

The obligation to assist: Model Litigants in AAT Proceedings

Self represented claimants

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The Disclaimer

This paper and today's comments are intended to inform and provoke discussion and focus on the cases where self represented claimants are most likely.

This paper and today's comments do not represent the views of the Commonwealth, Centrelink or any Department.

Who are self represented claimants and what are their issues?

Self represented claimants include persons with:

1. Cultural and language barriers
2. Mental and physical disabilities
3. Location barriers
4. and, our 'Regulars'.

Summary of issues

At a summarised level self-represented claimants face issues arising from lack of:

- Knowledge and familiarity with the AAT procedures and ethos
- Knowledge and understanding of the law
- Trust of the decision-making agency and/or the AAT.

AAT Existing Process

As noted in the AAT's *Guide to the Social Security Jurisdiction* April 2008 the AAT assist self-represented applicants by:

- assisting with applications outside time limits
- co-ordinating interim applications
- not requiring Statements of Issues
- **providing an Outreach service to explain the AAT process and ascertain interpreter or other requirements**
- **supporting legal advice to be obtained**
- **preparing letters to medical practitioners (sometimes by Centrelink)**
- requiring the respondent to file Statements of Facts and Contentions first and the claimant to prepare a response
- assisting to make hearing arrangements.

Touchstones for Assistance provided to self represented claimants

Administrative Appeals Tribunal Act 1975 –section 33(1AA) provides:

In a proceeding before the Tribunal for a review of a decision, the person who made the decision must use his or her best endeavours to assist the Tribunal to make its decision in relation to the proceeding.

Touchstones for Assistance provided to self represented claimants...

Appendix B of the *Legal Services Directions 2005 - The Commonwealth's obligation to act as a model litigant* relevantly provides that the Commonwealth is to act honestly and fairly in handling claims relevantly including:

- not causing delay
- acting consistently in the handling of claims
- not taking advantage of a claimant who lacks the resources to litigate a legitimate claim
- not relying on technical defences unless the agencies interests would be prejudiced by the failure to comply with a particular requirement
- and, of course, considering alternative dispute resolution.

Touchstones for Assistance provided to self represented claimants...

Minogue v Human Rights and Equal Opportunity Commissioner [1999] FCA 85 indicated that what was required in the Courts:

- depended on the litigant, the nature of the case (eg criminal versus civil) and the self represented litigant's intelligence and understanding
- a Judge should not intervene so as to be unable to maintain a position of neutrality
- a Judge should diminish the disadvantage of being unrepresented, but not so as to provide a positive advantage. It was suggested that the Court must explain matters and be lenient in standard of compliance – but that this does not amount to a Judge's responsibility to formulate and conduct the appellate's case for them. A judge should continue to see that rules are obeyed with proper exceptions.

Touchstones for Assistance provided to self represented claimants...

Some relevant differences between the AAT and Courts due to the *Administrative Appeals Tribunal Act 1975*– which may allow for greater assistance including:

- all material documents are lodged with the Tribunal (section 37) – cf discovery
- AAT can seek an additional statement in relation to findings on material questions of fact, reference to the evidence or other material on which those findings are based, and particulars of the reasons for a decision (section 38)
- AAT can limit the questions of fact, the evidence and the issues that it considers (section 25(4A) – probably shared in many Courts.

NB: self represented claimants can make an application to the Attorney-General under section 69 for funding for legal or financial assistance, if the person is in hardship.

Suggested Principles to guide assistance to self represented claimants

- AAT/agency not in a position to make the claimant's case
- AAT – independent and standing in shoes of decision-maker
- Agency – not to assist where a conflict of interest eg LPP– noting potential for conflict must be fairly limited as the goal is the correct or preferable decision
- Self represented claimant – depends on the skills, experience and understanding available to assist themselves
- Sufficient to ensure justice is done and reduction of disadvantage
- But not such special treatment as to divert Commonwealth resources to self represented claimant and put them at a real advantage to other Australians subject to a similar decision if made by original decision maker (noting already the additional consideration time provided).

Practical Applications of proposed Principles - Procedure

- preliminary conference/hearing – encourage a nominee/friend/family member to accompany
- hearings – set constraints in terms of the issues and facts to be litigated – especially for ‘regular’ litigants
- Statement of Facts and Contentions – include respondent’s summary of the applicant’s case and a reference to adverse evidence
- case list – include names and copies of relevant cases that the agency is not relying upon because they are not precedents – but may be adverse to the respondent’s case.

Practical Applications of proposed Principles - Evidence

- preliminary conference (in the social security jurisdiction) – once claimant makes their case, consider giving an indication as to what evidence might be of assistance in obtaining a different decision of own motion
- preliminary conference (in the social security jurisdiction) – new evidence that impacts on the decision, consider obtaining instructions to make a new decision of own motion
- agency material – if solely in the agencies power to obtain with cost or without cost. Is the reality that agency will obtain, if it is less costly than seeking an interim order that it is ‘not relevant’?
- other material (incl summons material) – if available to both parties at no, or very limited, cost and it is relevant to the case. If not ordinarily paid for in ordinary course of decision-making?

Practical Applications of proposed Principles – Evidence...

- medical reports – not if not ordinarily paid for in ordinary course of decision-making – but what about extreme hardship or disability? How should this be funded?
- hearing/ADR – whether a self-represented litigant will need information that is considered confidential. Issues of natural justice versus public interest. Possible solutions such as pro bono or Commonwealth assistance?
- hearing – Tribunal to lead evidence and respondent follow up on issues
- hearing – applicant to provide outline of evidence, as much for themselves
- hearing – cross examination – care regarding intimidation and exploring issues.