would involve reserved written decisions which would in each case add one day of members' time to complete.

5.009 To estimate the number of hearing and decision days occupied, three hypotheses have been analysed. The first is that two-thirds of hearings are at the lower figure set out above, and one-third at the higher. Secondly, that one-third of hearings are at the lower figure and two-thirds at the higher. The third hypothesis is that all hearings are at the higher figure. The number of hearing and decision days are estimated to be:

hypothesis 1 - 1076
hypothesis 2 - 1231
hypothesis 3 - 1385

If it is assumed that half of the AAT benches will have three members and that a full-time member would be involved in 200 hearing days per annum, then it may be calculated that the proposed jurisdiction would involve the equivalent of 11 full-time members on the first hypothesis, 13 on the second and 14 on the third.

5.010 Immediate Tangible Costs of the Administrative Appeals Tribunal. A number of the relevant elements are "in-out" costs, that is, the amount at present spent for particular goods or services for the SSATs may be taken for present purposes to provide the equivalent goods or services for the Administrative Appeals Tribunal. These elements are registry staff, accommodation for hearing rooms and registry staff and general administration of the Tribunals.

5.011 The first element of added cost is remuneration of Tribunal members. Recent implementation of the 1977 proposal has necessitated provision for futher members in the AAT to hear the estimated 150 cases. Because not all of these cases will be heard by presidential benches it is estimated that the 100 cases on important principles of wide application which are expected to arise under the scheme being considered by the Council (and which would be heard by presidential benches) would cost roughly the same amount as the 150 cases under the 1977 proposal. This is regarded as an "in-out" cost. The relevant cost comparison is therefore between the existing payment to SSAT members ($113,000 in 1979-80) and payment for the 11-14 equivalent full-time members involved in the non-important cases. The AAT members are assumed to be six senior members and 5 other members, 6 and 7, and 7 and 7 on the three hypotheses of paragraph 5.009 above. Their fees would represent an additional outlay (on the 1979 Remuneration Tribunal fee levels) of between about $277,000 and $381,000 (plus "on costs" e.g. superannuation) over that of the SSAT members.

5.012 New members for tribunals involve new support staff. There would probably be a cost difference of between about $137,000 and $163,000 (plus "on-costs") between the SSATs and the AAT (counting two support staff for each Senior Member).

5.013 Following implementation of the 1977 proposal additional registry, staff and other costs are being incurred both by SSATs and by the AAT. Under a scheme providing general rights of independent review, all registry costs would fall on the AAT. The additional costs to the AAT are likely to be less than those incurred by the SSATs, and hence some saving can be expected.

5.014 When a full caseload develops following

implementation of the 1977 proposal, extensive AAT travelling is likely to be involved. Were the AAT to have the entire jurisdiction there would be a significant saving in travel costs, since the AAT's workload would so increase that it would have a sufficient range of members in each capital city to handle almost all cases by using local members. It is assumed that there would be no new travel involved if a general jurisdiction were given to the AAT, as compared with existing SSAT travel.

5.015 In conclusion, the immediate nett added cost in operating the AAT in the social security jurisdiction proposed in this Report would appear to be in the order of $400,000 to $550,000 (plus "on costs") depending on the length of hearings.

5.016 Immediate Tangible Costs of the Applicant. For present purposes the only relevant costs under this heading are the additional expenses of witnesses which are paid by the Commonwealth and the costs of advice and assistance provided by the Commonwealth. The use of witnesses may be gauged by the above estimates as to the percentage of cases in which various numbers of witnesses would appear. No money estimate can be made of this cost without knowing who those witnesses would be and the extent to which they would fall within the categories for payment of expenses under section 67 of the AAT Act which were outlined in Re Sullivan and Delegate of Secretary Department of Transport (No 3) (AAT No 77/14004, November 1979).

5.017 It is expected that cases coming to the AAT under its recently conferred social security jurisdiction will often involve legal aid. There are assumed to be fewer cases likely to involve important principles of wide application (for which legal aid is generally likely to be necessary) under the proposed scheme, but it may be expected

that the saving indicated thereby would be at least offset by the use of legal aid in other cases. There might well, therefore, be some additional costs involved in the proposed system, but these are not considered likely to be great.

5.018 Immediate Tangible Costs of the Respondent. The proposed system involves presentation of the Department's case. The cost of this is expected by the Secretariat roughly to balance the saving achieved by elimination of the DSS member on SSATs, and may be regarded as an "in-out" cost. Given the Administrative Review Section already established within the Department, the Secretariat does not expect that the Department would seek outside legal representation in many cases. Moreover, such cases are considered to be as likely to arise under the present system as under the Council's proposed system. Outside representation is, therefore, considered likely to be at most a marginal additional cost.

5.019 The cost elements of internal reconsideration, collection of material for the appeal, support staff, accommodation and administration may be treated together. An increase in these costs would arise to the extent that the demands of a more rigorous Tribunal and a larger number of cases require additional work which more than offsets the savings arising from the increased Review Officer activity reducing the number of appeals lodged, and from elimination of the need for review by very senior officers following favourable SSAT recommendations. There would probably be some increase in cost in this area, but there is insufficient data available to the Secretariat to enable even a rough estimate to be made.

5.020 In considering the cost of travel of officers involved in hearings, it is assumed that the Department would not use its specialist Central Office appeals staff to

present simple cases, these latter being dealt with by State Offices. Travel for simple cases would therefore be minimal and no significant increase might be expected from the proposed scheme. The cases in which the Department would wish to use Central Office staff are probably those involving important principles. Since it is intended to use the Central Office staff for AAT cases under the scheme which is now in force, the cost of their travelling to deal with important cases under the Council's proposal can probably be regarded as an "in-out" cost.

5.021 Some increase in costs of witnesses produced by the Department will be associated with the proposed scheme. As with applicants' costs, an estimate cannot be made at this stage. Were the Department to produce all relevant persons for oral testimony in every case it would appear at first that this item of cost would be greatly enlarged and with it the total cost of hearings (which would be longer). It may be assumed, however, that cost-efficient administration would mean that such a situation would not arise. As with the taxation appeal process, DSS could be expected to weigh the cost of hearings or further review against the value of claims. Hence, if DSS habitually called many witnesses there would be expected to be fewer cases brought to hearing.

5.022 Secondary Tangible Costs of the Respondent. A major cost of the new review process might arise from primary decision-makers and Review Officers taking longer over their decisions, e.g., by seeking more information than hitherto. If, for instance, 5% more time were to be taken on every primary decision, the cost in delayed decisions or new manpower could be substantial. The question is whether increased time would be spent on every decision rather than on some only, or only on decisions brought to the attention of the Review Officer. This is a factor which cannot be

calculated in advance, but it is not uncontrollable. For efficient administration there comes a point where extra effort to prevent a few incorrect primary decisions is wasteful. DSS may be expected to be conscious of where this point is approached and take steps to concentrate extra effort on cases where it is warranted, e.g., RO decisions. This manner of proceeding is illustrated by the customs jurisdiction of the AAT where, in cases where duty is "paid under protest" (an essential prerequisite to lodging an appeal), primary procedures continue as before but the relevant file is removed to Central Office and the decision checked for accuracy. Thus while the proposed scheme for general AAT review is expected to lead to some added cost to DSS, no information is available upon which a useful estimate of that cost could be made.

5.023 Intangible Effects. In many ways intangible effects are the most important. While the aims of administrative review include making correct decisions and improving primary decision-making, one very important aim is that administrative review expresses society's view that decision-making by Government which affects individuals should not in principle operate without adequate external checks. The particular characteristics of a social security system make this purpose especially weighty. This was recognised by the Minister for Social Security when she expressed her belief (Commonwealth Parliamentary Debates (Senate), 27 September 1979, p.1027);

> "... that people who wish to appeal under the Social Services Act should have the same degree of redress against determinations that are made as people who are working under any Act of the Commonwealth Government."

5.024 Furthermore the strongly perceived need for external review of adverse social security decisions suggests that there would be a very considerable benefit to

society in introducing the proposed system. It would give practical effect to the view that underprivileged members of society (who predominantly make up the class of social security claimants) should have their statutory entitlement to payment properly safeguarded.

5.025 This general interest of society is reflected in the benefits to be obtained by claimants under the proposed review system. External review of adverse decisions by a properly constituted tribunal gives claimants confidence that society recognises their worth and that they will be justly treated. It avoids the demoralisation of claimants where payments might be refused or terminated without adequate reasons being given and without a sufficient means of having that decision assessed independently. The benefits for claimants of the proposed review system are, therefore, substantial.

5.026 Conclusion on Costs and Benefits. No strict cost-benefit analysis of a general right of AAT review can be made. The only cost figures derivable are in relation to the AAT - costs in the order of $400,000 to $550,000 over and above the costs involved under the scheme which is now in force, plus "on costs". The costs to DSS cannot be calculated at this stage but are likely to be significant.

5.027 Whether the cost of a general system of AAT review is justified is a question for the Government. The order of cost of the proposed system may be compared with the total outlays of DSS in Social Services Act payment, namely $6,762 million in 1978-79. The cost appears to be insignificant in comparison and to be a small price for assuring proper review of such a vast Government program.

5.028 The number of changed decisions arising from the proposed review process will be small compared with the

total number of decisions made. This is not an argument in favour of maintaining an unsatisfactory review process. Furthermore it provides no guidance as to the scope and scale of an appropriate system. Social security payments are individually of great importance and merit a fully satisfactory review system.

5.029 It is suggested that the benefits to the administration and the community to be derived from a general scheme of AAT review greatly outweigh the direct and secondary costs to the administration; and hence that any question of the cost effectiveness of the proposed system be resolved in favour of its institution.