

**DEVELOPING AN APPROPRIATE ADJUDICATIVE AND INSTITUTIONAL
FRAMEWORK FOR EFFECTIVE SOCIAL SECURITY PROVISIONING IN
SOUTH AFRICA**

By

MATHIAS ASHU TAKO NYENTI

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Supervisor: Professor Adriette Dekker (UNISA)

Co-supervisor: Professor Evance Kalula (UCT)

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DECLARATION

I declare that *Developing an appropriate adjudicative and institutional framework for effective social security provisioning in South Africa* is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

MATHIAS ASHU TAKO NYENTI
Student number: 46286055

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DEDICATION

To my father, Mr. E.M. Nyenti, for his inspiration and encouragement

ABSTRACT

Developing an adjudicative institutional framework for effective social security provisioning in South Africa entails the establishment of a system that gives effect to the rights (of access) to social security and to justice. These rights are protected in the Constitution and in various international law instruments. In the Constitution, the Bill of Rights guarantees everyone the right to have access to social security, including appropriate social assistance for persons who are unable to support themselves and their dependants. It further requires the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to access to social security. Since a dispute resolution (adjudication) framework is an integral part of any comprehensive social security system, it is included in the constitutional obligation of the State. The establishment of a social security adjudication system is an intersection of the right of access to social security and the right of access to justice. The Constitution states that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

In addition, other rights protected in the Constitution have a bearing on the realisation of the rights of access to social security and to justice. There is a close correlation between all the rights in the Bill of Rights, as they are interrelated, interdependent and mutually supporting. They must all be read together in the setting of the Constitution as a whole and their interconnectedness must be taken into account in interpreting rights; and in determining whether the State has met its obligations in terms of any one of them. These rights, which include the right to equality (section 9), the right to human dignity (section 10) and the right to just administrative action (section 33) must thus be considered in establishing a social security adjudication system. Also to be considered are other constitutional prerequisites for the establishment of a social security adjudication system, such as the limitation and enforcement of rights (sections 36 and 38 respectively); principles relating to courts and the administration of justice (Chapter 8) and basic values and principles governing public administration (Chapter 10).

In establishing a social security adjudication system in South Africa, international law standards and developments in comparative systems must also be taken into account. The Constitution adopts an international law- and comparative law-friendly approach. It states that when interpreting fundamental rights, international law must be considered while foreign law may be considered (section 39).

This thesis aims to develop an adjudicative and institutional framework for effective social security provisioning in South Africa that realises the rights of access to social security and to justice in the South African social security system. This is achieved by exploring the concept of access to justice, and its application in the social security adjudication system. The current social security adjudication system is evaluated against the concept of access to justice applicable in international and regional law instruments, comparable South African (non-social security) systems and comparative international jurisdictions. Principles and standards on the establishment of a social security adjudication system are distilled; and a reformed system for South Africa is proposed.

KEY TERMS: access to justice, social security, social protection, adjudication, dispute resolution, international standards, constitutional obligations, review, reconsideration, appeal, hearing, jurisdiction, fairness, decisions, integrated, uniform.

LIST OF ABBREVIATIONS AND ACRONYMS

AAT: Administrative Appeals Tribunal

CCMA: Commission for Conciliation, Mediation and Arbitration

CMS: Council for Medical Schemes

COIDA: Compensation for Occupational Injuries and Diseases Act

FaHCSIA: Ministry for Families, Housing, Community Services and Indigenous Affairs

ILO: International Labour Organisation

ITSAA: Independent Tribunal for Social Assistance Appeals

LRA: Labour Relations Act

ODMWA: Occupational Diseases in Mines and Works Act

PAJA: Promotion of Just Administrative Act

RAF: Road Accident Fund

RAFA: Road Accident Fund Act

SAA: Social Assistance Act

SADC: Southern Africa Development Community

SASSA: South African Social Security Agency

SSAA: Social Security Appeal Authority

SSAT: the Social Security Appeals Tribunal

TCEA: Tribunals, Courts and Enforcement Act

UIA: Unemployment Insurance Act

UIF: Unemployment Insurance Fund

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CHAPTER ONE

BACKGROUND OF THE STUDY

1. INTRODUCTION

The South African social security system consists of various institutions/forums, mechanisms and procedures established for the provision of access to social security. The institutions, mechanisms and procedures are established in order to give effect to the constitutional right of access to social security of applicants and/or beneficiaries. The Constitution accords everyone the right to have access to social security, including if they are unable to support themselves and their dependants, appropriate social assistance.¹ The State is required to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to access to social security.² The Constitution therefore compels the State to develop a social security system that ensures access for everyone (a comprehensive social security system).

A system set up by the State to realise the right of access to social security would be incomplete without an effective and efficient dispute resolution system. An established social security system that must thus include a dispute resolution framework that enables users of the system to resolve any disputes that might arise. Such a dispute resolution system must also be established in accordance with the requirements of the Constitution. Section 34 of the Constitution guarantees the right of access to justice (courts). It states that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. Therefore, the social security dispute resolution framework must not only comply with the requirements of the right of access to social security, but also access to justice.

In addition to the right of access to social security and of access to justice, the realisation of these rights would also require that other rights, that have a bearing on access to courts and to

¹ Section 27(1) of the Constitution of the Republic of South Africa of 1996 (hereinafter referred to as the Constitution).

² Section 27(2) of the Constitution.

social security, are also realised. The other rights are related to the rights of access to courts and to social security and have an impact on the enjoyment of the two rights. In *Government of the Republic of South Africa and Others v Grootboom and Others*,³ the Constitutional Court held that the right of access to social security cannot be interpreted in isolation as there is a close correlation between it and other constitutional rights and values. The Court pointed out that the rights in the Bill of Rights are interrelated, interdependent and mutually supporting.⁴ The court remarked that rights must be read together in the setting of the Constitution as a whole, and their interconnectedness needs to be taken into account in interpreting rights, and in determining whether the State has met its obligations in terms of one of them.

In the Court's opinion, giving effect to a particular right would require that other elements, which form the basis of other rights, must be in place as well. Together these rights have a significant impact on the dignity of people and their quality of life. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.⁵ Therefore, fulfilling the right to access to justice would have an impact on the extent to, or way in which, the right to have access to social security as well as other rights are fulfilled.

In addition, the Court held that the requirement of progressive realisation means that the State must take steps to achieve this goal. It means that accessibility should be progressively facilitated; legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time; and that rights must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.⁶

In establishing an adjudication framework that secures the rights of access to courts and social security for applicants/beneficiaries, some of the related rights that have an impact on

³ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC) (hereinafter referred to as the *Grootboom* case).

⁴ *Grootboom* case para 24.

⁵ *Grootboom* case para 23.

⁶ *Grootboom* case para 45.

the adjudication framework and that must also be given effect to include the right to equality,⁷ the right to human dignity,⁸ and the right to just administrative action.⁹

The establishment of a social security adjudication framework will also be informed by constitutional principles that have a bearing (either directly or indirectly) on the realisation of constitutional rights. Some of the constitutional principles that will be relevant in the establishment of a social security adjudication system include principles relating to courts and administration of justice;¹⁰ and the basic values and principles governing public administration.¹¹ These principles are useful tools in the protection and advancement of the rights in the Bill of Rights.¹²

In the determination of the scope and content of the rights in the Bill of Rights, the Constitution favours an international law- and comparative law-friendly approach. The Constitution requires that when interpreting fundamental rights, international law must be considered¹³, while foreign law may be considered.¹⁴ In addition, section 233 requires that when interpreting any legislation, any reasonable interpretation of the legislation that is

⁷ Section 9 of the Constitution states as follows:

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
3. The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

⁸ Section 10 of the Constitution states that “everyone has inherent dignity and the right to have their dignity respected and protected.”

⁹ Section 33 of the Constitution provides as follows:

1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
2. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
3. National legislation must be enacted to give effect to these rights, and must:
 - a. provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - b. impose a duty on the State to give effect to the rights in subsections (1) and (2); and
 - c. promote an efficient administration.

¹⁰ Chapter 8 of the Constitution regulates the “Principles Relating to Courts and Administration of Justice.”

¹¹ Chapter 10 of the Constitution regulates the “Basic Values and Principles Governing Public Administration.”

¹² Brand D “Introduction to socio-economic rights in South African Constitution” in Brand D & Heyns C (eds) *Socio-economic rights in South Africa* Pretoria, PULP (2005) 5. See also *Mashavha v President of the RSA and Others* 2004 (12) BCLR 1243 (CC) where the Court used technical and non-rights related principles in the (Interim) Constitution to protect the right of access to social assistance of the complainant.

¹³ Section 39(1) (b) of the Constitution.

¹⁴ Section 39(1) (c) of the Constitution.

consistent with international law must be prepared over any alternative interpretation that is inconsistent with international law. The provisions of international instruments relating to the adjudication of social security are in the form of standards, and act as benchmarks for the evaluation of domestic adjudication frameworks.

This implies that in evaluating the current South African social security adjudication system and in developing a reformed framework, adjudication standards in international law and in comparative social security systems will play a pivotal role (such as on the scope and content of the right of access to justice for social security applicants and/or beneficiaries; and the State's obligations in this regard).

2. AIMS OF STUDY

The study aims to investigate and evaluate relevant principles, norms and standards for an effective and efficient social security adjudicative and institutional framework in South Africa. It further seeks to analyse barriers that deny access to justice for users of a social security dispute resolution system (such as social, economic and other relevant contexts) and attempts to eliminate or reduce such possible barriers.

In the process of examining, finding and developing the relevant principles, norms and standards informing effective and efficient social security adjudication, attention is paid to social security adjudication structures, mechanisms and procedures, as well as the monitoring institutions. This is to identify any gaps and challenges in the legislative and institutional frameworks. It is also aimed at assessing the effectiveness of the dispute resolution framework in ensuring that every social security applicant or beneficiary is able to resolve a dispute affecting their right of access to social security. A review of the current social security adjudication framework will indicate any shortcomings in the system and provide guidelines towards the development of a new efficient system.

Attention is also paid to the relevant norms and standards informing effective social security provisioning in the institutional context, the role and impact of administrative law on effective service delivery and the South African constitutional context (this relates to the Bill of Rights, norms and standards on the administration of justice in Chapter 8 and principles relating to public administration in Chapter 10 of the Constitution). The institutional context

is also evaluated against the backdrop of comparative experiences and best practices, as well as international law provisions.

The current South African social security adjudicative institutional framework is evaluated against norms and standards in international law, in comparative international social security systems and from some key comparative South African (non-social security) adjudication institutions/forums and procedures. The recommended framework for effective social security provisioning in South Africa is also informed by these norms and standards.

Finally, the research attempts to distil the applicable legal principles, norms and standards pertaining to the social security adjudicative and institutional frameworks that are applicable within the South African context. This is with a view to make suggestions for the improvement of the South African social security dispute resolution system and to establish an adjudicative institutional framework for effective and efficient social security provisioning.

3. INTRODUCTION TO THE PROBLEM TO BE STUDIED

There is currently no uniform social security dispute resolution institution in South Africa. This is due to the piecemeal manner in which social security schemes were established and/or how protection against individual risks is regulated. The result is that the current social security dispute resolution system is fragmented and uncoordinated, with each statute providing for its own dispute resolution institution(s) and processes. There is a wide array of laws providing for dispute resolution institutions and procedures. Appeal mechanisms are also fragmented across the social security system, at times involving specially-constituted appeal bodies and at times the High Court. There are various other gaps and challenges that the current South African social security dispute resolution systems face. Some of these challenges relate to the inaccessibility of some social security institutions; inappropriateness of some current appeal institutions; the lack of a systematic approach in establishing appeal institutions; the limited scope of jurisdiction and powers of adjudication institutions; inconsistencies in review and/or appeal provisions in various laws; the unavailability of alternative dispute resolution procedures; the absence of institutional independence of adjudication institutions or forums.

The gaps and challenges in the current social security dispute resolution system indicate that it is unable to realise the right of access to justice and related rights of users of the system. There is thus a need for the establishment of an appropriate framework. The establishment of such a framework is further motivated by the gravity and importance of the issues at stake.

This calls for the introduction of special and earmarked adjudication institutions and procedures, in order to ensure access to justice and to deal effectively with social security disputes.

4. SIGNIFICANCE OF THE STUDY

The study is significant as it identifies the deficiencies in the social security dispute resolution system. Legal principles, norms and standards emanating from social security adjudicative and institutional frameworks in international and regional instruments and in comparative best practices serve as guidelines in evaluating the current South African system and in developing a reformed system.

The recommendations of the thesis (the establishment of a reformed social security dispute resolution framework) provide policy proposals for the improvement of the current social security dispute resolution system. Since an effective and efficient dispute resolution framework is an integral part of any social security system, the study thus contributes to present government initiatives to develop a comprehensive social security system of South Africa.¹⁵

Apart from its policy impact, the study also contributes to scholarship through its analysis of the nature and scope of the rights of access to justice and to social security in South Africa and of the obligations of the State in giving effect to the rights.

¹⁵ The study has already contributed to the development of policy proposals for an integrated dispute resolution system, as parts of it were used in a Project for the Department of Social Development on “Developing a policy framework for the South African social security adjudication system” (see Olivier M, Govindjee A & Nyenti M *Developing a Policy Framework for the South African Social Security Adjudication System: First (Research) Report* (Report prepared for the Department of Social Development, South Africa (May 2011)); and Olivier M, Govindjee A & Nyenti M *Developing a Policy Framework for the South African Social Security Adjudication System: Draft Policy* (Prepared for the Department of Social Development, South Africa (October 2011)).

5. LIMITATIONS OF THE STUDY

The reformed social security dispute system is based on principles and standards drawn from the Constitution and international law standards and best practices of how these principles and standards have been implemented in other South African legal spheres and in other international jurisdictions. However, it must be borne in mind that these principles and standards may not be directly transplantable into the South African (social security) environment in practice, due to its peculiar context.

6. PROCEDURE OF THE STUDY

This study involves mainly desk-bound or library-based research. Information on the South African and international law contexts is sourced from libraries and on the internet. Information on the social security adjudication framework of comparative systems is partly accessed from libraries and on the internet and involves direct interaction with people in the relevant institutions in the form of interviews. These interviews consisted of face-to-face discussions, emailed questions and telephonic conversations. Questions were also posed during visits to some of the social security adjudication institutions.

7. ORGANISATION OF THE STUDY

The study is divided into the following seven chapters: background of the study; constitutional perspectives on developing an effective social security adjudication framework; social security adjudication standards in international and regional instruments; dispute resolution systems in key comparative South African (non-social security) jurisdictions; social security dispute resolution systems in comparative international jurisdictions; current South African social security dispute resolution system; and Establishment of an efficient and effective social security dispute resolution framework in South Africa.

7.1 Chapter One: Background of the study

This chapter sets out the framework for the study. It introduces the study, and describes the aim of study, the problem to be studied, the significance of the study, limitations of the study, the research procedure, the organisation of the study and the conceptual framework.

7.2 Chapter Two: Constitutional perspectives on developing an effective social security adjudication framework

This chapter analyses some of the constitutional issues arising in the context of the establishment of an effective and efficient social security adjudication framework in South Africa. Constitutional requirements for the realisation of the right of access to courts, the right of access to social security and related rights; and the obligations in relation to these rights are investigated. Pertinent issues that are considered include the role and impact of the Constitution (including the role and impact of the aims and values underpinning the Constitution); the nature and scope of the rights to have access to courts and to social security (and other related rights); as well as the scope and nature of the State's obligation in terms of both rights, the relation between these rights and other fundamental rights; the particular interpretation to be given to the fulfilment of the rights in relation to South Africa's past and present contexts (including the Constitution's focus on protecting persons who are particularly vulnerable and desperate); the nature and scope of obligations imposed on the State and other entities in giving effect to these rights; and possible limitations to these rights. Analysing these will determine the prerequisites for the development of an appropriate social security adjudication framework from a constitutional perspective.

7.3 Chapter Three: Social security adjudication standards in international and regional instruments

This chapter investigates the international and regional standards pertaining to the development of a social security dispute resolution system that ensures access to justice. Some of these include the African Charter of Human and Peoples' Rights; the International Covenant on Civil and Political Rights; International Labour Organisation Conventions (such as the Social Security (Minimum Standards) Convention and the Employment Promotion and

Protection against Unemployment Convention); the European Convention on Human Rights and the Code on Social Security in the SADC.

The Constitution favours an international law - and comparative law-friendly approaches in interpreting the rights in the Bill of Rights. Adjudication standards in international law thus play a pivotal role in the evaluation of the South African social security adjudication system (and the scope and content of the right of access to courts for social security applicants and/or beneficiaries) and the State's obligations in this regard.

7.4 Chapter Four: Dispute resolution systems in key comparative South African (non-social security) jurisdictions

This chapter analyses the dispute resolution systems in some key comparative South African (non-social security) jurisdictions. The institutions, mechanisms and procedures in these jurisdictions, established to provide resolve disputes that may arise are reviewed to provide a possible benchmark for comparison with the current social security dispute resolution framework. The selected dispute resolution systems investigated are the labour relations system (which consists of the CCMA, the Labour Court and the Labour Appeal Court established by the Labour Relations Act (LRA)); the business competition regulation jurisdiction (which involves the Competition Commission, the Competition Tribunal and the Competition Appeal Court established in terms of the Competition Act); and the consumer protection jurisdiction (the National Consumer Tribunal is established in terms of the National Credit Act).

These institutions and their procedures have been established to realise the constitutional rights of their respective users (especially the rights of access to justice and to a fair trial). Therefore, it seeks to comply with the constitutional requirements of the rights. These mechanisms and procedures are thus examined to ascertain the effectiveness of these systems in providing access to justice for their users. Such mechanisms and procedures can provide guidelines for the development of a social security dispute resolution system.

7.5 Chapter Five: Social security dispute resolution systems in comparative international jurisdictions

This chapter reviews systems established for the resolution of social security disputes in jurisdictions that are comparable to South Africa. The jurisdictions examined include countries in the SADC region, Australia, New Zealand, United Kingdom and Germany. Institutions and procedures established for the resolution of social security disputes are investigated. These countries have been selected in view of their developed, longstanding and well-established social security systems and adjudication institutions and procedures that ensure the realisation of social security claimants' right of access to justice.

These institutions and their procedures have been established to realise constitutional, statutory and/or common law rights of social security claimants (such as the right of access to justice, the right to a fair hearing and the right (of access) to social security). They are also established in compliance with the international law obligations of (some of) these countries. The variety of the social security adjudication institutions (tribunals and other forums in Australia, New Zealand and the United Kingdom; and courts in Germany) and their procedures is also in line with the institutions and procedures proposed in section 34 of the Constitution as possible avenues for realising the right of access to courts. The effectiveness of the institutions and procedures in achieving access to justice and/or a fair hearing for social security claimants could therefore be instructive in proposing a social security dispute resolution system for South Africa.

7.6 Chapter Six: Current South African social security dispute resolution system

This chapter analyses the current South African social security dispute resolution system. The piecemeal manner in which schemes were established and/or protection against individual risks is regulated has resulted in each statute providing for its own dispute resolution institution(s) and processes. Therefore, reviewing South Africa's current social security dispute resolution framework involves the consideration of the institutions and processes provided in each statute (the Social Assistance Act (SAA);¹⁶ the Compensation for Occupational Injuries and Diseases Act (COIDA);¹⁷ the Occupational Diseases in Mines and

¹⁶ Social Assistance Act 13 of 2004.

¹⁷ Compensation for Occupational Injuries and Diseases Act 130 of 1993.

Works Act (ODMWA);¹⁸ the Unemployment Insurance Act (UIA);¹⁹ the Road Accident Fund Act (RAFA);²⁰ the Pension Funds Act;²¹ and the Medical Schemes Act.²² In addition, the role of the High Court is examined, as it is the external appeals institution for many of the social security dispute resolution institutions).

This is to assess their compliance with constitutional prerequisites and international standards. It is also to compare and/or contrast them with social security dispute resolution systems in comparative international jurisdictions, as well as comparative South African (non-social security) systems. It also seeks to identify the existing gaps and challenges (if any) in the present social security dispute resolution framework. This is to assess their effectiveness in ensuring that every social security applicant or beneficiary (irrespective of their social, economic and other conditions) has access to a streamlined, integrated and coordinated system that resolves social security disputes in a fair, expeditious and participatory manner. A review of the current adjudication system will provide guidelines for proposals towards the development of a new adjudicative and institutional framework.

7.7 Chapter Seven: Establishment of an effective social security dispute resolution framework in South Africa

This chapter proposes the most appropriate adjudicative (and institutional) framework for effective and efficient social security provisioning. This is achieved by highlighting principles and standards on the establishment of such a system, taking into account the application of these principles and standards in the South African context.

The principles and standards that are relevant in establishing an effective and efficient social security dispute resolution system are laid down by the South African Constitution and international standards. These principles and standards have been implemented in the current South African social security and comparative (non-social security) dispute resolution systems; and in the social security dispute resolution systems in international comparative

¹⁸ Occupational Diseases in Mines and Works Act 78 of 1973.

¹⁹ Unemployment Insurance Act 63 of 2001.

²⁰ Road Accident Fund Act 56 of 1996.

²¹ Pension Funds Act 24 of 1956.

²² Medical Schemes Act 131 of 1998.

jurisdictions. Therefore, these provide benchmarks and guidelines on the development of a reformed social security dispute resolution system.

8. CONCEPTUAL FOUNDATION

Since the study aims to establish a dispute resolution system that ensures access to justice for social security claimants, it is useful to clarify the nature and scope of the concepts of “access to justice” and “social security” as employed here. Approaches to these concepts have varied over different periods of time and in different environments. Approaches to the concept in South Africa may not be the same as approaches in other settings.

8.1 The concept of social security

The concept of social security in South Africa has developed from the traditional definition proposed by the ILO to a more comprehensive approach.²³ The ILO definition of the concept, based on employment-related social insurance and targeted and means-tested social assistance, was deemed to be too restrictive and narrow for the problems faced by developing countries like South Africa.²⁴

The concept of social security has therefore been broadened from the income situation to include general basic needs and the range of contingencies was also widened. This is in the belief that it is necessary to link traditional social security mechanisms with social and economic policies in general.²⁵

²³ The ILO views social security as the protection that society provides for its members, through a series of public measures, against the economic and social distress that otherwise will be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age, and death; the provision of medical care; and the provision of subsidies for families and children (see the ILO Social Security (Minimum Standards) Convention 102 of 1952 and ILO *Introduction to Social Security* (Geneva, 1989) 3).

²⁴ The ILO definition was considered to be too restrictive and narrow as it fails to capture the characteristics of a developing country like South Africa for a number of reasons, including the extent of poverty and deprivation to which millions of people in developing countries are exposed to, and the present exclusion of a majority of these from social security coverage; the rise in informal employment and the exclusion and/or marginalisation of the informally employed from social security; peculiar South African constitutional imperatives granting social security entitlements on a non-discriminatory basis, and which aim to promote human dignity, equality and freedom; and socio-economic imperatives of poverty reduction, increased access to adequate basic services and the creation of an environment for the sustainable advancement of all people. See Olivier MP “The Concept of Social Security” in Olivier MP *et al Social Security: A Legal Analysis* (Lexis Nexis, 2003) 4.

²⁵ Social security is thus defined as any kind of collective measures or activities designed to ensure that members of society meet their basic needs, such as adequate nutrition, shelter, health care and clean water supply, as well as being protected from contingencies – such as illness, disability, death, unemployment and old

This is the approach adopted by the South African White Paper on Social Welfare where it states that social security means policies that ensure adequate economic and social protection during unemployment, ill health, maternity, child bearing, widowhood, disability, old age, social assistance in relation to old age, disability, child and family care and poverty relief. Social security therefore covers a variety of public and private measures that provide cash and in-kind benefits or both (firstly, in the event of an individual's earning capacity permanently ceasing, being interrupted, never having developed or being exercised only at unacceptable social cost and such a person being unable to avoid poverty; and, secondly, in order to maintain children). It is as such aimed at poverty prevention, poverty alleviation, social compensation and income distribution.²⁶ The White paper concluded that social security is a system geared towards the provision of a national integrated and sustainable social security system with universal access, with the ultimate goal being to ensure that all South Africans have a minimum income, sufficient to meet basic subsistence needs and should not have to live below minimum acceptable standards.²⁷ It held that this approach is not only advisable but also necessary, so as to fully utilise limited resources.

This view of the concept, as a general system of basic social support, no longer linked to the regular employment relationship and founded on the conviction that society as a whole is responsible for its weaker members was termed social protection.²⁸ The United Nations Commission on Social Development states that social protection embodies society's responses to levels of either risk or deprivation, and includes secure access to income, livelihood, employment, health and education services, nutrition and shelter.²⁹ The Commission remarked that:

“the ultimate purpose of social protection is to increase capabilities and opportunities and, thereby, human development. While by its very nature social protection aims at providing at least minimum standards of well-being to people in dire circumstances, enabling them to live with dignity, one should not overlook that social protection should not simply be seen as a residual policy function of assuring

age, and to enable them to maintain a standard of living consistent with social norms. See Getubig IP & Schmidt S (Eds) *Rethinking Social Security: Reaching Out to the Poor* (UN Asia and Pacific Development Centre, 1992).

²⁶ White Paper on Social Welfare (GN 1108 in GG 18166 of August 1997) Chap. 7, para 1.

²⁷ White Paper on Social Welfare, Chapter 7, para 27.

²⁸ Von Maydell B “Fundamental Approaches and Concepts of Social Security” in Blanpain R *Law in Motion* (Kluwer 1997) 1034.

²⁹ United Nations *Enhancing Social Protection and Reducing Vulnerability in a Globalising World: Report of the Secretary-General* 39th session of the Commission for Social Development (New York, 13-23 February 2000) as quoted in Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present – Protecting the Future* (Draft Consolidated Report) (March 2002) 40.

the welfare of the poorest – but as a foundation at a societal level for promoting social justice and social cohesion, developing human capabilities and promoting economic dynamism and creativity.”³⁰

The Committee of Inquiry into a Comprehensive System of Social Security for South Africa adopted this broad approach to the concept, due to its merits for the country.³¹ However, it recognised that in the case of South Africa, such a system, even more than suggested by the United Nations Commission, must be embedded in economic organisation and social relations enabling it to address the country’s underlying structural and material basis of social exclusion. Therefore, the Committee developed the concept of “comprehensive social protection. It held that:

“comprehensive social protection is broader than the traditional concept of social security, and incorporates developmental strategies and programmes designed to ensure, collectively, at least a minimum acceptable living standard for all citizens. It embraces the traditional measures of social insurance, social assistance and social services, but goes beyond that to focus on causality through integrated policy-approach, including many of the developmental initiatives undertaken by the State.”³²

Comprehensive social protection seeks to provide the basic means for all people, living in South Africa, to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development.³³ It consists of certain core elements such as measures to address income poverty, measures to address capability and asset poverty, as well as measures to address specific needs. These core elements should be available to all South Africans – including certain categories of non-citizens – and need to be established in a universal-as-possible package of basic income transfers, services and assets, with access

³⁰ *Ibid.*

³¹ The Committee was of the opinion that the concept incorporates developmental strategies and programmes which are more appropriate for a developing country such as South Africa (it increases opportunities for people doing “informal” work to gain access to social protection coverage); it provides a coherent framework for integrating economic and social policy interventions (wider functions and objectives of social protection which are better able to address socially and economically embedded problems); and could create added potential for integrated private-, public- and community-sector interventions and benefit systems. See Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present – Protecting the Future* (Draft Consolidated Report) (March 2002) 40.

³² Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present-Protecting the Future* 41.

³³ *Ibid.*

provided in a non-work-related manner and whose availability is not primarily dependent on an ability to pay.³⁴

The Committee of Inquiry into a Comprehensive System of Social Security for South Africa further argued that the social security concept does not merely cover measures of a public nature. Social, fiscal and occupational welfare mechanisms, collectively and individually, whether public or private or of a mixed public and private origin, must be considered in the development of coherent social security policies.³⁵

Despite modern approaches to the concept of social security (both in South Africa and internationally), and current South African efforts to develop a comprehensive and integrated social security system,³⁶ the present system still follows the risk-based approach to the concept of social security adopted by the International Labour Organisation. This implies that different laws regulate, and different institutions administer, each of the social security risks. This also results in the absence of a uniform social security dispute resolution institution and processes. This is the approach adopted in this thesis, as dispute resolution institution and processes established by each of the statutes is evaluated.

8.2 The concept of access to justice

The concept of access to justice has evolved over the years from a narrow definition that refers to access to legal services and other state services (access to the courts or tribunals that adjudicate or mediate) to a broader definition that includes social justice, economic justice and environmental justice.³⁷ The broadening of the concept was due to the belief that its confinement to the courts or tribunals that adjudicate or mediate was considered to be too narrow a definition, although courts or tribunals that adjudicate or mediate were a very important component of access to justice. In the case of South Africa, it is argued that:

³⁴ *Ibid* 42.

³⁵ *Ibid* 50.

³⁶ The Government has established an Interdepartmental Task Team on Social Security (IDTT) and an Inter-Ministerial Committee on Social Security, Retirement Reform and National Health Insurance that are working towards the creation of a new comprehensive social security system. See IDTT *Comprehensive Social Protection: Overview (consultation document, prepared for the Inter-Ministerial Committee on Social Security, Retirement Reform and National Health Insurance)* (2010) and Department of Social Development *Creating Our Future: Strategic Considerations for a Comprehensive System of Social Security* (2008).

³⁷ Open Society Foundation for South Africa *Access to Justice Round-Table Discussion* (Parktonian Hotel, Johannesburg, 22 July 2003) 5.

“justice is not the exclusive preserve of the courts. The Constitution ... is designed to achieve justice in the broader sense including social justice and various functionaries including government, independent institutions, the private sector and indeed civil society take on a special responsibility for the achievement of justice and thus access to justice is more, much more than simply access to courts.”³⁸

However, social security dispute resolution systems, as required by the right (of access) to social security, are concerned with the resolution of disputes in a fair public hearing by a court or another independent and impartial tribunal or forum. In this instance, the concept thus relates to access to justice in the sense of access to the courts or tribunals that adjudicate or mediate social security disputes.

The legal dimension of the concept of access to justice developed as an element of the fundamental principle that all people should enjoy equality before the law. It proposes (amongst others) that each person should have effective means of protecting his or her rights or entitlements under the substantive law.³⁹

The concept of access to justice is understood in terms of legal rights, processes and procedures. It denotes the situation where state legal systems are organised “to ensure that every person is able to invoke the legal processes for legal redress irrespective of social or economic capacity” and “that every person should receive a just and fair treatment within the legal system”.⁴⁰ This view of the concept is based on the principle that the legal system should be structured and administered in such a manner that it provides everyone with affordable and timely access to appropriate institutions and procedures through which to

³⁸ Kollapen J “Access to Justice within the South African context” Keynote Address to Open Society Foundation for South Africa Access to Justice Round-Table Discussion (see Open Society Foundation for South Africa *Access to Justice Round-Table Discussion* (Parktonian Hotel, Johannesburg, 22 July 2003) 5).

³⁹ Sackville R “Some thoughts on access to justice” paper presented at the New Zealand Centre for Public Law First Annual Conference on the Primary Functions of Government (Faculty of Law, Victoria University of Wellington, New Zealand: 28 & 29 November 2003) 1. He further remarks that the concept assumes that access to justice can be achieved by the law and the legal system, and that a just society will be prepared to find the resources required to achieve the goal of access to justice. It also suggests that it is feasible to establish mechanisms that will effectively break down the barriers preventing disadvantaged individuals and groups from utilising the legal system to enforce their rights and protect their interests.

⁴⁰ Murlidhar S *Law, Poverty and Legal Aid: Access to Criminal Justice* (Lexis Nexis, 2004) 1.

claim and protect their rights. In this case, access to justice refers to “the equity with which those from differing backgrounds are able to gain from the justice delivery system”.⁴¹

Such a view of the concept only focuses on the operation of the dispute resolution system. For example, a review of access to justice in the United Kingdom by Lord Woolf was only concerned with the civil justice system and the problems it faced.⁴² The principles laid down were thus aimed at solving these problems and in this way improve access to the system.⁴³

The view of the concept by the Law Society of New South Wales (Australia) is also restricted to the functioning of the justice system, by placing importance on the system being, and seen to be, accessible and affordable, readily easy to understand, fair, efficient and effective.⁴⁴ It is contended that this approach:

“centralises the issue of overcoming the procedural barriers within the court system itself. Such an approach tends to concentrate on issues of overcoming delays within the court process, efficiency, formality and cost of proceedings, and the organisation, structure and administration of courts and tribunals.”⁴⁵

A slightly wider approach to the concept of access to justice was adopted by the Australian Access to Justice Advisory Committee. It considers access to justice to consist of three key elements: equality of access to legal services (ensuring that all persons, regardless of means, have access to high quality legal services or effective dispute resolution mechanisms necessary to protect their rights and interests); national equity (ensuring that all persons enjoy, as nearly as possible, equal access to legal services and to legal service markets that

⁴¹ Bowd R *Access to justice in Africa: Comparisons between Sierra Leone, Tanzania and Zambia* Institute of Security Studies Policy Brief Nr 13 (October 2009) 1.

⁴² Woolf HK (The Right Honourable Lord Woolf, Master of the Rolls) *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales* (July 1996) 2. The problems identified in civil law system at the time were that it is too expensive in that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of equality between the powerful, wealthy litigant and the under resourced litigant. It is too uncertain: the difficulty of forecasting what litigation will cost and how long it will last induces the fear of the unknown; and it is incomprehensible to many litigants. Above all it is too fragmented in the way it is organised since there is no one with clear overall responsibility for the administration of civil justice; and too adversarial as cases are run by the parties, not by the courts and the rules of court, all too often, are ignored by the parties and not enforced by the court.

⁴³ Lord Woolf *Access to Justice: Final Report 2*. The Report stated that the civil justice system should be just in the results it delivers; be fair in the way it treats litigants; offer appropriate procedures at a reasonable **cost**; deal with cases with reasonable speed; be understandable to those who use it; be responsive to the needs of those who use it; provide as much certainty as the nature of particular cases allows; and be effective (i.e. adequately resourced and organised).

⁴⁴ Law Society of New South Wales *Access to Justice - Final Report* (December 1998) 11.

⁴⁵ Schetzer L, Mullins J & Buonamano R “Access to Justice & Legal Needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW” (Background Paper) August 2002, 65.

operate consistently within the dictates of competition policy); equality before the law (ensuring that all persons, regardless of race, ethnic origins, gender or disability, are entitled to equal opportunities in such fields as education, employment, use of community facilities and access to services).⁴⁶

It has been remarked that:

“while this concept of access to justice focuses on the justice system, it is confined neither to the courts nor to services associated with courts. It extends to the structure of the legal services market, improved access to sources of information for consumers (in both the public and private sector), and alternatives to the judicial process for the resolution of complaints or disputes.”⁴⁷

An even broader approach to the concept of access to justice sees the law as only one means of achieving justice. It is proposed that “a variety of other means of doing justice including alternative dispute resolution, participation in social movement politics, democratic representation, and civic education for the respect of rights must proliferate”.⁴⁸ This view therefore suggests that justice in the courtroom should give way to justice in many rooms.⁴⁹

The evolution of the definition of the concept of access to justice indicates that earlier approaches to the concept failed to take into account the impact of social and economic conditions on the ability of claimants to use dispute resolution institutions and processes. Therefore, the concept of access to justice must go beyond the functioning of institutions that resolve disputes and legal processes and should be defined within the context of the social and economic conditions of prospective users of the justice system. Despite the availability of well-functioning dispute resolution institutions and processes, conditions such as poverty, illiteracy, geographical location etc. have an inevitable impact on the ability to utilise the legal system. Defined as such, any measures adopted to enhance access to justice will include measures aimed at empowering users in using the established systems.

⁴⁶ Access to Justice Advisory Committee (Australia) *Access to Justice: An Action Plan* (AGPS, Canberra: 1994) 7–9.

⁴⁷ Sackville R “Some thoughts on access to justice” paper presented at the New Zealand Centre for Public Law First Annual Conference on the Primary Functions of Government (Faculty of Law, Victoria University of Wellington, 28 & 29 November 2003) 2.

⁴⁸ Parker C *Just Lawyers: Regulation and Access to Justice* (Oxford University Press, 1999) 56.

⁴⁹ Parker C *Just Lawyers: Regulation and Access to Justice* (Oxford University Press, 1999) 207. See generally Galanter M “Justice in Many Rooms” in Cappelletti M (ed) *Access to Justice and the Welfare State* (Sitjhoff, 1981) 147-181.

Such an expanded view of the concept of access to justice was recognised as early as the 1960s and 1970s. This recognition engendered the idea that an aggrieved individual's formal right to litigate or defend a claim must be transformed into a right of effective access to the legal system.⁵⁰ This implied that affirmative steps had to be taken to give practical content to the law's guarantee of formal equality before the law. It was thus "necessary to overcome, or at least ameliorate, the barriers inhibiting access".⁵¹ This was because it was:

"... no longer sufficient for the law to provide a framework of freedom in which men, women and children may work out their own destinies: social justice, as our society now understands the term, requires the law to be loaded in favour of the weak and exposed, to provide them with financial and other support, and with access to courts, tribunals and other administrative agencies where their rights can be enforced."⁵²

Therefore, the modern concept of access to justice must be defined in a manner that also considers the number of ways in which access is denied either through spatial, temporal, linguistic, social or symbolic barriers.⁵³ The concept is also about breaking down the barriers that prevent the poor and indigent from accessing the social security adjudication system.

This view of the concept of access to justice is supported in the South African context, as the Constitution guarantees a right of "access to justice". It requires that access to justice must be defined together with the right to equality (formal and substantive) and other rights.⁵⁴

⁵⁰ Cappelletti M and Garth B (eds) *Access to Justice: A World Survey* (Vol. 1) (Sijthoff and Noordhoff, 1978) 6–10.

⁵¹ Law and Justice Foundation of New South Wales (Australia) *Access to Justice Roundtable: Proceedings of a Workshop on July 2002* (April 2003) 20.

⁵² Scarman L *English Law - The New Dimensions* (Hamlyn Lectures, Stevens & Sons, 1974) 28-29; as quoted in Law and Justice Foundation of New South Wales (Australia) *Access to Justice Roundtable Proceedings of a Workshop July 2002* (April 2003) 20.

⁵³ Baxi P "Access to justice and rule-of- [good] law: the cunning of judicial reform in India" Working Paper Commissioned by the Institute of Human Development, New Delhi on behalf of the UN Commission on the Legal Empowerment of the Poor (May 2007) 4.

⁵⁴ See Chapter Two (*infra*) on the constitutional perspectives on developing an effective social security adjudication framework.

CHAPTER TWO

CONSTITUTIONAL PERSPECTIVES ON DEVELOPING AN EFFECTIVE SOCIAL SECURITY ADJUDICATION FRAMEWORK

1. INTRODUCTION

The establishment of an effective and efficient social security dispute resolution system entails the realisation of mainly the constitutional rights of access to courts⁵⁵ and to social security.⁵⁶ This implies that the social security dispute resolution system that is established must fully give effect to both rights as required by the Constitution. The realisation of these rights would also require that other rights that have a bearing on access to courts and to social security are also realised. The other rights are related to the rights of access to courts and to social security and have an impact on the enjoyment of the two rights. As the Constitutional Court has stated, the rights in the Bill of Rights are interrelated, interdependent and mutually supporting; and must be read together in the setting of the Constitution as a whole.⁵⁷ Their interconnectedness needs to be taken into account in interpreting a right and in determining whether the State has met its obligations in terms of one of them. The Court further held that realising a particular right (in this case the right of access to courts or the right of access to social security) would require that other elements which form the basis of other rights must be in place as well.

In establishing an adjudication framework that secures the rights of access to courts and social security for applicants/beneficiaries, some of the related rights that have an impact on the adjudication framework and that must also be given effect to include the right to equality,⁵⁸ the right to human dignity,⁵⁹ and the right to just administrative action.⁶⁰ The

⁵⁵ Section 34 of the Constitution (Constitution of South Africa, 1996) states that “everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

⁵⁶ Section 27(1) (c) of the Constitution states that “everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.”

⁵⁷ See for example *Government of the Republic of South Africa and Others v Grootboom and Others* (2000) 11 BCLR 1169 (CC) para 24.

⁵⁸ Section 9 of the Constitution states as follows:

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

development of the social security adjudication system would have to be informed by the nature and scope of all of the rights of access to courts and to social security, as well as related rights. Furthermore, the system will also be informed by the nature and scope of the obligations on the State and other actors in connection to these rights.

In addition, the adjudication framework will also be informed by constitutional principles that have a bearing (either directly or indirectly) on the realisation of constitutional rights. Some of the constitutional principles that will be relevant in the establishment of a social security adjudication system include principles relating to Courts and Administration of Justice;⁶¹ and the basic values and principles governing public administration.⁶² These principles are useful tools in the protection and advancement of the rights in the Bill of Rights.⁶³

This chapter analyses some of the constitutional issues arising in the context of the establishment of an effective and efficient social security adjudication framework in South Africa. Constitutional requirements for the realisation of the right of access to courts, the right of access to social security and related rights; and the obligations in relation to these rights are investigated. Pertinent issues that are considered include the role and impact of the Constitution (including the role and impact of the aims and values underpinning the Constitution); the nature and scope of the rights to have access to courts and to social security (and other related rights); as well as the scope and nature of the State's obligation in terms of

3. The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

⁵⁹ Section 10 of the Constitution states that "everyone has inherent dignity and the right to have their dignity respected and protected."

⁶⁰ Section 33 of the Constitution provides as follows:

1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

2. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

3. National legislation must be enacted to give effect to these rights, and must

a. provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

b. impose a duty on the State to give effect to the rights in subsections (1) and (2); and

c. promote an efficient administration.

⁶¹ Chapter 8 of the Constitution regulates the "Principles Relating to Courts and Administration of Justice."

⁶² Chapter 10 of the Constitution regulates the "Basic Values and Principles Governing Public Administration."

⁶³ Brand D "Introduction to socio-economic rights in South African Constitution" in Brand D & Heyns C (eds) *Socio-economic rights in South Africa* Pretoria, PULP (2005) 5. See also *Mashavha v President of the RSA and Others* 2004 (12) BCLR 1243 (CC) where the Court used technical and non-rights related principles in the (Interim) Constitution to protect the right of access to social assistance of the complainant.

both rights, the relation between these rights and other fundamental rights; the particular interpretation to be given to the fulfilment of the rights in relation to South Africa's past and present contexts (including the Constitution's focus on protecting persons who are particularly vulnerable and desperate); the nature and scope of obligations imposed on the State and other entities in giving effect to these rights; and possible limitations to these rights. Analysing these will determine the prerequisites for the development of an appropriate social security adjudication framework from a constitutional perspective.

2. ROLE AND IMPACT OF THE CONSTITUTION

The Constitution has an impact on the development of a social security adjudication framework due to its protection of the rights to have access to courts and to social security as fundamental human rights in the Bill of Rights.⁶⁴ In addition to access to courts and to social security, many other rights that are related to these rights are also guaranteed in the Constitution. The status of the Constitution also ensures that these rights must be realised. Constitutional supremacy is one of the foundational values of the Republic of South Africa.⁶⁵ The Constitution is the supreme law of the Republic. Law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.⁶⁶ The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all organs of State.⁶⁷ The Bill of Rights also binds a natural or a juristic person if, and to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the rights.⁶⁸ The Constitution further requires every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation and when developing the common law.⁶⁹

The Constitution places obligations on the realisation of these rights. Section 2 states that duties imposed by the constitution must be performed, while section 7(2) enjoins the State to respect, protect, promote and fulfil the rights in the Bill of Rights. The State is also compelled

⁶⁴ The Bill of Rights is in Chapter 2 of the Constitution.

⁶⁵ Section 1(c) of the Constitution.

⁶⁶ Section 2 of the Constitution.

⁶⁷ Section 8(1) of the Constitution.

⁶⁸ Section 8(2) of the Constitution.

⁶⁹ Section 39(2) of the Constitution.

to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right of access to social security.⁷⁰

2.1 Aims of the Constitution

The Preamble of the Constitution stipulates what was hoped to be achieved through the enactment of a Constitution as the supreme law of the Republic. The aims reflect the spirit and purpose of the Constitution, and must be taken into consideration when constitutional rights and obligations are to be interpreted, and when the rights are to be limited. It has been declared that:

“the Preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purposes.”⁷¹

Some of the aims of the Constitution are to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights and to improve the quality of life of all citizens.⁷² Therefore, the Constitution was adopted and a bill of fundamental rights was entrenched, not only to avoid a repetition of and to redress South Africa’s past injustices, but in order to establish a new society based on mutual respect, equality and freedoms.⁷³ The Constitution’s aims to heal the divisions of the past and to improve the quality of life of all citizens, further indicates that it seeks to eradicate social and economic disadvantages (such as inequality, poverty and lack of access to basic human rights). This has been confirmed by the Constitutional Court, when it stated that:

“we live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment; inadequate social security and many do not have access to clean water or adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring. ... This commitment is also reflected in various provisions of the bill of rights

⁷⁰ Section 27(2) of the Constitution.

⁷¹ *S v Mlungu* 1995 3 SA 867 (CC); 1995 7 BCLR 793 (CC) para 112.

⁷² Preamble of the Constitution.

⁷³ Olivier MP *et al* “Constitutional issues” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (2003) 52.

and in particular in sections 26 and 27 which deal with housing, health care, food, water and social security.”⁷⁴

2.2 Values underpinning the Constitution

A social security adjudication framework, that seeks to realise the rights of access to courts and to social security, must promote the values that inform and underpin the objectives of the Constitution. The Constitution states that some of South Africa’s foundational values are human dignity, the achievement of equality and the advancement of human rights and freedoms.⁷⁵ Constitutional values lie at the heart of the Bill of Rights,⁷⁶ and are important in the interpretation and enforcement of the rights entrenched in the Bill of Rights. The impact of constitutional values in interpreting the constitution and understanding its fundamental purpose was highlighted by the Constitutional Court when it stated that:

“the introduction of fundamental rights and constitutionalism in South Africa represented more than merely entrenching and extending existing common law rights, such as might happen if Britain adopted the bill of rights. The Constitution introduces democracy and equality for the first time in South Africa. It acknowledges a past of intense suffering and injustice, and promises a future of reconciliation and reconstruction To treat it with the dispassionate attention one might give a tax law would be to violate its spirit as set out in unmistakably plain language. It would be a repugnant to the spirit, design and purpose of the Constitution as a purely technical, positivist and value-free approach to the post-Nazi constitution in Germany.”⁷⁷

Constitutional values must also be taken into account when a constitutional right is interpreted, as section 39 enjoins every court, tribunal or forum to promote the values that underlie an open and democratic society based on human dignity, equality and freedom when interpreting the rights in the Bill of Rights. In addition, the Constitution’s imitation clause adopts a value-based approach, as section 36 requires that a right in the Bill of Rights must only be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁷⁸

⁷⁴ *Soobramoney v Minister of Health (KwaZulu Natal)*(1997) 12 BCLR 1696 (CC) paras 8-9.

⁷⁵ Section 1(a) of the Constitution.

⁷⁶ *Khosa and Others v The Minister of Social Development and Others; Mahlaule and Another v The Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) para 85.

⁷⁷ *S v Mlungu* 1995 3 SA 867 (CC); 1995 7 BCLR 793 (CC) para 111.

⁷⁸ Section 36(1) of the Constitution.

The Constitutional Court has stated that the fundamental rights in the Bill of Rights are entrenched because South Africa is a society that values human beings and wants to ensure that people are afforded their basic needs. A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational.⁷⁹ Constitutional values are also important for the smooth functioning of South African society, as a system which disregards historical injustices and offends the constitutional values of equality and dignity could result in instability.⁸⁰

Therefore, the right to have access to courts by social security beneficiaries, as is the case with all other rights, must be interpreted in the light of underlying constitutional values, as well as the interests that that right is meant to protect. Analysis of the values and purpose of the right to have access to courts provides the right with its substantive content.⁸¹ These constitutional values are instrumental to the establishment of a social security adjudication framework as the framework must seek to promote these values. The adjudicative framework put in place must seek to ensure that users of the system are able to realise their rights to have access to court equally, freely and with dignity.

2.2.1 Equality

Equality is a foundational value that informs constitutional interpretation, as well as a fundamental right. The Constitution provides that everyone is equal before the law and has the right to equal protection before the law;⁸² and that equality includes the full and equal enjoyment of all the rights and freedoms.⁸³ In addition, section 34 guarantees everyone the right of access to courts. Therefore, equality in respect of access to courts is implicit in the reference to everyone in section 34. As it has been stated:

“fundamental to that spirit and tenor was the promise of the equal protection of the laws to all the people of this country and a ringing and decisive break with a past which perpetuated inequality and irrational discrimination and arbitrary governmental and executive action.”⁸⁴

⁷⁹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC) para 44, as quoted in the *Khosa* case para 52.

⁸⁰ *Mashavha v President of the RSA and Others* 2004 (12) BCLR 1243 (CC), para 57.

⁸¹ Albertyn C and Goldblatt B “Section 9 – the right to equality” Paper presented at the Constitutional Law of South Africa Conference, Constitution Hill, 29 March 2006, 1.

⁸² Section 9(1) of the Constitution.

⁸³ Section 9(2) of the Constitution.

⁸⁴ *S v Mlungu* 1995 3 SA 867 (CC); 1995 7 BCLR 793 (CC) para 8.

The right to equality can form the basis for demands that rights that are afforded to a person or category of persons be extended to another person or category of persons.⁸⁵ The social and economic status of social security applicants/beneficiaries has also been elevated to a ground similar to the grounds in section 9(3), in terms of which a person may not be unfairly discriminated against.⁸⁶ The word “including” in section 9(3) indicates that the list was not intended to be a closed one. As a result, the Promotion of Equality and Prevention of Unfair Discrimination Act⁸⁷ enacted in terms of section 9(4)⁸⁸ of the Constitution has proposed socio-economic status as one of the additional grounds for inclusion into the list of prohibited grounds.⁸⁹

The right to equality has both formal and substantive dimensions.⁹⁰ Formal equality entails the prohibition of unjustified discrimination, in the sense that all persons must be treated in the same manner, irrespective of their circumstances. Equality of access to courts, in the formal sense, ensures that all persons should have access to effective dispute resolution mechanisms necessary to protect their rights and interests. Formal equality requires sameness of treatment, implying that the adjudication system should be open to everybody, irrespective of their circumstance. It therefore ignores economic and social disparities between individuals or groups of persons.⁹¹ Where a concept of formal equality is applied in relation to access to a social security adjudication framework, access may be denied to some potential litigants due to their social and economic situation. Formal equality is therefore insufficient to

⁸⁵ An example of this can be seen in *Khosa and Others v The Minister of Social Development and Others; Mahlaule and Another v The Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) where the court extended access to social assistance permanent residents on the basis that (inter alia) their exclusion unfairly discriminated against them in contravention of section 9 (3) of the Constitution.

⁸⁶ Section 9(3) states that the State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

⁸⁷ Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) 4 of 2000.

⁸⁸ Section 9 4 provides that “no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

⁸⁹ Section 34 (1) of PEPUDA states that “In view of the overwhelming evidence of the importance, impact on society and link to systemic disadvantage and discrimination on the grounds of HIV/AIDS status, socio-economic status, nationality, family responsibility and family status-

a) special consideration must be given to the inclusion of these grounds in paragraph (a) of the definition of "prohibited grounds" by the Minister;

b) the Equality Review Committee must, within one year, investigate and make the necessary recommendations to the Minister.”

⁹⁰ The Constitution provides that everyone is equal before the law and has the right to equal protection of the law - section 9(1); and the State may not discriminate directly or indirectly against anyone on one or more grounds, including amongst others, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation and culture - section 9(3).

⁹¹ Currie I and De Waal J *The Bill of Rights Handbook* Cape Town, Juta (2005) 233.

ensure equality of access to justice since attributes such as affluence, race and political power influence the administration of justice to a greater or lesser extent. This calls for the socio-economic upliftment of economically and socially deprived persons for the achievement of equality.⁹² Equality in term of access must thus be interpreted as a whole, with “a broad judicial examination of equality relating to both formal and substantive issues.”⁹³ A concept of equality that goes beyond formal equality is then required.

The Constitution requires a substantive approach to equality as section 9(2) states that equality includes the full and equal enjoyment of all rights and freedoms. Substantive equality aims to promote the attainment of equality by focusing on outcomes. It requires the law to ensure equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal.⁹⁴ In this case, the economic and social conditions of individuals or groups of persons are taken into account in determining the attainment of equality. Substantive equality dictates that the equality provisions could be used to address historical imbalances by granting more favourable treatment to the historically and socially disadvantaged.

Therefore, one purpose of equality, as a constitutional value and a fundamental right, is to remedy historical disadvantage and material inequalities. A substantial approach to equality permits and requires positive measures, tailored for the needs of particular individuals and groups, to address inequality and remedy disadvantage, thus creating the conditions for full and equal participation in society.⁹⁵ The Constitutional Court has remarked that the equality clause in the Constitution was adopted in the recognition that discrimination against people, who are members of disfavoured groups, can lead to patterns of group disadvantage and harm. Such discrimination is unfair as it builds and entrenches inequality amongst different groups in our society. The need to prohibit such patterns of discrimination and to remedy their result is the primary purpose of the equality clause.⁹⁶ In *President of the Republic of South Africa v Hugo*, the court held that:

⁹² Devenish GE *A Commentary on the South African Bill of Rights* Durban, Butterworths (1999) 39.

⁹³ Davis D “Equality and Equal Protection” in van Wyk B, Dugard J, de Villiers B and Davis D (eds) *Rights and Constitutionalism* Juta, Cape Town (1994) 207.

⁹⁴ Currie I and De Waal J *The Bill of Rights Handbook* 233.

⁹⁵ Cheadle MH, Davis DM and Haysom NRL *South African Constitutional Law: The Bill of Rights* Durban, Butterworths (2002) 57 & 76.

⁹⁶ *Brink v Kitschoff NO* 1996 6 BCLR 752 (CC) para 42.

“... we need ... to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.”⁹⁷

Substantive equality requires that the adjudication system should be designed to ensure equality of outcome and must be able to accommodate the disparity of its users in order to achieve equality.⁹⁸ In this case, access to justice would not only mean that everybody should have equal access to the mechanisms of justice; but should also ensure the promotion of equality and social justice for poor and other vulnerable persons by taking into account their social, economic, cultural and other relevant contexts. Equality, in terms of access to justice, means access should be equal, in the sense that the poor should not be excluded on the basis of their socio-economic and other disadvantages; and that there should be equity in the provision of justice.⁹⁹ Such disadvantages limits an affected person’s access to justice, as

“... a marked characteristic of virtually all communities living in extreme poverty is that they do not have access, on equal terms, to the institutions and services of Government that give effect to human rights. This inequality of access, in particular to justice, is often linked to discrimination on other grounds. Although commonly seen as an issue of economic and social rights, the experience of the poor is as likely to be marked by repression as by economic depression and indeed the two are interlinked.”¹⁰⁰

The need for the adoption of substantive equality is further necessitated by the Constitution’s focus on particularly vulnerable and desperate persons. The State’s constitutional obligations require that the State protects particularly vulnerable and desperate persons and groups. The Constitutional Court has stated that the State has to make provision for the most vulnerable

⁹⁷ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 41.

⁹⁸ Currie I and De Waal J *The Bill of Rights Handbook* 233.

⁹⁹ Institute for Security Studies *Access to justice in Africa: Comparisons between Sierra Leone, Tanzania and Zambia* (Policy Brief Nr 13) October 2009, 1.

¹⁰⁰ Foundation for Human Rights “Civil Society priorities in the access of justice and promotion of constitutional rights programme of the Department of Justice and Constitutional Development (DOJ&CD)” March 2009, 5.

and desperate in society.¹⁰¹ In the case of social security litigants, their particularly vulnerable and desperate status is indisputable. This is especially true of social assistance applicants or beneficiaries, who are indigent and have to satisfy the means (income and asset) test to qualify for benefits. The position of social security applicants or beneficiaries is further worsened by the fact that the social security dispute resolution process - litigation - only commences after an application for a benefit has been rejected or payment of the benefit has either been stopped or only partially paid. Where the social security statute provides for internal administrative remedies as a prerequisite for external adjudication, these remedies would also have been exhausted. Delays in the justice system further mean that before court cases are eventually decided, most litigants will be in a very precarious financial position. The need to pay court and attorney fees further compounds matters for most litigants.¹⁰² As Anderson asserts, the poor tend to reach court in cases where they are at risk of destitution – both because their margins for error are smaller and because the most fundamental components of livelihood are at stake.¹⁰³

Therefore, due to the vulnerable status of the social security beneficiaries, it could, in the light of the relevant constitutional provisions and developing jurisprudence, constitutionally be expected of the State to establish a comprehensive adjudication system. It further requires the development of innovative mechanisms to effectively realise their right of access to court. An example of an instance where innovative mechanisms have been developed to effectively realise their right of access to court is the possibility in terms of the Constitution for a group or class of people to bring a case in court (class actions).¹⁰⁴ In developing the common law of standing to make provision for the realisation of the constitutional right to bring a class

¹⁰¹ *Grootboom* (paras 52 and 69) where the failure to make express provision to facilitate access to temporary (housing) relief for people who have no access to land, no roof over their heads or who live in intolerable conditions was found to fall short of the obligation set by s 26(2) in the Constitution.

¹⁰² In relation to social security (specifically social assistance) litigants' ability to pay legal fees, Wallis AJ in *Cele v the South African Social Security Agency and 22 related cases* (2009 (5) SA 105 (D) para 2) rightly wondered how people so impoverished that they qualify for social assistance grants can afford to pay fees.

¹⁰³ Anderson MR "Access to justice and legal process: making legal institutions responsive to poor people in LDCs" (IDS Working Paper 178), Sussex, Institute of Development Studies (February 2003) 19-20.

¹⁰⁴ Section 38 of the Constitution on the enforcement of rights states that:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -

- a. anyone acting in their own interest;
- b. anyone acting on behalf of another person who cannot act in their own name;
- c. anyone acting as a member of, or in the interest of, a group or class of persons;
- d. anyone acting in the public interest; and
- e. an association acting in the interest of its members.

action, the court in *The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza*¹⁰⁵ was able to develop an innovative mechanism through which a category of particularly vulnerable and desperate persons (social assistance (disability grant) beneficiaries whose grants had been unlawfully terminated) to have access to court to enforce their right of access to social security.

The notion of substantive equality will require the redefinition of the concept of access to courts to incorporate the promotion of equality and social justice for poor and other vulnerable persons.¹⁰⁶ Adopting such an approach to equality in this respect requires the development of an adjudication system that takes into account their social, economic, cultural and other relevant contexts. Due to the particularly vulnerable and desperate status of social security applicants or beneficiaries in general, and aggrieved social security applicants/beneficiaries in particular, it may necessitate the development of a special dispute resolution system. The socio-economic context of social security litigants (the very poorest of our society) warrants the consideration of dispute resolution systems or mechanisms that will be more suitable to their peculiar needs and circumstances. This category of persons therefore requires an expeditious, efficient, affordable and easily accessible dispute resolution system. Such a system is necessary because when people are poor, individual incidents of unjust administrative action or unfair denial of access to services, can tip them into greater poverty and widen inequalities.¹⁰⁷

The Constitutional Court has proposed a further concept of “restitutionary equality” due to the requirement in section 9(2) that legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, the Court held that:

“particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through the Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and

¹⁰⁵ *The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* 2001 4 SA 1184 (SCA).

¹⁰⁶ Vawda YA “Access to Justice: From Legal representation to the promotion of equality and social justice – Addressing the legal isolation of the poor” 2005 *Obiter* 234-247 at 234.

¹⁰⁷ Heywood M and Hassim A “Remedying the maladies of ‘lesser men or women’: The personal, political and constitutional imperatives for improved access to justice” (2008) 24 *SAJHR* 266.

unless remedies, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.... One could refer to such equality as remedial or restitutionary equality.”¹⁰⁸

2.2.2 *Human Dignity*

Human dignity is also a foundational value and a fundamental right that will inform the social security adjudication system. Section 1 states that the Republic of South Africa is one sovereign democratic state founded on the values of human dignity, the achievement of equality and advancement of human rights and freedoms, non-racialism and non-sexism; while section 7(1) further states that the Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. Section 10 states that everyone has inherent dignity and the right to have their dignity respected and protected.

Human dignity informs constitutional interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all rights. It is not only a value but also a justiciable and enforceable human right that must be respected and protected.¹⁰⁹ The value of human dignity will also be influential in the interpretation of the right of access to courts and the State’s obligations in this regard. It has been remarked that:

“... as an abstract value, common to the core values of our Constitution, dignity informs the content of all the concrete rights and plays a role in the balancing process necessary to bring different rights and values into harmony. It too, however, must find its place in the constitutional order. Nowhere is this more apparent than in the application of the social and economic rights entrenched in the Constitution. These rights are rooted in respect for human dignity, for how can there be dignity in a life lived without access to housing, health care food, water or in the case of persons unable to support themselves, without appropriate social assistance? But social and economic policies are pre-eminently policy matters that are the concern of government. In formulating such policies the government has to consider not only the rights of individuals to live with dignity, but also the general interests of the community concerning the application of resources.”¹¹⁰

¹⁰⁸ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) paras 60-61.

¹⁰⁹ *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) para 35.

¹¹⁰ Chaskalson A “Human Dignity as a Foundational Value of our Constitutional Order” (2000) 16 *SAJHR* 193 at 204.

The influence of human dignity in this instance is further increased by the relationship between access to courts for aggrieved social security beneficiaries and the realisation of their right of access to social security. Lack of access to courts affects their ability to have access to social security and other constitutional rights, which in turn affects their ability to ensure a basic standard of living. As the Constitutional Court has stated, “there can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have not food, clothing and shelter”.¹¹¹ In *President of the Republic of South Africa v Hugo* the Court held that:

“at the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.”¹¹²

It is only when access to courts is realised that people will be able to protect their dignity. Without dignity, the law’s legitimacy will be undermined; and without the rule of law, democracy and the Constitution itself will feel hollow for the poor, who are the majority in South Africa.¹¹³

3. IMPACT OF THE RIGHT TO HAVE ACCESS TO COURTS

In order to determine the meaning of the right to have access to courts, regard must be had to the approach to interpreting the Constitution; the purpose and importance of the right; the nature and scope of both the right as well the State’s obligations in terms of the right; and possible limitations to the right.

3.1 Approach to interpreting the right

Interpreting the right of access to courts must be done in accordance with the approach for the interpretation of the rights in the Bill of Rights. In terms of the Constitution, any

¹¹¹ *Government of the Republic of South Africa and Others v Grootboom and Others* para 23.

¹¹² *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC) at para 41.

¹¹³ Heywood M and Hassim A “Remedying the maladies of ‘lesser men or women’: The personal, political and constitutional imperatives for improved access to justice” (2008) 24 *SAJHR* 279.

interpretation of the rights in the Bill of Rights must promote the values that underlie an open and democratic society based on human dignity, equality and freedom, must consider international law and may consider foreign law.¹¹⁴ It must also promote the spirit, purport and objects of the Bill of Rights.¹¹⁵ The Constitutional Court has also laid down the approach to be adopted in the interpretation of a fundamental right in the Constitution. In the case of *S v Zuma*,¹¹⁶ the Court held that the approach to be adopted in interpreting the Constitution is an approach which, whilst paying due regard to the language that has been used, is generous and purposive and gives expression to the underlying values of the Constitution. Therefore, a right must be interpreted in a manner that seeks to realise the objectives of the right. The Court held that:

“the meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be... a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter’s protection.”¹¹⁷

In the *Grootboom* case, the Constitutional Court held that rights must further be interpreted with regard to the context within which the right was enacted.¹¹⁸ The Court stated that interpreting a right in its context requires the consideration of two types of context. On the one hand, rights must be understood in their textual setting (which requires a consideration of Chapter 2 and the Constitution as a whole), and, on the other hand, rights must also be understood in their social and historical context.

In relation to the history and background to the adoption of the right of access to courts, the right needs to be interpreted with regard to history of deliberate denial of access by the State. Before the adoption of the Constitution, the State used various mechanisms to eliminate the

¹¹⁴ Section 39(1) (a)-(c).

¹¹⁵ Section 39(2).

¹¹⁶ *S v Zuma* 1995 4 BCLR 401 (CC); 1995 2 SA 642 (CC).

¹¹⁷ *S v Zuma* para 15.

¹¹⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* paras 21-22.

jurisdiction of the courts. These include the prohibition of legal proceedings against the State; the use of “ouster clauses” and restrictive time limit and notice requirements.¹¹⁹

The outright prohibition against the bringing of legal proceedings against the State was one of the mechanisms that restricted access to justice. An example of this was the Ciskei Definition of State Liability Decree. The Decree provided that “no legal proceedings may be brought against the State in respect of any claim arising from any procedural irregularity, abuse of power, maladministration, nepotism, corruption or act of negative discrimination on the part of any member or servant of the Government of the Republic of Ciskei which was overthrown on 4 March 1990”.¹²⁰ Such provisions automatically eliminated access to courts, as a litigant could not institute legal proceedings, irrespective of the correctness of the claim. They would therefore be in contravention of the right of access to courts.¹²¹

The right of access to court was also restricted through the use of the so-called “ouster clauses”. These clauses, which have the effect of ousting the jurisdictions of courts to review state conduct, ensured that apartheid-era state conduct was beyond judicial scrutiny.¹²² Access to court was also restricted by interfering in the independence of the judiciary. This was achieved by appointing executive-minded judges into the judiciary and making political appointments of judges.¹²³ The right of access to courts must therefore be interpreted with regards to the historical denial of the right and the Constitution’s aim to prevent the recurrence of this.

Restrictive time limits and notice requirements pose barriers to access to justice. Time limits and/or notice periods for the institution of a case are stipulated in various statutes.¹²⁴ Time limits and notice periods are necessary in a dispute resolution system as they bring certainty and stability to social and legal affairs and maintain the quality of adjudication (which is central to the rule of law).¹²⁵ However, where a statute imposes a time limit and/or notice period requirement, an aggrieved person is barred from bringing the case to court after the

¹¹⁹ See Brickhill J and Friedman A “Access to courts” in Woolman S *et al Constitutional Law of South Africa* (2nd Edition, Original Service 07-06) (Cape Town, Juta) 59-1 and 59-2.

¹²⁰ Section 2(1) of the Definition of State Liability Decree 34 of 1990 (Ck).

¹²¹ *Ntenti v Chairman, Ciskei Council of State and Another* 1993 (4) SA 546 (Ck); 1994 (1) BCLR 168 (Ck).

¹²² See Brickhill J and Friedman A “Access to courts” in Woolman S *et al Constitutional Law of South Africa* (2nd Edition, Original Service 07-06) (Cape Town, Juta) 59-1 and 59-2.

¹²³ *Ibid*, 59-2.

¹²⁴ See for example the Road Accident Fund Act 56 of 1996.

¹²⁵ See *Road Accident Fund and Another v Mdeyide* 2011 (1) BCLR 1 (CC) para 8.

expiry of the time limit. The negative effect of time limits and notice requirements on the right of access to court has been described in many cases. Such requirements have been described as “conditions which clog the ordinary right of an aggrieved person to seek the assistance of a court of law”,¹²⁶ as “a very drastic provision” and “a very serious infringement of the rights of individuals”.¹²⁷ Such requirements have the effect of “hampering as it does the ordinary rights of an aggrieved person to seek the assistance of the courts”.¹²⁸

In *Brümmer v Minister for Social Development and Others*, the Constitutional Court held that:

“time bars limit the right to seek judicial redress. However, they serve an important purpose in that they prevent inordinate delays which may be detrimental to the interests of justice. But not all time limits are consistent with the Constitution. There is no hard and fast rule for determining the degree of limitation that is consistent with the Constitution. The “enquiry turns wholly on estimations of degree.” Whether a time bar provision is consistent with the right of access to court depends upon the availability of the opportunity to exercise the right to judicial redress. To pass constitutional muster, a time bar provision must afford a potential litigant an adequate and fair opportunity to seek judicial redress for a wrong allegedly committed. It must allow sufficient or adequate time between the cause of action coming to the knowledge of the claimant and the time during which litigation may be launched. And finally, the existence of the power to condone non-compliance with the time bar is not necessarily decisive.”¹²⁹

In evaluating the appropriateness of a time-bar or notice requirement, the Constitutional Court has held that:

“what counts ... is the sufficiency or insufficiency, the adequacy or inadequacy, of the room which the limitation leaves open in the beginning for the exercise of the right. For the consistency of the limitation with the right depends upon the availability of an initial opportunity to exercise the right that amounts, in all the circumstances characterising the class of case in question, to a real and fair one.”¹³⁰

¹²⁶ See *Benning v Union Government (Minister of Finance)* 1914 AD 180 at 185.

¹²⁷ *Gibbons v Cape Divisional Council* 1928 CPD 198 at 200.

¹²⁸ See *Avex Air (Pty) Ltd v Borough of Vryheid* 1973(1) SA 617(A) at 621F-G and *Administrator, Transvaal, and Others v Traub and Others* 1989(4) SA 731 (A) at 764E.

¹²⁹ See *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC) para 51.

¹³⁰ See *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) para 12.

Therefore, adequate time must be given to institute a claim and the practical possibility and genuine opportunity to do so is important.

It is also necessary to interpret access to courts within the broader context of the Bill of Rights, including the rights which have a bearing on the right. The right of access to courts is protected in the Bill of Rights together with other rights. As the Constitutional Court has affirmed, all the rights contained in the Bill of Rights are interrelated and mutually supporting. Together, these rights have a significant impact on the dignity of people and their quality of life.¹³¹ The right of access to courts is related to all the other rights in the Bill of Rights, as it is considered a “leverage right” through which a person can enforce their other rights. It is therefore a constitutional tool for the enforcement of all the other rights in the Bill.¹³²

This right also needs to be interpreted and understood in its social context. In relation to the socio-economic and historical context of persons in need of access to courts in general, it was remarked that South Africa is:

“a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce these, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons.”¹³³

The social context reflective of aggrieved social security applicants or beneficiaries in particular has been explained in numerous cases. In *Soobramoney v Minister of Health (KwaZulu Natal)*,¹³⁴ the court highlighted the socio-economic and historical conditions prevailing in South Africa when it remarked that:

“we live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment; inadequate social security and many do not have access to clean water or adequate health services. These conditions

¹³¹ *Grootboom*, para 53.

¹³² See Brickhill J and Friedman A “Access to courts” in Woolman S *et al Constitutional Law of South Africa* (2nd Edition, Original Service 07-06) Cape Town, Juta, 59-3.

¹³³ Didcott J in *Mohlopi v Minister of Defence* 1997 (1) SA 124 (CC) para 14.

¹³⁴ *Soobramoney v Minister of Health (KwaZulu Natal)* (1997) 12 BCLR 1696 (CC) para 8.

already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.”

3.2 Importance and purpose of the right of access to court

In realising the right of access to courts, an adjudication system must consider the importance and purpose of the right. The right to have access to court is vital for various reasons. Firstly, the right is important due to the historical context of access to courts. The right is guaranteed due to the significant obstacles that stood in the way of an unqualified access to courts in the past, which made it difficult for aggrieved persons to seek redress. Courts were also prohibited from dispensing justice independently and impartially¹³⁵ to all. Access to courts is fundamental to a viable and dynamic legal system that is based on justiciable human rights; the substantive rights in the Bill of Rights would be inaccessible and therefore meaningless to the ordinary person if there was no right of access to courts. The absence of access to courts would make fundamental rights elitist and negate the principle of equality.¹³⁶

The realisation of the right of access to courts is vital due to its relationship with all the other rights in the Bill of Rights. The Constitution has made it clear that the rights in the Bill of Rights are interrelated, interdependent and mutually supporting.¹³⁷ It is therefore impossible to define the scope and content of a right in isolation. The rights must be read together and their inter-relatedness must be considered when delineating the scope of each right. When considered together, the rights have a significant impact on the dignity of people and their quality of life. Therefore, the right of access to courts is an integral component of the right of access to social security. The realisation of the right of access to social security would be incomplete without a realisation of the right of access to courts.

Access to justice is essential for the success of an operative Bill of Rights and the promotion of human rights. It is the core of social and economic rights and of making law and justice accessible to all. The right is considered to be of cardinal importance for the adjudication of justiciable disputes, and due to the nature of the right, there can surely be no dispute that the

¹³⁵ Devenish GE *A Commentary on the South African Bill of Rights* Durban, Butterworths (1999) 485.

¹³⁶ *Ibid.*, 486.

¹³⁷ *Grootboom* para 53.

right of access to court is by nature a right that requires active protection.¹³⁸ It is thus the core of constitutional rights and in making law and justice accessible to all. The Constitutional Court is of the opinion that “untrammelled access to the courts is a fundamental right of every individual in an open and democratic society based on human dignity, equality and freedom. In the absence of such right the justiciability of the rights enshrined in the Bill of Rights would be defective; and absent true justiciability, individual rights may become illusory”.¹³⁹

In *Napier v Barkhuizen*, the Constitutional Court stressed that South Africa’s democratic order requires an orderly and fair resolution of disputes by courts or other independent and impartial tribunals. This is fundamental to the stability of an orderly society. It is indeed vital to a society that, like South Africa, is founded on the rule of law. Section 34 gives expression to this foundational value by guaranteeing to everyone the right to seek the assistance of a court.¹⁴⁰ In addition, the Court held that “section 34 is an express constitutional recognition of the importance of the fair resolution of social conflict by impartial and independent institutions. The sharper the potential for social conflict, the more important it is, if our constitutional order is to flourish, that disputes are resolved by courts”.¹⁴¹ The Court concluded that access to courts not only reflects the foundational values that underlie our constitutional order, it also constitutes public policy.¹⁴²

The realisation of the right to access to courts is also necessary for the judiciary to properly execute its constitutional duties. In this respect, it is argued that unless the need for justice and remedies for injustice are effectively met by the courts and the law, there will be negative consequences for the popular legitimacy of the courts and indeed the Constitution itself. This creates a political imperative to improve access to justice.¹⁴³ Therefore, the need for access to justice should be a core concern of the courts, for it goes to the very essence of their function. If people in need are not able to bring their cases to court and present them effectively, then the courts cannot satisfactorily perform the function entrusted to them by the Constitution.¹⁴⁴

¹³⁸ *Beinash & Another v Ernst and Young & Others* 1999 (2) SA 91; 1999 (2) BCLR 125 para 17.

¹³⁹ *Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 1288 (CC); 2001 (8) BCLR 765 (CC) para 23.

¹⁴⁰ *Napier v Barkhuizen* 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC) para 31.

¹⁴¹ *Napier v Barkhuizen*, para 32.

¹⁴² *Napier v Barkhuizen*, para 33.

¹⁴³ Heywood M and Hassim A “Remedying the maladies of ‘lesser men or women’: The personal, political and constitutional imperatives for improved access to justice” (2008) 24 *SAJHR* 280.

¹⁴⁴ Budlender G “Access to Courts” (2004) 121 *SALJ* 339-358 at 355.

In another instance, the Court stated that section 34, and the access to courts it guarantees for the adjudication of disputes, is a manifestation of a deeper principle, one that underlies our democratic order.¹⁴⁵ The court further remarked that:

“the right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes.... Construed in this context of the rule of law ... access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.”¹⁴⁶

The fundamental right of access to courts is protected in the Constitution because the right is essential for constitutional democracy under the rule of law; and in order to enforce one’s rights under the Constitution, legislation and the common law everyone must be able to have a dispute, that can be resolved by the application of law, decided by a court.¹⁴⁷ The right of access to court under section 34 of the Constitution is of fundamental importance to ensure that concrete expression is given to the foundational value of the rule of law.¹⁴⁸ It is a provision that is fundamental to the upholding of the rule of law, the constitutional state and the *regstaatidee*.¹⁴⁹ In a constitutional state and a rules-based society, people should “be able to use the rules when needed in order advance the objectives of the Constitution and ultimately have proper, substantive and meaningful access to the various institutions that interpret the rules and deal with the various contestations that inevitably arise”.¹⁵⁰

3.3 Nature and scope of the right of access to courts

Section 34 of the Constitution has three components.¹⁵¹ In the first instance, it guarantees everyone who has a dispute the right to be able to bring that dispute to a court or tribunal to seek redress (right of access to justice). This is to ensure protection against actions by the State and other persons which deny access to courts and other forum and the elimination of obstacles in the way of access to courts. Secondly, the right further requires that courts,

¹⁴⁵ *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) para 16.

¹⁴⁶ *Chief Lesapo v North West Agricultural Bank and Another* para 22.

¹⁴⁷ *Road Accident Fund and Another v Mdeyide* 2011 (1) BCLR 1 (CC) para 1.

¹⁴⁸ *Road Accident Fund and Another v Mdeyide* para 138.

¹⁴⁹ *Bernstein and Others v Bester NO and Others* 1996 (4) BCLR 449 (CC) para 105.

¹⁵⁰ Kollapen J “Access to Justice within the South African context” keynote address presented at the Open Society Foundation for South Africa *Access to Justice Round-Table Discussion* Parktonian Hotel, Johannesburg, 22 July 2003.

¹⁵¹ Currie I & de Waal J *The Bill of Rights Handbook* 704.

tribunals or forums that resolve disputes must be independent and impartial in the execution of their duties. Finally, section 34 guarantees the right to have disputes resolved in a fair and public hearing.

3.3.1 The right to bring a dispute to court (access to justice)

Section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

Therefore, the social security adjudication framework that is established must be in conformity with the right as envisaged in section 34 of the Constitution. The Constitution envisages that right will be realised only when the various components of the right are fulfilled – in relation to the scope of the concept of access to justice and its implications for social security adjudication.

The current social security adjudication framework requires reform so as to realise the constitutional right of access to courts for social security applicants or beneficiaries. The right to have any dispute that can be resolved by the application of law decided before a court or another independent and impartial tribunal or forum seeks to ensure access to the institutions and mechanisms to resolve disputes. In relation to social security applicants and beneficiaries, it thus ensures access to justice.

As discussed earlier, the concept of access to justice is defined both narrowly and broadly.¹⁵² The narrow (traditional) definition of the concept of “access” to “justice” is the situation where state legal systems ensure that every person is able to utilise the legal processes for legal redress irrespective of their social or economic capacity and where every person receives a just and fair treatment within the legal system. The traditional definition of the

¹⁵² See Chapter One, para 8.2 (The concept of access to justice) and the authorities discussed therein (e.g. Open Society Foundation for South Africa *Access to Justice Round-Table Discussion* (Parktonian Hotel, Johannesburg, 22 July 2003) 5; Kollapen J “Access to Justice within the South African context” Keynote Address to Open Society Foundation for South Africa Access to Justice Round-Table Discussion (see Open Society Foundation for South Africa *Access to Justice Round-Table Discussion* (Parktonian Hotel, Johannesburg, 22 July 2003) 5); Murlidhar S *Law, Poverty and Legal Aid: Access to Criminal Justice* (Lexis Nexis, 2004) 1; Bowd R *Access to justice in Africa: Comparisons between Sierra Leone, Tanzania and Zambia* Institute of Security Studies Policy Brief Nr 13 (October 2009) 1).

concept is based on the principle that the legal system should be structured and administered in such a manner that it provides everyone with affordable and timeous access to appropriate institutions and procedures through which to claim and protect their rights.

The traditional definition of the concept of access to justice, which is understood in terms of legal rights, processes and procedure,¹⁵³ fails to take into account the impact of the social and economic conditions (such as poverty, literacy, geographical location etc.) on the ability of claimants to use the adjudication system. A broad approach to the concept of access to justice goes beyond access to the institutions that resolve disputes and to legal services. The socio-economic condition of claimants (especially poverty) has an inevitable impact on the ability of the poor and the marginalised to utilise the legal system. Therefore, the concept of access to justice is defined in a manner that also considers the number of barriers to the ability to utilise the legal processes to receive a just and fair treatment. Such ability is hampered through various barriers (geographical, time-related, linguistic, cultural, social or legal etc).

It is accepted that in South Africa in particular, the impact of the socio-economic conditions of claimants and other barriers on their ability to utilise the adjudication system must be considered within the concept of access to justice.¹⁵⁴

Access to justice, as expressed in section 34 of the Constitution (the ability of a person to utilise the legal system to receive a just and fair treatment), has three components. In the first instance, access to justice requires that accessibility to the adjudication institutions must be ensured. This means everyone who has a dispute must be able to bring a dispute to a court or tribunal to seek redress. Secondly, access to justice entails that effective dispute resolution institutions and mechanisms must be in place. Effectiveness requires, amongst others, that courts, tribunals or forums that resolve disputes must be independent and impartial in the execution of their duties. Finally, in order to ensure access to court, section 34 guarantees the right to have disputes resolved in a fair and public hearing.

Accessibility of adjudication institutions requires that law or conduct should not deny the ability and opportunity to access dispute resolution institutions; and that all obstacles in the

¹⁵³ Murlidhar S Law, *Poverty and Legal Aid: Access to Criminal Justice* (Lexis Nexis, 2004) 1.

¹⁵⁴ See the remarks of Didcott J in *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) para 14 (discussed in para 3.1 of Chapter Two (Approach to interpreting the right) above).

way of access to courts must be eliminated. It thus encompasses a number of different aspects. It includes the ability of the users of the adjudication system to be able to bring a dispute to a court and the right to have their dispute heard. It also encompasses issues such as the fairness with which they are treated; the justness of results delivered; the speed with which cases are processed; the responsiveness of the system to those who use it; and the ability of the adjudication institutions to ensure equal treatment of persons from different backgrounds (including socio-economic backgrounds).¹⁵⁵

The scope of the concept of access to justice in the Constitution is also interpreted in terms of the interrelated, interdependent and mutually-supporting nature of the rights in the Bill of Rights (the interrelationship of the rights of the Constitution are discussed later in this policy). In this case, the concept of access to justice means not only access to the courts, but includes the (collective) rights to equality, human dignity, just administrative action and other matters concerning the administration of justice.¹⁵⁶ The relationship between access to justice and other rights in the Constitution (especially socio-economic rights) requires that access to these other constitutional rights must also be included in the notion of access to justice. Access to socio-economic and other rights is thus necessary for the achievement of access to justice. This is because there can be no access to justice in the face of poverty, unemployment and social inequality.¹⁵⁷

The Constitution guarantees access to justice for everyone. Therefore, the concept of access to justice must be interpreted within the context of the Constitution's concept of equality.¹⁵⁸ There is a need to adopt a substantive approach to equality in relation to access to justice for social security applicants/beneficiaries (since it is about breaking down the barriers that

¹⁵⁵ See Currie I and De Waal J *The Bill of Rights Handbook* Cape Town, Juta (2005); Department of Justice and Constitutional Development "HIV/AIDS, Human Rights and Access to Justice" (Draft Discussion Paper)(May 2009) 11-12; Vawda YA "Access to Justice: From Legal representation to the promotion of equality and social justice – Addressing the legal isolation of the poor" 2005 *Obiter* 234-247; Foundation for Human Rights "Civil Society priorities in the access of justice and promotion of constitutional rights programme of the Department of Justice and Constitutional Development (DOJ&CD)" (March 2009); Anderson MR "Access to justice and legal process: making legal institutions responsive to poor people in LDCs" (IDS Working Paper 178) Sussex, Institute of Development Studies (February 2003) 19-20; Nyenti MAT "Dispute resolution in the South African social security system: the need for more appropriate approaches" 2012 *Obiter* vol. 33(1) 27-46; *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC); *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC).

¹⁵⁶ Department of Justice and Constitutional Development "HIV/AIDS, Human Rights and Access to Justice" (Draft Discussion Paper)(May 2009) 11-12.

¹⁵⁷ Vawda YA "Access to Justice: From Legal representation to the promotion of equality and social justice – Addressing the legal isolation of the poor" 2005 *Obiter* 234-247 at 247.

¹⁵⁸ See the discussion on equality (formal and substantive) in para 2.2.1 of Chapter Two (above).

prevent the poor and indigent from accessing the social security adjudication system). In this case:

“access to court therefore means more than the legal right to bring a case before a court. It includes the ability to achieve this. In order to be able to bring his or her case before a court, a prospective litigant must have knowledge of the applicable law; must be able to identify that she or he may be able to obtain a remedy from a court; must have some knowledge about what to do in order to achieve access; and must have the necessary skills to be about to initiate the case and present it to the court. In South Africa the prevailing levels of poverty and illiteracy have the result that many people are simply unable to place their problems effectively before the courts.”¹⁵⁹

A broad conceptualisation of access to courts in the South African context accords with the Constitution’s equality concept. Equality in terms of the Constitution involves both formal and substantive dimensions.¹⁶⁰ Adopting a substantive approach to equality in relation to access to court for social security applicants/beneficiaries is about breaking down the barriers that prevent the poor and indigent from accessing the social security adjudication system.

Access to justice for social security claimants thus requires that an appropriate adjudication system needs to be established. Therefore, the necessary legislative, policy, institutional (and other relevant) requirements for the resolution of social security disputes must be put in place. In addition, it also includes ensuring that prospective users of the dispute resolution system are able to access the system. The adjudication system developed should take into account and/or eliminate possible barriers that (may) prevent users of the system from utilising the system. An effective or efficient social security adjudication system must be sensitive to the social, economic and other relevant contexts of the users of the system. It has been remarked that traditionally, access to justice is understood in terms of legal rights, processes and procedure, often shadowing the socio-economic element, particularly that of poverty. However, the link between justice and poverty is the inevitable impact on poor and marginalised communities, the majority of whom are women, who are “deprived of choices, opportunities, and access to basic resources”.¹⁶¹

¹⁵⁹ Budlender G “Access to Courts” (2004) 121 *SALJ* 339-358 at 344.

¹⁶⁰ See the discussion on the right to equality in para 2.2.1 (*supra*).

¹⁶¹ United Nations Development Programme *Access to Justice* (March 2004).

Some of the barriers of access to justice for social security claimants include poverty;¹⁶² geographic location of adjudication institutions;¹⁶³ physical inaccessibility of adjudication institutions;¹⁶⁴ lack of knowledge of rights (also due to illiteracy);¹⁶⁵ inappropriate dispute resolution institutions and mechanisms;¹⁶⁶ procedural hurdles;¹⁶⁷ and delay in the resolution of disputes.¹⁶⁸

¹⁶² Poverty poses a significant challenge to access to justice. The principal barrier posed by poverty is the inability to meet the costs of representation (also due to the high cost of legal services and challenges in receiving legal assistance from the Legal Aid South Africa). Recent studies indicate that the average South African household would need to save a week's income in order to afford a one-hour consultation with an average attorney. Even worse, for black households (who are mostly poorer than the average) the barrier to access to court is even higher (AfriMAP & Open Society Foundation of South Africa "South Africa: Justice sector and the rule of law (A discussion paper)" (2005) 29). Where the dispute resolution system fails to take such a barrier into consideration (e.g. by simplifying the mechanisms and procedures of the system and reducing or eliminating issues such as rules for the initiation of court proceedings, the payment of court fees and the need for legal representation) there would be an even stronger argument for the availability of state-provided legal assistance for such cases (see generally the discussion on the right to free legal assistance in para 3.3.3 (Procedural fairness (including the requirement of a public hearing))).

¹⁶³ One of the factors restricting the right of access to courts in South Africa is the long distances that many people have to travel in order to access the courts and related services. The courts are not located in places that they can be easily accessed by aggrieved social security applicants/beneficiaries. Only the Magistrates' Courts are widely spread throughout the country (also in rural and township areas). High Courts (which adjudicate most constitutional rights cases) are largely limited to urban areas, making them less accessible to the users of these forums (AfriMAP & Open Society Foundation of South Africa "South Africa: Justice sector and the rule of law (A discussion paper)" (2005) 109). The Department of Justice and Constitutional Development has taken cognisance of the impact of geography on access to courts, as it identified the establishment of suitable courts in rural and township areas as a priority as far back as 1999 (*Ibid*).

¹⁶⁴ An aspect of access to justice is the ability to walk to and reach the building where justice is administered. However, courts are also not physically accessible to some litigants, such as persons with disabilities (*Esthé Muller v DoJCD and Department of Public Works* (Equality Court, Germiston Magistrates' Court 01/03)). A social security adjudication system must ensure that court structures are accessible to all users, including persons with disabilities.

¹⁶⁵ For a person to be able to approach a court or tribunal to seek redress, he or she must have knowledge of his or her rights. Therefore, knowledge of rights is a prerequisite to access to justice. However, many South Africans have little knowledge of the law and human rights (see Mubangizi JC 'Protection of Human Rights in South Africa: Public Awareness and Perceptions' (2004) 29(1) *JJS* 62). An inherent aspect of the positive obligations on the State in relation to constitutional rights is the active education of citizens (in this case social security applicants/beneficiaries) about their right of access to courts and to social security (Heywood M & Hassim A "Remedying the maladies of 'lesser men or women': The personal, political and constitutional imperatives for improved access to justice" (2008) 24 *SAJHR* 278). Some social security statutes recognise the need for education on rights. For example, the Social Assistance Act requires the South African Social Security Agency (SASSA) to publish and distribute to beneficiaries and potential beneficiaries, brochures in all official languages of the Republic setting out in understandable language the rights, duties, obligations, procedures and mechanisms of the Act, as well as contact details of the Agency or anyone acting on its behalf (section 2(4) of the Social Assistance Act 13 of 2004).

¹⁶⁶ At present, disputes relating to entitlement and access to social security (both social assistance and social insurance) in South Africa are resolved mainly by resort to litigation in the High Court (see Chapter Six). Many of the barriers on access to justice (especially issues of cost, delay and travel distances) relate to the use of litigation in the High Court to resolve social security disputes. This implies that the absence of alternative avenues for dispute resolution in South African social security has an adverse impact on the right to access to social security (their right of access to justice is limited).

¹⁶⁷ Access to courts involves a process of enabling and empowering those not enjoying rights to claim those rights; which includes eliminating any procedural hurdles that prevent the free exercise of the right (see Vawda "Access to justice: From legal representation to the promotion of equality and social justice – Addressing the legal isolation of the poor" 2005 *Obiter* 239-240). Therefore, even where a social security adjudication system is accessible in other aspects, it will still be ineffective if (potential) users are restricted from the system due to

Due to the particularly vulnerable and desperate status of social security claimants, it may be necessary to develop a special dispute resolution system. The socio-economic context of social security litigants (the very poorest of our society) warrants the consideration of dispute resolution systems or mechanisms that will be more suitable to their peculiar needs and circumstances. This category of persons therefore requires an expeditious, efficient, affordable and easily accessible dispute resolution system.

3.3.2 Establishment of a court or another independent and impartial tribunal or forum

In order to be able to guarantee access to justice, an adjudication institution must be effective. Effectiveness of the adjudication institution entails that the institution must be able to provide claimants with appropriate redress. For an adjudication to be able to do this, it must be able to decide disputes according to the facts and the law, including freedom from improper influence (both internal and external).¹⁶⁹ This means that to be effective, an adjudication institution must be independent and impartial.

insurmountable procedural hurdles. Procedural rules give content to substantive rights, and must enable the effective realisation of the rights. It has been declared that “a substantive right on paper is of no use unless it is harnessed to an effective procedural remedy which allows the litigant to actually bring the case before the court in good time and without excessive cost. Legal gateways are important determinants of what kind of justice can be achieved. ... Legal procedures not only determine whether the poor can get access to legal remedies, and how quickly and effective such remedies will be, they can also influence the way that a particular dispute is construed by the law, and the kinds of outcomes which are possible” (Anderson MR “Access to justice and legal process: making legal institutions responsive to poor people in LDCs” (IDS Working Paper 178) Sussex, Institute of Development Studies (February 2003) 15).

¹⁶⁸ A major problem facing social security and other adjudication in the South African context is the length of time it takes for disputes to be resolved. Recent research points out that it a long time for a civil case to be heard, particularly in the busier courts. For example, in the Cape High Court the ordinary court roll for civil matters is full for up to a year (see AfriMAP & Open Society Foundation of South Africa “South Africa: Justice sector and the rule of law (A discussion paper)” (2005) 118). It is clear that access to justice only becomes complete when one's dispute is settled speedily (African National Congress “Access to justice in a Democratic South Africa” (Lecture by ANC President Jacob Zuma to the Platform for Public Deliberations) University of Johannesburg, 9 September 2008). It was held in the *Mohlomi* case that “inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs” (see *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) para 11). Delay in finalising adjudication impairs social security litigants' rights of access to courts. It further compounds the problems they face, since it is not only their right of access to courts that is infringed but also their right of access to social security.

¹⁶⁹ ILO *Social security and the rule of law* (General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization) (Report of the Committee of Experts on the Application of Conventions and Recommendations to the International Labour Conference, 100th Session, 2011- Report III (Part 1B)) (2011) para 433.

The right of access to justice in section 34 requires that a person who has a dispute has the right to have the dispute resolved by a court or where appropriate, another independent and impartial tribunal. Section 34 therefore envisages that there will be circumstances where it may be more appropriate for a tribunal or forum to resolve such disputes. There is thus no right to have a dispute that can be resolved by the application of law decided only by a court of law.¹⁷⁰ Where it is appropriate to do so, legal disputes can and should be resolved by other tribunals and forums apart from ordinary courts.

The right further requires that another forum decides a dispute where it is “appropriate” to do so. The term “appropriate” implies that an adjudication institution should be preferred if it is ideally suited for the type of dispute in question. This implies that where it is appropriate to do so, legal disputes can and should be resolved by other tribunals and forums apart from ordinary courts. Where the selected adjudication forum is ideally suited for the type of dispute in question, the State has an obligation to prefer and establish such a forum. Other adjudication forums and procedures apart from the normal courts could be preferable for a particular type of dispute due to their specialisation, expertise, the need to consider local circumstances, and the need for the adoption of expeditious, informal and inexpensive procedures.¹⁷¹

The need for more appropriate avenues for dispute resolution further involves the preferred mechanisms or procedures for dispute resolution. There are various mechanisms or processes in place for the resolution of disputes, and parties to a dispute should choose the most appropriate mechanism. A dispute resolution mechanism will be appropriate where its procedure, goals and values are suitable to the requirements of the parties’ situation.¹⁷² In addition, whether a mechanism is appropriate in each case will depend on the nature of the dispute, the amount of money involved, the remedies sought, the willingness of the parties to resolve the dispute and the nature of the relationship between the parties.¹⁷³

¹⁷⁰ *Carephone (Pty) Ltd v Marcus and Others* 1999 (3) SA 304 (LAC); 1998 (10) BCLR (1326 (LAC) para 33.

¹⁷¹ Currie I & de Waal J *The Bill of Rights Handbook* Cape Town, Juta (2005) 723.

¹⁷² Bosch C, Molahleli E and Everett W *The Conciliation and Arbitration Handbook: A comprehensive guide to labour dispute resolution proceedings* LexisNexis (2004) 7.

¹⁷³ Sanders D and Morrison P “Mediation: Better Than Arm Wrestling” <http://www.royllaw.co.za/> (24 February 2010).

In addition to requiring courts to be independent,¹⁷⁴ the Constitution, in section 34, requires tribunals and forums that resolve disputes to be independent and impartial. However, different standards of independence exist between courts and other tribunals and forums. As part of the Bill of Rights, section 34 (and the standard of independence guaranteed therein) may be subject to limitations of a reasonable nature. Such a limitation is not contemplated under section 165.¹⁷⁵ The difference in independence standards between courts and alternative tribunals or forums has been attributed to differences in the judicial functions performed. It is suggested that since courts perform a variety of judicial functions, they must comply with the highest standards of judicial independence.¹⁷⁶ On the other hand, alternative tribunals or forums may depart from a strict standard of independence. In *Financial Services Board v Pepkor Pension Fund*, it was held that:

“there are undoubtedly degrees of independence. Not every tribunal can be as completely independent as a court of law is expected to be. The independence of courts of law and of administrative tribunals cannot be measured by the same standard.”¹⁷⁷

Judicial authority in the country is vested in the courts. However, the overburdened state of the courts and their inappropriateness to hear certain disputes, due to either a lack of specialised knowledge or experience, means another independent and impartial tribunal or forum may be preferred in a particular type of dispute. Another adjudication institution could be preferable for a particular type of dispute due to its expertise, the need to consider local circumstances, or the need for the adoption of expeditious, informal and inexpensive procedures.¹⁷⁸

In addition, access to justice requires tribunals and forums that resolve disputes to be independent and impartial. There are various important reasons in support of the establishment of independent and impartial tribunals.¹⁷⁹ These include the fact that a tribunal is able to focus its attention on the issues presented by the parties without being distracted by the broader concerns of the relevant department; when the individual rights and interests in

¹⁷⁴ Section 165(2) of the Constitution.

¹⁷⁵ See the discussion on “Constitutional Principles on Courts and Administration of Justice” in paragraph 8 (*infra*).

¹⁷⁶ Currie I & de Waal J *The Bill of Rights Handbook* Cape Town, Juta (2005) 723.

¹⁷⁷ *Financial Services Board v Pepkor Pension Fund* 1999 (1) SA 167 (C) para 174F-G.

¹⁷⁸ Currie I & de Waal J *The Bill of Rights Handbook* Cape Town, Juta (2005) 723.

¹⁷⁹ See generally Baxter L *Administrative Law* (Juta, 1984); *Watchenuka & Another v Minister of Home Affairs & Others* 2003 (1) SA 619 (C); *Ruyobeza & Another v Minister of Home Affairs & Others* 2003 (5) SA 51 (C).

question (in this case the right of access to social security) are so important as to merit the special attention which only a body undistracted by general administrative concerns can give them; the desirability of an impartial decision free from the considerations of policy which departmental officials and ministers propagate but which engender so-called ‘departmental bias’; and the desirability of insulating the decision concerned from the vicissitudes of parliament and party politics, especially considering the important legal rights and interests are at stake.

The independence of a tribunal or forum has three essential components.¹⁸⁰ These components include security of tenure for the tribunal or forum officials; a basic degree of financial independence for the tribunal; and institutional independence in matters that relate directly to the exercise of the tribunal’s judicial function. Institutional independence implies control over the administrative decisions that bear directly and immediately on the exercise of the tribunal’s or forum’s judicial functions.

Tribunals or forums must also be impartial. The requirement that an adjudication institution must be impartial means that the institution’s decisions should be unbiased. The test is not whether the institution (or person) making the decision is in fact biased, but whether it (or he/she) may be perceived as biased by a reasonable member of the public. In *De Lange v Smuts NO and Others*, the Constitutional Court that:

“although there is obviously a close relationship between ‘independence’ and ‘impartiality’, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word ‘impartial’ . . . connotes an absence of bias, actual or perceived The word ‘independent’ . . . embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly the Executive branch of government that rests on objective conditions or guarantees.”¹⁸¹

The perception on the part of users of the social security system is thus a further consideration supporting the requirements of independence and impartiality. The word ‘impartial’ therefore connotes an absence of bias, actual or perceived.

¹⁸⁰ *De Lange v Smuts NO* 1998 3 SA 785 (CC) para 70.

¹⁸¹ *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) para 71.

3.3.3 Procedural fairness (including the requirement of a public hearing)

In order to ensure access to justice, the Constitution requires disputes to be decided in a fair public hearing by independent and impartial institutions. As discussed above, the right to a fair trial implies that adjudication institutions are impartial and have judicial independence to decide disputes according to the facts and the law, including freedom from improper internal and external influence.

In *De Beer NO v North-Central Local Council and South-Central Local Council*, the court stated that the hearing itself must also be fair.¹⁸² The need for a fair public hearing is important for the realisation of the right. As the Constitutional Court has remarked:

“this section 34 fair hearing right affirms the rule of law which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution the courts must interpret legislation and the rules of court, where it is reasonably possible to do so, in a way that would render the proceedings fair.”¹⁸³

Section 34 requires that an alternative tribunal or forum must also conduct proceedings in a fair public hearing.¹⁸⁴ However, the proceedings need not be identical to those of a court of law,¹⁸⁵ as the requirements of fairness in terms of section 34 are flexible and depend on different factors. In addition, it would neither be unfair nor unconstitutional for a tribunal or forum to adopt procedures different from those of a court.¹⁸⁶

The resolution of disputes must also be undertaken in a fair manner. Embedded in the right to a fair trial is also the right to procedural equality.¹⁸⁷ This implies that adjudication

¹⁸² *De Beer NO v North-Central Local Council and South-Central Local Council* 2002 (1) SA 429 (CC) para 14.

¹⁸³ *De Beer NO v North-Central Local Council and South-Central Local Council* para 11.

¹⁸⁴ Currie I and de Waal J *The Bill of Rights Handbook*, 723.

¹⁸⁵ See *Mbebe and Others v Chairman, White Commission and Others* 2000 (7) BCLR 754 (Tk) para 776.

¹⁸⁶ See *Bongoza v Minister of Correctional Services and Others* 2002 (6) SA 330 (TkH) paras 22-25. See also Brickhill J and Friedman A “Access to courts” in Woolman S *et al Constitutional Law of South Africa* (2nd Edition, Original Service 07-06) Cape Town, Juta, 59-97 and 59-98.

¹⁸⁷ ILO *Social security and the rule of law* (General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization) (Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution) Report III (Part 1B)) International Labour Conference, 100th Session, 2011 (2011) para 433.

institutions should therefore ensure that claimants have reasonable opportunities to assert or defend their rights. This implies, among other things:¹⁸⁸

- Reasonable notice of the time when the dispute is to be decided should be given to a person concerned.¹⁸⁹ The adjudication institution should also be given the power to condone a failure to comply with any notice requirements.
- Power to determine the appropriate procedures (where a dispute is resolved by a tribunal or another forum, the procedures do not have to be identical to those of a court of law. This is because the requirements of fairness in terms of section 34 are flexible and depend on different factors. Therefore, a tribunal or forum can be empowered to adopt procedures different from those of a court. This would enable a measure of flexibility to be granted to tribunal or forum in deciding disputes.
- Personal appearance and appropriate representation (each party to a dispute should be able to participate in the adjudication of the dispute. Each party should also be guaranteed the right to engage a lawyer or another qualified representative of their choice).¹⁹⁰
- Equal access to evidence (each party should also have access to the relevant evidence, including documents, expert opinions, etc.)
- Rapid resolution of disputes (disputes must be resolved as expeditiously as possible, especially in social security disputes).
- Inexpensive adjudication procedures (procedures should be free or costs should be kept at the absolute minimum so as to allow even the poor to be able to resolve disputes).

¹⁸⁸ *Ibid.*

¹⁸⁹ In the case of South Africa, the Constitutional Court has held that the notice must be such that it gives the person an adequate and fair opportunity to seek judicial redress (see *De Beer NO v North-Central Local Council and South-Central Local Council* paras 13 and 14). The reasonableness of the notice to the affected person depends on the circumstances of the case in the light of the purpose of the notice requirement, which is to bring relevant information about the claim and the hearing to the attention of anyone affected by claim. The court further held that the reasonableness of the notice would also depend on the nature of the possible order and the gravity of its consequences.

¹⁹⁰ South African courts have stated that a right to legal representation at a litigant's expense must be construed in the right to a fair public hearing, as to hold otherwise would render the right "entirely nugatory" (*Bangindawo v Head of the Nyanda Regional Authority* 1998 (3) BCLR 314 (Tk) 331D). In terms of the court's view, legal representation is integral to the right and any denial would constitute a limitation on the right. However, such a limitation may be justified if it is to serve a reasonable purpose such as the facilitation of access to courts by saving costs, time and by keeping the procedure simple (See for example *Beinash & Another v Ernst and Young & Others* 1999 (2) SA 91; 1999 (2) BCLR 125).

- Guarantee of an effective remedy (the adjudication institution should be able to make a decision that has to be duly motivated or, in other words, explain the reasoning that led to the decision in the dispute, and be legally enforceable).

Legal assistance to claimants who cannot afford legal assistance should be provided by the State. The right to free legal assistance has also been read into the right to have a fair public hearing in section 34. This is by virtue of the differences in the wording of the right of access to court in both the Constitution and the Interim Constitution;¹⁹¹ comparative jurisprudence on the right to free legal representation; the constitutional requirement of equality between civil and criminal litigants and emerging South African jurisprudence on the issue.

Proponents of a right to free legal assistance in South Africa point to the differences in the wording of the right of access to court in section 34 of the Constitution and in section 22 of the Interim Constitution. Section 22 of the Interim Constitution guaranteed the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum. In *Bernstein v Bester*,¹⁹² the court contrasted section 22 of the Interim Constitution with article 6(1) of the European Convention on Human Rights (ECHR) which guarantees the right to a fair civil trial by providing for a right to a fair public hearing.¹⁹³ It held that:

“a provision cannot ordinarily be implied if all the surrounding circumstances point to the fact that it was deliberately omitted. That the framers of the Constitution were alert to issues of constitutionalising rules of procedural law and justice is evident from the detailed criminal fair trial provisions in section 25(3). The internal evidence of the Constitution itself suggests that the drafters were well informed regarding provisions in international, regional and domestic human and fundamental rights instruments. Section 6 of the European Convention on Human Rights explicitly confers the right to a fair and public hearing, not only in a criminal trial, but also in regard to the determination of civil rights and obligations ... Nearer home, article 12(1)(a) of the Namibian

¹⁹¹ Constitution of the Republic of South Africa of 1993.

¹⁹² *Bernstein v Bester* 1996 (2) SA 751 (CC).

¹⁹³ In *Airey v Ireland* (32 Eur Ct HR Ser A (1979) the European Court of Human Rights (which interprets the European Convention on Human Rights) held that the right of access to a fair civil trial includes the right to be able to place one's case effectively before a court, which in many circumstances will require the assistance of a lawyer. In holding that the applicant had a right to free legal assistance, the court held that :the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective ... This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial ... It must therefore be ascertained whether Mrs Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and effectively” (para 24).

Constitution expressly provides that “[i]n the determination of their civil rights and obligations ... all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law ...”. In these circumstances an argument could be made out that the framers deliberately elected not to constitutionalise the right to a fair civil trial.”¹⁹⁴

Therefore, the inclusion of the right to a fair public hearing in section 34 of the Constitution indicates that a right to a fair civil trial is envisaged.¹⁹⁵

A right to free legal assistance is also determined by having regard to the provisions of Constitution on free legal assistance and the equality principle. Section 35(3)(g) of the Constitution provides persons accused of a crime with the right to free legal assistance “if substantial injustice would otherwise result”. The clarification of the meaning of the phrase “if substantial injustice would otherwise result” by the Constitutional Court has been interpreted as providing a corollary right to free legal assistance in section 34.¹⁹⁶ In *S v Vermaas; S v Du Plessis*,¹⁹⁷ the Constitutional Court laid down guidelines for the provision of free legal assistance in criminal cases. The court held that “the accused person’s aptitude or ineptitude to fend for himself or herself” must be assessed. The court further held that regard must be had to the:

“ramifications [of the decision to grant legal representation] and their complexity or simplicity ... how grave the consequences of a conviction may look, and any other factor that needs to be evaluated in the determination of the likelihood or unlikelihood that, if the trial were to proceed without a lawyer for the defence, the result would be ‘substantial injustice’.”¹⁹⁸

If the court’s guidelines are applied in civil cases, it implies that free legal assistance must be provided if substantial injustice would result.¹⁹⁹ It is proposed that when evaluating whether or not a fair public hearing has been achieved in a civil proceeding, factors to be considered include the consequences of the case for the party concerned; the complexity of the issues;

¹⁹⁴ *Bernstein v Bester NO* 1996 (2) SA 751 (CC) para 106.

¹⁹⁵ See generally Budlender G “Access to Courts” (2004) 121 *SALJ* 339-358 and Dugard J “Courts and The Poor in South Africa: A critique of systemic judicial failures to advance transformative justice” (2008) 24 *SAJHR* 214-238.

¹⁹⁶ See Budlender G “Access to Courts” (2004) 121 *SALJ* 339-358 and Dugard J “Courts and The Poor in South Africa: A critique of systemic judicial failures to advance transformative justice” (2008) 24 *SAJHR* 214-238.

¹⁹⁷ *S v Vermaas; S v Du Plessis* 1995 (3) SA 292 (CC).

¹⁹⁸ *S v Vermaas; S v Du Plessis* para 15.

¹⁹⁹ In *Nkuzi Development Association v Government of the Republic of South Africa* (2002 (2) SA 733 (LCC) para 12) the Land Claims Court interpreted the phrase ‘if substantial injustice would otherwise result’ in section 35(3)(g) of the Constitution to imply that the right to a fair public hearing guarantees a right to legal representation in certain circumstances.

the ability of the party to represent himself or herself effectively; the risk of error if a party is not represented and possible ‘inequality of arms’ if the other party is likely to be represented.²⁰⁰ Therefore, in the same way as in a criminal case, the social security litigant’s aptitude or ineptitude to fend for himself or herself must be assessed, as well as the ramifications of the decision whether or not to provide free legal assistance, the complexity or simplicity of the case, the consequences of a failure to have access to justice (the inability realise all the rights in the Bill of Rights).

The provision of free legal assistance is also influenced by the equality principles in the Constitution. The right to equality entails that every litigant should have access to state-provided legal assistance. However, Legal Aid South Africa provides services mainly in criminal matters.²⁰¹ Although Legal Aid South Africa is increasing its assistance in civil cases (where it prioritises matters involving children, women in divorce proceedings, maintenance and domestic violence cases and unlawful evictions), legal assistance is still largely directed at criminal cases. During the year 2007/2008 financial year, the Legal Aid Board assisted clients in 396,068 matters. Of all the cases dealt with, ninety percent (90%) were criminal cases with only ten percent (10%) being civil cases.²⁰² This indicates that:

“... legal assistance for poor persons is lacking in a variety of civil matters, in administrative forums where their rights are routinely overlooked; in government bureaucracies which deny them access to social security, and other socio-economic rights (such as in social security administration and delivery institutions and government departments); and in the general context of upholding their dignity, equality and social justice.”²⁰³

This state of affairs has grave consequences for the rights of equality and human dignity of civil cases and for the legitimacy of the Constitution itself. As the contention goes:

“confining the provision of legal services primarily to criminal matters, and defining access (to justice) so narrowly, has other serious consequences...for example that the focus on criminal defence has implications for gender discrimination. The channelling of limited resources into the provision of

²⁰⁰ Budlender G “Access to Courts” (2004) 121 *SALJ* 339-358 at 344.

²⁰¹ The Legal Aid South Africa is a statutory organisation that administers the provision of legal assistance. The objective of Legal Aid is to render or make available legal representation to indigent persons at State expense as contemplated in the Constitution (see Legal Aid Board “Legal Aid South Africa Legislative Mandate” accessed at <http://www.legal-aid.co.za>).

²⁰² Legal Aid South Africa *Annual Report 2007/2008*, 23.

²⁰³ Vawda YA “Access to Justice: From Legal representation to the promotion of equality and social justice – Addressing the legal isolation of the poor” 2005 *Obiter* 234-247 at 239.

representation to accused persons takes away resources from other areas where legal services are required, and as a majority of criminal accused are men, women (and other groups) are underserved by the legal aid system. The areas of law affecting women, children, the disabled and the poor – domestic and family issues, access to facilities, jobs, education and social services – are inadequately catered for in the current delivery models.”²⁰⁴

Emerging South African jurisprudence has also reinforced the notion of a constitutional right to free legal assistance. In *Nkuzi Development Association v Government of the Republic of South Africa*,²⁰⁵ the Land Claims Court held that the right to a fair hearing includes the right to legal representation at state expense, in certain circumstances. The Court held that:

“there is no logical basis for distinguishing between criminal and civil matters. The issues in civil matters are equally complex and the laws and procedures difficult to understand. Failure by a judicial officer to inform these litigants of their rights, how to exercise them and where to obtain assistance may result in a miscarriage of justice.”²⁰⁶

The court held that the litigants in the case have a right to free legal assistance, and that the State had an obligation to provide such legal assistance through mechanisms selected by it.²⁰⁷ The court therefore ordered that the State take all reasonable measures to provide free legal assistance, so that people in all parts of the country who have rights to free legal assistance are able to exercise their rights effectively.

Court or tribunal proceedings must also be held in public. This is due to the need for transparency, giving a proper opportunity for the issues to be decided openly and providing for the presentation of evidence.²⁰⁸ Where proceedings are to be held in private, these would also constitute a limitation of section 34 and must be justified in terms of the Constitution.

²⁰⁴ *Ibid*, 236.

²⁰⁵ *Nkuzi Development Association v Government of the Republic of South Africa* 2002 (2) SA 733 (LCC).

²⁰⁶ *Nkuzi Development Association v Government of the Republic of South Africa* para 11.

²⁰⁷ *Nkuzi Development Association v Government of the Republic of South Africa* paras 1.1 and 12.

²⁰⁸ See Chapter Three paras 3 (protection of the right of access to justice in international instruments) and 4.5 (Procedural guarantees to ensure a fair hearing) for the discussion on the right to a public hearing.

4. IMPACT OF THE RIGHT OF ACCESS TO SOCIAL SECURITY

4.1 Nature of the right of access to social security

Section 27(1)(c) of the Constitution states that everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. The constitutional right of access to social security therefore vests in “everyone”. The constitutional reference to everyone implies that all in need must have access to the social welfare scheme that the State has put in place. If some who are in need are excluded, this implies that not everyone has access to the scheme. The Constitutional Court has stated that the word ‘everyone’ is a term of general import and unrestricted meaning, which means what it conveys. Once the State puts in place a social welfare system, everyone has a right to have access to that system.²⁰⁹

Access to social security and its supporting rights is necessary as a result of its impact on the realisation of the founding values of the Constitution and enjoyment of the other rights in the Bill of Rights. Courts have stated that socio-economic rights must be understood in the context of the founding values of our Constitution. The right of access to social security, like all other socio-economic rights in the Constitution, is closely related to the founding values of human dignity, equality and freedom. Access to socio-economic rights is crucial to the enjoyment of the other rights mentioned in the Bill of Rights, in particular the enjoyment of human dignity, equality and freedom.²¹⁰ The protection of the right of access to social security also seeks to promote equality, as section 27 entitles everyone to have access to socio-economic rights.²¹¹ It is also protected to ensure a person’s dignity, as the protection of a person’s dignity is the core aim and basis for social security and other socio-economic rights.²¹² This was confirmed by the Constitutional Court, when it remarked that:

²⁰⁹ *Khosa & others v The Minister of Social Development & others; Mahlaule & others v The Minister of Social Development & others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) para 111.

²¹⁰ *Khosa and Others v The Minister of Social Development and Others; Mahlaule and Another v The Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) para 104.

²¹¹ *Khosa & others v The Minister of Social Development & others; Mahlaule & others v The Minister of Social Development & others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) para 42.

²¹² Van Rensburg LJ & Lamarche L “The right to social security and assistance” in Brand D & Heyns C (eds) *Socio-economic rights in South Africa* PULP, 2005, 235.

“there can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter.”²¹³

The right of access to social security is entrenched due to the impact apartheid had on the quality of life of many South Africans, and their enjoyment of socio-economic rights. In an attempt to redress past injustices (including poverty and inequality), social security seeks to realise some of the aims of the Constitution, such as to heal the divisions of the past and establish a society based on democratic values and to improve the quality of life of all citizens and free the potential of each person.²¹⁴

The right of access to social security, including social assistance, for those unable to support themselves and their dependants is further entrenched because the South African society values human beings and wants to ensure that people are afforded their basic needs.²¹⁵ In the *Grootboom* case, it was remarked that a society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society based on human dignity, equality and freedom.²¹⁶ The State has an obligation to ensure that its residents have their basic needs met and as such have access to food, clean water and shelter. Social security is a vital component of the social system that is available for those who cannot meet these basic needs for themselves or their families.²¹⁷ It enables people to avoid destitution and affords that their basic needs are met upon stoppage or disruption of their income or their earning potential never developing. It also ensures complete protection against human damage, an adequate standard of living and protection against destitution. It serves to protect human beings from the life-threatening and degrading conditions of poverty and material insecurity.²¹⁸

Social security and other socio-economic rights serve the additional purpose of facilitating the integration of persons into society so as to further their sense of participation. It also

²¹³ *Grootboom* para 23.

²¹⁴ Preamble of the Constitution.

²¹⁵ *Khosa & others v The Minister of Social Development & others; Mahlaule & others v The Minister of Social Development & others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) para 52.

²¹⁶ *Grootboom* para 44.

²¹⁷ *Khosa & others v The Minister of Social Development & others; Mahlaule & others v The Minister of Social Development & others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) para 114.

²¹⁸ Liffman R “Social Security as a Constitutional Imperative: An Analysis and Comparative Perspective with Emphasis on the Effect of Globalisation on Marginalisation” in Olivier MP *et al* (eds) *The Extension of Social Security Protection in South Africa* SiberInk, 2001, 41.

prevents the arbitrary discrimination of access to or participation in society and the eradication of stumbling blocks that impede access to benefits.²¹⁹

The failure to establish an effective and efficient adjudication system that secures the right of access to social security will also be evaluated through the impact of such absence on the litigants' right of access to social security. The absence of an efficient adjudication system through which aggrieved social security beneficiaries can enforce and realise their rights entails that they would be denied access to social security. To borrow from comments by the Constitutional Court, the denial of the right of access to social security would be total (no access) and the consequences of the denial would be grave (social exclusion, poverty, lack of basic services, denial of equality and human dignity). They would be relegated to the margins of society and would be deprived of what may be essential to enable them to enjoy other rights granted under the Constitution. Denying them their right under section 27 (1) therefore affects them in a most fundamental way.²²⁰

4.2 Scope of the right of access to social security

Although the Constitution guarantees the right of access to social security, it does not offer a definition of the concept. The Constitution merely refers to social security and social assistance. Therefore, the Constitution considers the concept to consist of social insurance²²¹ and social assistance.²²² However, the Committee of Inquiry into a Comprehensive System of Social Security for South Africa has developed an ideal South African social security concept in the notion of (comprehensive) social protection.²²³ The Committee states that:

²¹⁹ *Ibid*, 47.

²²⁰ Mokgoro J referring to the impact of the restriction of permanent resident non-citizens from the social security (social assistance) system in *Khosa & others v The Minister of Social Development & others; Mahlaule & others v The Minister of Social Development & others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) paras 77 and 81.

²²¹ The Code on Social Security in the SADC (2007) states that social insurance is "... a form of social security designed to protect income-earners and their families against a reduction or loss of income as a result of exposure to risks. These risks impair one's capacity to earn income. Social insurance is contributory with contributions being paid by employers, employees, self-employed persons, or other contributors, depending on the nature of the specific scheme. Social insurance is aimed at achieving a reasonable level of income maintenance."

²²² The Code on Social Security in the SADC (2007) states that social assistance is "... a form of social security which provides assistance in cash or in kind to persons who lack the means to support themselves and their dependants. Social assistance is means-tested and is funded from government revenues. Normally, the beneficiaries are those who are not covered by any other form of social security. The objective of social assistance is to alleviate poverty through, amongst other things, the provision of minimum income support."

²²³ The traditional concept of social security was developed by the ILO in its Social Security (Minimum Standards) Convention 102 of 1952 where it was defined as "*the protection which society provides for its*

“comprehensive social protection is broader than the traditional concept of social security, and incorporates developmental strategies and programmes designed to ensure, collectively, at least a minimum acceptable living standard for all citizens. It embraces the traditional measures of social insurance, social assistance and social services, but goes beyond that to focus on causality through an integrated policy-approach including many of the developmental initiatives undertaken by the State.”²²⁴

Since dispute resolution mechanisms (should) constitute an integral part of any social security framework, they could be considered as included in the notion of measures aimed at ensuring comprehensive social security. As Olivier asserts, “social protection also encapsulates elements and rights related and ancillary to social security itself. Together with social security, the presence of these elements ensures adequate social protection.”²²⁵ He concludes that:

“conceptual refinement does not merely provide a theoretical basis for understanding this vast terrain of interventions and mechanisms, but ... requires a proper understanding of the importance of adopting a multi-factoral, fundamental rights-friendly, goal-orientated and co-ordinated, multi-actor and multi-dimensional approach in order to realise social security. Given the nature and socio-economic and political historical context of the South African environment, these issues are indeed critical for giving effect to the constitutionally-entrenched rights operating in the areas of social security and social protection.”²²⁶

Such as broad concept of social security is endorsed by the Constitution, as section 27(1)(c) guarantees a right to have access to social security as opposed to a right to social security. The phrase “the right to have access to” was initially interpreted as qualifying or limiting rights. However, the Constitutional Court concluded that the right to have access to (housing) is a much wider notion than the right to social security.²²⁷ The Constitutional Court’s comments on the implications of the difference between the words a right to and a right to

members, through a series of public measures, against the economic and social distress that otherwise will be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age and death; the provision of medical care; and the provision of subsidies for families and children.” See also ILO Introduction to Social Security 3.

²²⁴ Committee of Inquiry into a Comprehensive System of Social Security in South Africa: *Transforming the Present – Protecting the Future* (Draft Consolidated Report)(March 2002) 41.

²²⁵ Olivier MP “The Concept of Social Security” in Olivier MP *et al* (eds) *Social Security: A Legal Analysis* (2003) 26.

²²⁶ Olivier MP “The Concept of Social Security”, 47.

²²⁷ See the *Grootboom* case.

have access to in relation to section 26(1) has implications for the interpretation of section 27(1) (c). In the *Grootboom* case, the court held that

“the right delineated in section 26 (1) is a right of “access to adequate housing” as distinct from the right to adequate housing This difference is significant. It recognizes that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met. There must be land, there must be services, there must be a dwelling. Access to land for the purposes of housing is therefore included in the right.”²²⁸

The right of access to social security intersects with other rights in the Bill of Rights and reinforces these rights at the points of intersection. Socio-economic rights and the rights to life and human dignity are intertwined in the Constitution.²²⁹ As pointed out in the *Grootboom* case,²³⁰ the rights in the Bill of Rights are interrelated, interdependent and mutually supporting. Their interrelatedness has immense human and practical significance in a society founded on the values of human dignity and equality.²³¹ As a result, the rights must all be read together in the setting of the Constitution as a whole and their interconnectedness needs to be taken into account when interpreting socio-economic rights, and in determining whether the State has met its obligations in terms of one of them. Therefore, the right of access to social security must be interpreted in terms of the close correlation between it and the other rights. In the Court’s opinion:

“... affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.”²³²

The Constitutional Court further remarked that realising a particular socio-economic right would require that other elements which form the basis of other socio-economic rights must be in place as well. Together these rights have a significant impact on the dignity of people

²²⁸ *Grootboom* para 35.

²²⁹ *Khosa & others v The Minister of Social Development & others; Mahlaule & others v The Minister of Social Development & others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) para 41.

²³⁰ *Grootboom* para 24.

²³¹ *Khosa & others v The Minister of Social Development & others; Mahlaule & others v The Minister of Social Development & others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) para 40.

²³² *Grootboom* para 23.

and their quality of life. Fulfilling the right of access to social assistance could have an impact on the extent to or way in which the other rights have to be fulfilled. As the Court stated:

“the poor are particularly vulnerable and their needs require special attention. It is in this context that the relationship between sections 26 and 27 and the other socio-economic rights is most apparent. If under section 27 the state has in place programmes to provide adequate social assistance to those who are otherwise unable to support themselves and their dependants, that would be relevant to the state’s obligations in respect of other socio-economic rights.”²³³

It is proposed that access to social security entails the process by which an individual enters into the social security (assistance) system and must include access to the decision-making process.²³⁴ Applying the *Grootboom* interpretation of access to section 27(1)(c), the realisation of social security requires that an infrastructure for the realisation of the right and the provision of all relevant services and processes, including adjudication processes be created. Access further requires the State to create the conditions that make these services accessible to persons or categories of people.²³⁵ A social security adjudication system that enables litigants to resolve disputes with social security institutions is one such infrastructure that the State is required to provide in fulfilling its obligations in term of social security.

The relationship between the right of access to social security and the other rights is also relevant in determining whether the State has fulfilled its constitutional obligations. As the Constitutional Court stated in *Khosa*:

“when the rights to life, dignity and equality are implicated in cases dealing with socio-economic rights, they have to be taken into account along with the availability of human and financial resources in determining whether the state has complied with the constitutional standard of reasonableness. This is, however, not a closed list and all relevant factors have to be taken into account in this exercise. What is relevant may vary from case to case depending on the particular facts and circumstances ...”²³⁶

²³³ *Grootboom* para 36.

²³⁴ De Villiers N “Social grants and the Promotion of Administrative Justice Act” (2002) 18 *SAJHR* 320-349 at 322.

²³⁵ Van Rensburg LJ & Lamarche L “The right to social security and assistance” in Brand D & Heyns C (eds) *Socio-economic rights in South Africa PULP*, 2005, 235.

²³⁶ *Khosa & others v The Minister of Social Development & others; Mahlaule & others v The Minister of Social Development & others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) para 44.

In addition, the Court held that even where the State may be able to justify a limitation of the right of access to social security through the provisions in section 27(2), the criteria upon which they choose to limit the right must be consistent with the Bill of Rights as a whole. Thus, if the means chosen by the legislature to give effect to the State's positive obligation under section 27 unreasonably limits other constitutional rights, that too must be taken into account.²³⁷

5. IMPACT OF THE RIGHT TO JUST ADMINISTRATIVE ACTION

5.1 Application of the right to just administrative action

Section 33 of the Constitution entrenches the right of everyone to administrative action which is lawful, reasonable and procedurally fair.²³⁸ Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.²³⁹ The State is compelled to pass national legislation to give effect to the right of administrative justice and to provide for the review of administrative action by a court or other independent and impartial tribunal.²⁴⁰

The provisions of section 33 are relevant to any social security adjudication framework as the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state²⁴¹ and, to the extent foreseen by the Constitution, natural and juristic persons.²⁴² It is already accepted that the right to just administrative action in general (including the provisions of the Promotion of Administrative Justice Act (PAJA)) to some extent bind even private bodies when taking decisions that adversely affect a person's rights.²⁴³ The provisions of section 33 regulate the conduct of public administration. Administrative justice ensures that public officials act within their powers under the various social security statutes and that the procedures they apply are fair and that the outcomes of their decisions are reasonable. Together, the rights to administrative justice and access to

²³⁷ *Khosa & others v The Minister of Social Development & others; Mahlaule & others v The Minister of Social Development & others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) para 45.

²³⁸ Section 33(1) of the Constitution

²³⁹ Section 33(2) of the Constitution

²⁴⁰ Section 33(3) of the Constitution

²⁴¹ Section 8(1) of the Constitution.

²⁴² In terms of section 8(2) of the Constitution, a provision in the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the rights.

²⁴³ De Villiers N "Social grants and the Promotion of Administrative Justice Act" (2002) 18 *SAJHR* 320-349 at 341.

social security seek to ensure that everyone has lawful, reasonable and procedurally fair access to social security. In the first instance, determining a person's of eligibility to social security and the provision of benefits by statutory social security institutions and (to the extent applicable) private social security institutions constitutes administrative action, which means they are bound by section 33.²⁴⁴ Therefore, the decisions of statutory and private social security institutions which negatively affect the rights of applicants or beneficiaries will be evaluated against the requirements of administrative justice in the Constitution.

Before evaluating the impact of the right to just administrative action on the social security dispute resolution framework, it is imperative to ascertain whether section 33 is applicable. Secondly, section 34 requires that disputes that can be resolved by the application of law to be decided by a court or another independent and impartial tribunal or forum. It is thus clear that social security disputes could be resolved by either a court (as defined in Chapter 8 of the Constitution) or an alternative independent and impartial tribunal or forum. The question to be answered is whether or not the court, tribunal or forum falls within the defined scope for the application of just administrative action.

Generally, the right to just administrative action applies to all actions taken by persons or bodies exercising public power or performing public functions. However, some specific exceptions to this general rule have been laid down. These exceptions include legislative action by elective legislatures, executive policy decisions, judicial action by judicial officers, and matters falling within the labour relations sphere.²⁴⁵ More specifically, PAJA has also defined the scope of actions that fall under the term administrative action.

For the requirements of just administrative action to be applicable to the actions of social security (dispute resolution) institutions, it must be ascertained whether these actions fall outside the exceptions specified by the Constitutional Court, or if they are not specifically excluded in terms of PAJA. The Constitutional Court has held that in trying to ascertain whether the requirements of just administrative action are applicable in a particular case, "what matters is not so much the functionary as the function. The question is whether the task

²⁴⁴ See *President of the Republic of South Africa v South African Rugby Football Union* 1999 BCLR 1059 (CC), 2000 (1) SA 1 (CC) and *Chirwa v Transnet Limited and Others* 2008 (4) SA 367 (CC); (2008) 3 BCLR 251 (CC) which laid down a "functions test" in determining whether an institution is performing a public function.

²⁴⁵ Klaaren J and Penfold G "Just Administrative Action" in Woolman S *et al Constitutional Law of South Africa* (2nd Edition, Original Service 06-08) Cape Town, Juta, 63-25.

itself is administrative or not”.²⁴⁶ This requires examining the task(s) of the institutions involved in the social security dispute resolution system.

The social security dispute resolution system comprises the institutions or organs administering and paying out social security benefits and either a court or an alternative tribunal or forum. The administrative institutions or organs that undertake the determination of applicants’ rights to social security benefits would also undertake internal review procedures (or first level adjudication procedures) such as reconsideration or revision of the initial decision. After the exhaustion of the internal review (or first level) processes, applicants would have access to an external appeal mechanism to a court or an alternative independent and impartial tribunal or forum (second level adjudication procedures).

The internal review procedures or first level adjudication procedures by the institutions or organs administering and paying out social security benefits, although forming part of the dispute resolution process, constitute an integral part of their duties of determining eligibility for social security benefits. The actions of these institutions and organs (especially the statutory schemes) would qualify as administrative action as they are certainly exercising public power or performing public schemes. Their functions cannot be termed judicial action by judicial officers, and would not constitute an exception to the application of administrative action as laid down by the Constitutional Court. They would also not conform to the exceptions provided in PAJA.

The “functions test” laid down in the *South African Rugby Football Union* and *Chirwa* cases can also be applied to the court or alternative independent and impartial tribunal or forum undertaking external appeals or second level adjudication procedures. Where a court (as defined and regulated in Chapter 8 of the Constitution) is established, its actions could constitute “judicial action by judicial officers”, falling within the scope of the exceptions to administrative action specified by the Constitutional Court and by PAJA.

Where an alternative independent and impartial tribunal or forum is preferred, the applicability (or not) of administrative justice may not be as clear-cut. Due to the possible

²⁴⁶ *President of the Republic of South Africa v South African Rugby Football Union* 1999 BCLR 1059 (CC), 2000 (1) SA 1 (CC) para 141. See also *Chirwa v Transnet Limited and Others* 2008 (4) SA 367 (CC); (2008) 3 BCLR 251 (CC) paras 139-142.

wide array of functions to be performed by such an institution (including mediation, conciliation, arbitration and litigation) its functions may constitute (on the one hand) “judicial action by judicial officers”. On the other hand, some of its functions could also be viewed as administrative decisions which would constitute administrative action subject to PAJA.²⁴⁷

This results from the possibility of the dispute resolution institution being considered to be performing a judicial, a quasi-judicial and/or an administrative function, since not only its functions but also its form and characteristics can be said to “straddle a wide spectrum”.²⁴⁸ In the *Sidumo* case, the Constitutional Court stated that while a tribunal or forum implements or gives effect to policy or to legislation, it may also resemble a court of law.²⁴⁹ The Court held that:

“an administrative body, although operating as such, may nevertheless in the discharge of its duties function as if it were a court of law performing what may be described as judicial functions, without negating its identity as an administrative body and becoming a court of law.”²⁵⁰

Section 33 may further apply to a social security adjudication tribunal or forum due to the interconnected and over-lapping nature of the right of access to courts and the right to just administrative action. In the *Sidumo* case, the Constitutional Court responded to arguments that CCMA Commissioners do not perform an administrative function and that their awards should not be subject to administrative review under PAJA. It was also argued that the realisation of labour rights in arbitrations conducted under the LRA are linked to the fundamental rights provided for in sections 23 and 34 and not to the right to just administrative action contained in section 33 of the Constitution.²⁵¹ In rejecting this argument, the Court held that:

²⁴⁷ See Brickhill J and Friedman A “Access to courts” in Woolman S *et al Constitutional Law of South Africa* (2nd Edition, Original Service 07-06) Cape Town, Juta, 59-95.

²⁴⁸ See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC) para 82 and *Grey’s Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA); 2005 (10) BCLR 931 (SCA) paras 20-25. See also Brickhill J and Friedman A “Access to courts” in Woolman S *et al Constitutional Law of South Africa* (2nd Edition, Original Service 07-06) Cape Town, Juta, 59-3/4 and 59-88/59-91; Hoexter C *Administrative Law in South Africa* Juta, Cape Town (2007) 52-53; and Currie I and de Waal J *The Bill of Rights Handbook* Juta, Cape Town (2005) 705.

²⁴⁹ See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* para 82.

²⁵⁰ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* para 82, quoting the Appellate Division in *South African Technical Officials’ Association v President of the Industrial Court and Others* 1985 (1) SA 597 (A) para 610G-H.

²⁵¹ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* para 111.

“this submission is based on the misconception that the rights in sections 23, 33 and 34 are necessarily exclusive and have to be dealt with in sealed compartments. The right to fair labour practices, in the present context, is consonant with the right to administrative action that is lawful, reasonable and procedurally fair. Everyone has the right to have these rights enforced before the CCMA acting as an impartial tribunal. In the present context, these rights in part overlap and are interconnected.”²⁵²

The Court also stated that where sections 33 and 34 are considered to be mutually exclusive provisions, this will lead to a formalist jurisprudence based on a distinction between “administrative” in section 33 and “judicial” or “adjudicative” decisions by tribunals governed only by section 34, which is at odds with the substantive vision of the Constitution.²⁵³

In terms of the approach of the Constitutional Court in the *Sidumo* judgment, it is clear that a tribunal or forum established to resolve social security disputes in terms of section 34 would have to comply with the requirements of independence, impartiality and fair public hearings, as is the case with a court of law. However, it would also be bound by the provisions of section 33 and PAJA as its form, characteristics and functions straddle both rights.

Therefore, for the purposes of this study, the processes and decisions by social security institutions that fall under the dispute resolution framework (internal or first-tier decisions) will be investigated, as will the processes and decisions of an external (second-tier) tribunal or forum. This will include the reconsideration and/or review of the initial decision by the social security institution and the review or consideration of an appeal by a court, tribunal or forum.

5.2 Context of the right to just administrative action

The entrenchment of the right to just administrative action in the Constitution must be viewed against the social, economic and historical context of the right, and against the historical context of the enjoyment of the right. The historical context of just administrative action is

²⁵² *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* para 112. See also *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC)) paras 112 and 114 where the Court held that it was inappropriate to separate, sequentially order and compartmentalise human rights because human rights are better approached and defended in an integrated rather than a disparate fashion. In addition, a single situation can give rise to multiple, overlapping and mutually reinforcing constitutional rights.

²⁵³ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* para 135.

one of abuse of governmental power, with wide ranging discretionary powers by government officials.²⁵⁴ South Africa's apartheid past was characterised by poor and inefficient administration and the flagrant disregard of basic administrative law tenets.²⁵⁵ At the same time, the authority of courts to review administrative action was also curtailed.

Administrative law is the interface between the bureaucratic state and its subjects. The day-to-day lives of ordinary people are profoundly affected by the way those who hold power over their lives exercise their power. Important steps towards the creation of a just society can be taken by opening up the administrative process and developing an equitable system of administrative law.²⁵⁶ The constitutional rights to administrative justice, access to courts and access to social security (together with the rights to equality and human dignity) operate to ensure that everyone has lawful, reasonable and procedurally fair access to the social security adjudication system. Administrative justice seeks to ensure that adjudication officials act within their powers under the Social Assistance Act, that the procedures they apply are fair and that the outcomes of their decisions are reasonable. In addition, the Constitution seeks to empower courts to review administrative action that is non-compliant, and to ensure that persons whose rights are infringed by unlawful administrative action can get redress.²⁵⁷

The right to just administrative action is vital for the attainment of the aims of the Constitution, such as to heal the injustices of the past, to ensure social justice and to improve the quality of life for all South African citizens. As a result, the Constitution requires public officials to perform their duties in accordance with the fundamental principles of justice, fairness and reasonableness.²⁵⁸ Just administrative action is also necessary for the realisation of the State's duty to provide effective, transparent, accountable and coherent government.²⁵⁹ As stated in *President of the Republic of South Africa v South African Rugby Football Union*:

“the constitution is committed in establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated. In the past, the lives of the majority of South Africans was

²⁵⁴ Currie I and de Waal J *The Bill of Rights Handbook* 642.

²⁵⁵ Oliver MP “Adjudication and enforcement of social security” in Olivier MP *et al Social Security: A Legal Analysis* LexisNexis, Durban (2003) 181.

²⁵⁶ Plasket C Administrative justice and social assistance 2003 *SALJ* Vol. 120, No. 3, 494-524 at 495.

²⁵⁷ Currie I and de Waal J *The Bill of Rights Handbook* 642-643.

²⁵⁸ Currie I and de Waal J *The Bill of Rights Handbook* 643.

²⁵⁹ Section 41(1)(c) of the Constitution.

governed by labyrinthine administrative regulations which, amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs and which were implemented by a bureaucracy hostile to fundamental rights or accountability. The new constitution envisages the role and obligations of government quite differently.”²⁶⁰

The Constitutional Court further held that the principal function of section 33 is to regulate the conduct of the public administration and, in particular, to ensure that where the action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades.²⁶¹

Section 33(1) states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Furthermore, in terms of section 33(2) everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

It is also required that national legislation must be enacted to give effect to the right to administrative action, and to provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; impose a duty on the State to give effect to the right to administrative action; and to promote an efficient administration.²⁶²

5.3 The right to just administrative action

5.3.1 Lawful administrative action

The Constitutional Court has stated that the exercise of public power is only legitimate when it is lawful. It further held that an administrative functionary “may exercise no power and perform no function beyond that which is conferred by law.”²⁶³ These two statements form the basis of the principle of legality and lawful administrative action, and the rule of law.

²⁶⁰ *President of the Republic of South Africa v South African Rugby Football Union* 1999 BCLR 1059 (CC), 2000 (1) SA 1 (CC) para 133.

²⁶¹ *President of the Republic of South Africa v South African Rugby Football Union* para 1117E-F.

²⁶² Section 33(3) of the Constitution.

²⁶³ See *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) paras 56 and 58.

In the context of administrative action, the principle of lawful administrative action requires that the decision-maker must hold the necessary authority to take the decision in question (where there are prior conditions that must exist before the power may be exercised, those conditions must exist or otherwise the decision will be unlawful; and if the power is derived from another person, there must be a lawful delegation or assignment of the power).²⁶⁴

5.3.2 Reasonable administrative action

The principle of reasonable administrative action requires that the public authority entrusted with the discretion must act in a reasonable and rational manner, taking into account all relevant considerations. The outcome of the decision must not be unreasonable. The Constitutional Court explained the principle as follows in *Pharmaceutical Manufacturers Association of South Africa: In Re: Ex Part Application of the President of the Republic of South Africa*:

“It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.”²⁶⁵

The elements of the right to reasonable administrative action have been laid down by various cases.²⁶⁶ These include (amongst others) that the decision must be based on relevant circumstances (also called ‘considerations’) and must not be influenced by irrelevant considerations; it is rational and not arbitrary (i.e. the administrator has thought properly about the issues before him/her or must have “applied his mind properly”); it is justifiable (i.e. it must be capable of being explained in a way that shows it is based on the facts before the

²⁶⁴ See *Pharmaceutical Manufacturers Association of South Africa: In Re: Ex Part Application of the President of the Republic of South Africa* 2000 BCLR 241 (CC) paras 12, 58 and 90. See also *Minister of Education (Western Cape) v Mikro Primary School Governing Body* [2005] 3 All SA 436 (SCA); and *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (8) BCLR 872 (CC); 2006 (2) SA 311 (CC).

²⁶⁵ *Pharmaceutical Manufacturers Association of South Africa: In Re: Ex Part Application of the President of the Republic of South Africa* 2000 BCLR 241 (CC) para 85.

²⁶⁶ See for example, *Pharmaceutical Manufacturers Association of South Africa: In Re: Ex Part Application of the President of the Republic of South Africa* 2000 BCLR 241 (CC). *Kemp & Others v Wyk & Others* [2008] 1 All SA 17 (SCA); and *Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd* 2 All SA 239 (SCA).

official and the purpose of the legislation); and it is not materially influenced by an error of fact or law.

Reasonableness does not mean that the decision must be right, or the best solution available. It merely means that the decision must fall within the range of appropriate decisions. The evaluation of the reasonableness of a decision does not mean that it must determine whether the decision is correct or not, or that the court must agree with the decision. The court instead asks the question whether the decision is justifiable.²⁶⁷

5.3.3 Procedurally fair administrative action

Fair procedures enhance the legitimacy of administrative decisions and can be regarded as fundamental principles of good administration. Section 195(1) of the Constitution provides that public administration should be governed by the democratic values and principles enshrined in the Constitution, including the maintenance of a high standard of professional ethics, accountability, responsiveness to the needs of the people and impartial, fair and equitable services.

The right to procedurally fair administrative action entitles affected persons to ‘the principles and procedures’ which in the circumstances are ‘right and just and fair’.²⁶⁸ The essence of procedural fairness (also known as the principle of common sense and common decency) is also that those who are affected by official decisions are entitled, prior to any decision being taken, to be heard by an unbiased decision-maker.²⁶⁹

5.3.4 The right to written reasons

The Constitution requires that a person whose rights are affected by administrative action must be provided with written reasons. Providing reasons for a decision makes administrators to be accountable; and increases public confidence in the administrative process, thus

²⁶⁷ Klaaren J & Currie I *Administrative Justice Bench-book* (2003).

²⁶⁸ *Van Huyssteen and Others NNO v Minister of Environmental Affairs and Tourism and Others* 1996 (1) SA 283 (C) at 305D (SA).

²⁶⁹ See the discussion in Chapter Two para 3.3.2 (Establishment of a court or another independent and impartial tribunal or forum).

enhancing its legitimacy.²⁷⁰ It also promotes a culture of justification.²⁷¹ *In Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another*, the Constitutional Court remarked that:

“the duty to give reasons when rights or interests are affected has been stated to constitute an indispensable part of a sound system of judicial review. Unless the person affected can discover the reason behind the decision, he or she may be unable to tell whether it is reviewable or not and so may be deprived of the protection of the law. Yet it goes further than that. The giving of reasons satisfies the individual that his or her matter has been considered and also promotes good administrative functioning because the decision-makers know that they can be called upon to explain their decisions and thus be forced to evaluate all the relevant considerations correctly and carefully.”²⁷²

For reasons to be effective, they must be sufficiently particular. As the Transvaal Provincial Division of the High Court has held, it is not sufficient to merely “recite the words of the statute”, such as saying that “the reason why you are refused a disability grant is because you are not unable to work”. Requiring the reasons for refusal seems to be a different thing from merely requiring the local authority to state which of the specified grounds (in the statute) the refusal was based on. Therefore, the reasons must state why the person has been found to be able to work, for example that he or she can perform the functions necessary for manual labour of the type available in his or her locality.²⁷³

In *Nomala v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government*, it was further held that it is also not sufficient to provide a letter with a box ticked off that sets out a general category justifying the decision, such as “not medically unfit” or “insufficient medical details”. The reasons must contain sufficient particularity of the applicant’s own personal circumstances to enable the person to know what case he has to meet on appeal. This case held that standard form reasons containing only general statements such as “not disabled”/ “able to work” did not constitute proper reasons in a refusal of a disability grant, as they put the applicant in no better position to appeal the decision, not

²⁷⁰ Hoexter C *Administrative Law in South Africa* Juta, Cape Town (2007) 416. See also *Mphahlele v First National Bank of South Africa* 1999 (2) SA 667; 1999 (3) BCLR 253.

²⁷¹ Mureinik E “A Bridge to Where? Introducing the Interim Bill of Rights” (1994) 10 SAJHR 31 at 32.

²⁷² *Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another* 2002 (3) SA 265; 2002 (9) BCLR 891. para 159.

²⁷³ *Tala v Village Council of Wolmaranstad* 1927 TPD 425.

knowing how the decision-maker had reasoned in coming to this conclusion.²⁷⁴ Proper written reasons must set out the decision and state the findings on the main facts, refer to the evidence or other material on which those findings were based and show the manner in which these facts were applied in arriving at the decision.

5.4 Promotion of Just Administrative Act (PAJA) 3 of 2000

Pursuant to the requirement that national legislation must be enacted to give effect to the right to administrative action, the Promotion of Administrative Justice Act (PAJA) was adopted. PAJA set out the scope of the rights in section 33 (including the scope of the right to procedural fairness) and prescribes the requirements for the provision of reasons, provides frameworks for judicial review of administrative action and the enforcement of the rights in section 33.²⁷⁵ By giving effect to the right to just administrative action, PAJA seeks to promote an efficient administration and good governance, and create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function.²⁷⁶ Therefore, the provisions of PAJA bind all public and to some extent even private bodies when taking decisions that adversely affect a person's rights.²⁷⁷ This implies that the decisions of statutory and (to the extent applicable) private social security institutions which negatively affect the rights of applicants or beneficiaries will also be evaluated against the requirements of administrative justice in the act.

In terms of section 1 of PAJA, the act aims to provide guidelines and benchmarks for administrative action and decisions. The act defines administrative action,²⁷⁸ decision,²⁷⁹ and

²⁷⁴ *Nomala v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government* 2001 (8) BCLR 844 (E).

²⁷⁵ See Klaaren J and Penfold G "Just Administrative Action" in Woolman S *et al Constitutional Law of South Africa* (2nd Edition, Original Service 06-08) Cape Town, Juta, 63-4.

²⁷⁶ Preamble of PAJA.

²⁷⁷ de Villiers N "Social grants and the Promotion of Administrative Justice Act" (2002) 18 *SAJHR* 320-349 at 341.

²⁷⁸ Section 1 of PAJA states that "In this Act, unless the context indicates otherwise -

(i) "administrative action" means any decision taken, or any failure to take a decision, by -

(a) an organ of state, when—

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include -

empowering provision;²⁸⁰ and provides detailed rules of procedural fairness.²⁸¹ The Act requires a fair procedure in the event that administrative action materially and adversely affects the rights or legitimate expectations of any person.²⁸² Section 3(2)(a) states that what constitutes fair administrative procedure will depend on the circumstances of each case. However, fair administrative procedure must include adequate notice of the nature and purpose of the proposed action; a reasonable opportunity to make representations; a clear statement of the action; adequate notice of any right of review or internal appeal, where applicable; and adequate notice of the right to request reasons.²⁸³ However, it must be noted that if it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements of section 3(2)(b).²⁸⁴ Section 4(b) lists relevant factors to be taken into account to determine whether the departure is reasonable and justifiable.

The right to reasons for adverse administrative action is regulated in section 5. This section deals with the furnishing of written reasons for administrative action. It allows a person

(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution;

(bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121(1) and (2), 125(2)(d), (e) and (f), 126, 127(2), 132(2), 133(3)(b), 137, 138, 139 and 145(1) of the Constitution;

(cc) the executive powers or functions of a municipal council;

(dd) the legislative functions of Parliament, a provincial legislature or a municipal council;

(ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;

(ff) a decision to institute or continue a prosecution;

(gg) a decision relating to any aspect regarding the appointment of a judicial officer, by the Judicial Service Commission;

(hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or (ii) any decision taken, or failure to take a decision, in terms of section 4(1).

²⁷⁹ In terms of section 1(v), “decision” means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to -

(a) making, suspending, revoking or refusing to make an order, award or determination;

(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;

(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;

(d) imposing a condition or restriction;

(e) making a declaration, demand or requirement;

(f) retaining, or refusing to deliver up, an article; or

(g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly.

²⁸⁰ An “empowering provision” is the source of lawful authority which entitles a state official to take action. In terms of social security, empowering provision will be the laws regulating the different branches of the system (such as COIDA, RAF, UIA etc), as well as any laws enacted to regulate the adjudication system.

²⁸¹ Sections 3 and 4 of PAJA.

²⁸² Section 3(1) of PAJA.

²⁸³ S 3(2)(b) of PAJA..

²⁸⁴ S 4(a) of PAJA.

whose rights are affected to ask for written reasons for the decision, and requires the State official to provide them as soon as reasonably possible. In relation to a decision to grant or refuse social assistance, this section is superceded by the detailed provisions of the Social Assistance Act and its regulations that require written reasons for decisions to be given to beneficiaries without a prior request. If the Social Assistance Act does not cover any situation, section 5 of the PAJA would regulate the right to ask for and receive reasons.

Regulations 26 to 28 of the Regulations under the PAJA set out the contents of a request for reasons and the procedure for dealing with it.²⁸⁵ They provide that the request must be in writing, and if the person cannot write, the administrator must give reasonable assistance to enable him or her to do so. The request can be sent by fax, e-mail, post or by hand. They must indicate the action concerned and what rights it impinges upon.

The Act lists the grounds upon which administrative action may be reviewed.²⁸⁶ These grounds cover all forms of unlawful, unreasonable and unfair administrative action and the section gives authority to courts to strike down such action. In terms of the Act, an aggrieved person is restricted to bringing a claim for judicial review if it is alleged that the administrative action is unlawful. In terms of section 6(1), proceedings for the judicial review of an administrative action may be instituted in a court or tribunal.²⁸⁷ Furthermore, the review grounds contained in the Act are fairly limited.²⁸⁸ Bringing a claim for judicial review would

²⁸⁵ Regulations on Fair Administrative Procedures (published in GN No. R. 1022 in GG 23674 of 31 July 2002).

²⁸⁶ Section 6 of PAJA.

²⁸⁷ In terms of section 1, a court means the Constitutional Court, a High Court and a Magistrate's Court; while a tribunal means any independent and impartial tribunal established by national legislation for the purposes of exercising judicial review.

²⁸⁸ Section 6(2) provides as follows:

“A court or tribunal has the power to judicially review an administrative action if—

(a) the administrator who took it—

(i) was not authorised to do so by the empowering provision;

(ii) acted under a delegation of power which was not authorised by the empowering provision; or

(iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken—

(i) for a reason not authorised by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) arbitrarily or capriciously;

(f) the action itself—

also imply that legal representatives would have to argue a case on behalf of a client. This may often be undesirable in the event of impoverished applicants who challenge a negative decision in the area of social security. The proceedings tend to be very formal, while the sheer costs of such an endeavour would make this option unattractive in most social security cases.

Other procedural matters are also regulated.²⁸⁹ Section 7 regulates the time within which an application to review administrative action must be instituted, and the relationship between internal appeals and judicial review. Section 7(1) states that any proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the date on which any proceedings instituted in terms of internal remedies have been concluded; or where no such remedies exist, of which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.²⁹⁰

Section 7(2) requires the exhaustion of internal remedies, as no court or tribunal shall review an administrative action in terms of the Act unless any internal remedy provided for in any other law has first been exhausted. If a court or tribunal is not satisfied that any internal remedy has been exhausted, it must direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act. However, in exceptional circumstances, and on application by the person concerned, a court or tribunal may exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.

Section 8 sets out the court's powers to provide remedies in proceedings for judicial review. According to section 8(1), the court or tribunal, in proceedings for judicial review in terms of

(i) contravenes a law or is not authorised by the empowering provision; or

(ii) is not rationally connected to—

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.

²⁸⁹ Sections 7 and 9 of PAJA.

²⁹⁰ Section 7(1) of PAJA.

section 6(1), may grant any order that is just and equitable, including orders directing the administrator to give reasons; or to act in the manner the court or tribunal requires; orders prohibiting the administrator from acting in a particular manner; orders setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions; or in exceptional cases substituting or varying the administrative action or correcting a defect resulting from the administrative action; or directing the administrator or any other party to the proceedings to pay compensation; orders declaring the rights of the parties in respect of any matter to which the administrative action relates; orders granting a temporary interdict or other temporary relief; or orders as to costs.

In addition, the court or tribunal, in proceedings for judicial review in terms of section 6(3), may grant any order that is just and equitable, including orders directing the taking of the decision; orders declaring the rights of the parties in relation to the taking of the decision; orders directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or orders as to costs.²⁹¹

Section 9 allows for the time periods prescribed in sections 5 and 7 of the PAJA to be extended. It states that the period of 90 days referred to in section 5 may be reduced; or 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period, by agreement between the parties or, failing such agreement by a court or tribunal on application by the person or administrator concerned.²⁹² It further states that the court or tribunal may grant an application for extension of time periods where the interests of justice so require.

5.5 Impact of PAJA on social security dispute resolution

Various social security statutes provide for aggrieved persons to apply for the reconsideration or review of an initial adverse decision or for a right to appeal. The application for reconsideration, review or appeal is to be lodged with either the original decision-maker (social security institution), the administrative heads of the departments responsible for the social security institution (either the Directors-General or the Ministers) or to an appeal institution established in terms of the enabling legislation (such as appeal board or

²⁹¹ Section 8(2) of PAJA.

²⁹² Section 9(1) of PAJA.

committee).²⁹³ The reconsideration, review or the appeal procedures of these institutions and/or officials must be undertaken in accordance with the requirements of PAJA.

The right to procedurally fair action requires that an aggrieved applicant or beneficiary who applies for reconsideration, review, or appeals a negative decision must be heard by an unbiased²⁹⁴ decision-maker before a decision is taken.²⁹⁵ The right to procedurally fair action requires that the opportunity to make representations is a concrete one. Therefore, there must be some appropriate opportunity to make representations. The circumstances may require that the affected person be orally heard or the opportunity may be limited to making written representations. The nature of the decision, its importance to the institution and the applicant or beneficiary and the circumstances of the affected applicant or beneficiary parties will determine what amounts to an appropriate opportunity to be heard.

The applicant or beneficiary must be given sufficient information to enable him to respond meaningfully. The decision-maker must tell the person affected by the administrative action about the nature and purpose of the decision he/she intends to take. If there are important factual issues that the applicant or beneficiary must address, he/she must be made aware of these. The affected person should be given enough time to make representations. The applicant has the right to legal representation who can argue the issues where they are sufficiently complex.²⁹⁶

Where reconsideration, or review, or an appeal is turned down or an adverse decision is taken, the applicant or beneficiary must be informed of his/her right to request the reasons for the decision.²⁹⁷ This implies that the decision-maker has a duty to provide reasons,²⁹⁸ which requires him/her to think more carefully and rationally about his/her decision. The right to request reasons also satisfies the principles of transparency and accountability in section 195(1) of the Constitution. The reasons must be sufficiently particular of the applicant's or

²⁹³ See Chapter Six on the current South African social security adjudication system.

²⁹⁴ The right to fair procedural action the absence of bias in the decision maker, as a biased person cannot be fair. The test is not whether the person is, as a fact, biased, but whether he may be perceived as biased by a reasonable member of the public.

²⁹⁵ See *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza and others* 2001 (4) SA 1184 (SCA) and *Msomu v Abrahams NO and another* 1981 (2) SA 256 (N).

²⁹⁶ Section 3(3) of PAJA.

²⁹⁷ See section 5(1) of PAJA. This enables the applicant or beneficiary to know why the decision was taken and assists him/her to effectively challenge the decision on appeal.

²⁹⁸ *Bushula and others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and another* 2000 (7) BCLR 728 (E); 2000 (2) SA 849 (E).

beneficiary's own personal circumstances so that he/she can effectively challenge the decision on appeal.²⁹⁹ The reasons must set out the decision, state the findings on the main facts, refer to the evidence or other material on which those findings were based and show the manner in which these facts were applied in arriving at the decision.

PAJA also contains provisions aimed at facilitating the proper functioning of the dispute resolution system. Section 1(iv) of PAJA extends the jurisdiction of courts over causes of action and persons, thereby increasing physical access to courts. Section 7(1) introduces a time limit for lodging an application for review, which limits judicial consideration of administrative action. In terms of section 7(2), a court is prohibited from reviewing an administrative action unless any internal remedy, provided in any other law, has first been exhausted. Where a social security statute provides for a right to apply for reconsideration,³⁰⁰ or review to be lodged with the social security institution³⁰¹ or an appeal to an appeal body in terms of the statute,³⁰² section 7(2) requires that the reconsideration, review or appeal must first be undertaken before an application for review to a court is made. However, in exceptional circumstances and on application by the affected person, a court may exempt the need to exhaust internal remedies if it is in the interests of justice.

The need to exhaust internal remedies and the courts' discretion to waive this obligation is in an effort to promote the efficiency of the adjudication system.³⁰³ As one commentator has remarked:

“in broad terms, it is appropriate that an internal remedy enjoys precedence and that judicial interference be deferred in favour of administrative self-management. A corrective process which is internalised and systemic can be considerably more efficient than the ad hoc external pronouncements which judicial review offers.”³⁰⁴

²⁹⁹ *Nomala v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government* 2001 (8) BCLR 844 (E).

³⁰⁰ See for example the Social Assistance Act 13 of 2004 (as amended)

³⁰¹ See the Occupational Diseases in Mines and Works Act 78 of 1973 which empowers the Certification Committee to review (reconsider) its own finding. The Act also provides a right of further review to the Medical Review Authority for Occupational Diseases.

³⁰² As is the case with the Unemployment Insurance Act 63 of 2001.

³⁰³ The absence of proper internal review or reconsideration and external appeal mechanisms results backlogs in dispute resolution due to numerous cases challenging the decisions of social security institutions. This causes lengthy delays in the determination of social security rights and to substantial costs for both the applicants and the social security institutions.

³⁰⁴ De Villiers N “Social grants and the Promotion of Administrative Justice Act” (2002) 18 *SAJHR* 320-349 at 344.

These provisions also facilitate an aggrieved person's access to court, thereby promoting the right of access to courts.

6. IMPACT OF THE NATURE AND SCOPE OF CONSTITUTIONAL OBLIGATIONS

6.1 Nature of constitutional obligations

Section 2 states that the obligations imposed by the Constitution must be fulfilled. Section 7(2) compels the State to respect, protect, promote and fulfil the rights in the Bill of Rights. Sections 2 and 7(2) compel the State to actively implement the right of access to social security, while section 27(2) requires the State to take affirmative steps to give effect to the right.³⁰⁵ By entrenching the right of access to courts, the Constitution enables the enforcement of the right of access to social security by “creating avenues of redress through which complaints that the State or others have failed in their constitutional duties can be determined and constitutional duties can be enforced”.³⁰⁶ When sections 34 and 27(1)(c) are read together with the State's constitutional obligations in sections 2 and 7(2), to respect, protect, promote and fulfil the rights in the Bill of Rights in section 7(2), it is clear that the Constitution imposes multi-level obligations on the State, with both negative and positive components.³⁰⁷

The duty to respect requires the State and other (non-state) actors to refrain from unjustly infringing the right. The duty to respect requires negative state action and the courts will only expect the State not to unjustly interfere with a person's fundamental rights. Therefore, there is at the very least, a negative obligation placed on the State and other non-state actors to desist from preventing or impairing access to the right.³⁰⁸

This implies that section 34 accords every person the right not to have his/her access to courts subjected to undue and unjustified interference and/or restriction. Therefore, the right to have

³⁰⁵ Brand D “Introduction to socio-economic rights in South Africa” in Brand D & Heyns C (eds) *Socio-economic rights in South Africa* Pretoria, PULP (2005) 2.

³⁰⁶ *Ibid.*

³⁰⁷ See *Grootboom* para 34.

³⁰⁸ *Ibid.*

access to courts entails that aggrieved social security beneficiaries or applicants should have an unfettered ability not only to bring a cause of action to a court or another adjudicating forum, but also to be able to get redress. This fulfils the purpose of the right to have access to courts, which is to provide protection against actions by the State and/or other entities which deny access to the courts and other forums.³⁰⁹ Actions or omissions that unreasonably impair the right to bring a dispute to court³¹⁰ and access to social security³¹¹ would constitute violations of the State's duty to respect the right of access to courts. The duty to respect the right of access to courts also requires the State to not take measures preventing existing access to the right ("deliberately retrogressive measures").³¹² In *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)*,³¹³ the Constitutional Court upheld the constitutional validity of section 35 of the COIDA. The Court was asked to confirm a decision of the Eastern Cape High Court which declared this section unconstitutional.³¹⁴ The Court declined to confirm the judgment. The Court held that although it was clear that the challenged provision differentiated between employees and non-employees; the legitimate purpose of the Act is to provide a system of compensation for employees for disability or death caused by injuries or diseases in the workplace. Such a system supplants the common law right of an employee to damages from a negligent employer. Instead, it allows the employee to claim limited compensation from a fund (to which employers are obliged to contribute) even where the employer was not negligent.³¹⁵ The Court further held that, viewed in the context of the Act as a whole, section 35 was not arbitrary or irrational. In addition, it did not favour employers only. Therefore, it was rationally connected to the legitimate purpose of the Act.³¹⁶

The duty to 'protect' a right means that the State must take measures to ensure that third parties do not deprive individuals of their access to the right.³¹⁷ All fundamental rights require

³⁰⁹ Currie I and de Waal J *The Bill of Rights Handbook* 708.

³¹⁰ See the discussion in para 2.2.4 for some of the actions or omissions that may unreasonably impair the right to bring a dispute to court.

³¹¹ Such as the lack of an effective dispute resolution system for the enforcement of the right.

³¹² Budlender G "Access to Courts" (2004) 121 *SALJ* 339-358 at 345.

³¹³ *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* 1999 (2) SA 1 (CC); 1999 (2) *BCLR* 139 (CC).

³¹⁴ Section 35 of the COIDA, which prevents employees from claiming damages from their employers, except where provided for in the Act, was thus considered to be an unjustified infringement on the right of access to courts.

³¹⁵ *Jooste v Score Supermarket Trading (Pty) Ltd* paras 13 and 15.

³¹⁶ *Jooste v Score Supermarket Trading (Pty) Ltd* para 17. See, generally, the discussion on the COIDA adjudication system in Chapter Six, para 3.

³¹⁷ *Ibid*, 346.

the State to protect citizens from political, economic and social interference with their stated rights.³¹⁸ This obligation requires setting up a framework wherein individuals can realise these rights without undue influence from the State.

The Constitution requires that the State promotes everyone's rights.³¹⁹ In terms of the duty to promote, the State is required to actively educate the bearers of rights about their rights. The State must publicise the rights and inform bearers on how the rights can be accessed and enforced.³²⁰ The beneficiary has the right to require positive assistance, or a benefit or service from the State. The duty to promote requires that the relevant legislative, executive and judicial frameworks for the realisation of the right have to be both in place and effective.

The duty to 'fulfil' means that the State must take measures to assist people to enjoy the right, to strengthen people's access to and utilisation of resources and means to enjoy the right. It requires states to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realisation of the right. Where individuals are unable, for reasons beyond their control, to enjoy the right by means at their own disposal, the State has an obligation to fulfil or provide that right directly.³²¹ The duty to fulfil in this context means to provide opportunities for individuals or associations to realise the rights and/or to provide for the fulfilment of the right by directly providing for the need, for example by making available resources for the acquisition thereof. In the *Grootboom* case the Constitutional Court found that the State has a duty to provide emergency housing (i.e. shelter) to particularly needy and vulnerable groups of people, should they not be able to provide in this for themselves.

The duty to fulfil the right plainly obliges the State to take positive measures that enable and assist individuals to enjoy the right. The nature of the duty to fulfil rights:

‘... requires the state to take positive measures to assist those who currently lack access to the rights to gain access to them. This includes the adoption of “enabling strategies” to assist people to gain

³¹⁸ O'Regan K “Introducing socio-economic rights” 1999 *ESR Review* 1:4, 2.

³¹⁹ *Ibid.*

³²⁰ In *Minister of Health & others v Treatment Action Campaign & others*, the court held that in order for the measures adopted by the State to realise the right (of access to health care services) to be reasonable, they “must be made known appropriately.” See also Liebenberg S “The interpretation of socio-economic rights” in Chaskalson M *et al Constitutional Law of South Africa* (2nd Edition, Original Service, 12-03)(2003) chapter 33, 5.

³²¹ Budlender G “Access to Courts” (2004) 121 *SALJ* 339-358 at 346.

access to the rights through their own endeavours and initiatives, as well as more direct forms of assistance to groups in especially vulnerable or disadvantaged circumstances.”³²²

The rights in the Bill of Rights may also place a duty on the State to act rationally and in good faith, and require that it justifies its failure to fulfil its obligations.³²³ It may therefore be expected to provide valid reasons of its failure to respect, protect, promote and fulfil the rights of access to courts and to social security.

6.2 Scope of constitutional obligations

This section analyses the scope of constitutional obligations relating to both the right of access to courts and the right of access to social security. The scope of the State’s obligations in relation to the rights of access to courts and to social security has different dimensions. Firstly, the right presupposes the existence, or if not available, the establishment of a functional judicial system. This requirement was clarified by the Constitutional Court in *President of the Republic of South Africa v Modderklip Boerdery* when the court stated that:

“The first aspect that flows from the rule of law is the obligation of the State to provide the necessary mechanisms for citizens to resolve disputes that arise between them. This obligation has its corollary in the right or entitlement of every person to have access to courts or other independent forums provided by the State for the settlement of such disputes ... The mechanisms for the resolution of disputes include the legislative framework, as well as mechanisms and institutions such as the courts ...”³²⁴

The constitutional obligation to realise the right of access to courts does not only imply the establishment of mechanisms for the resolution of disputes, the obligation extends beyond such establishment. In the *Modderklip Boerdery* case, the Court further stated that the State’s obligation in relation to the right:

“goes further than the mere provision of the mechanisms and institutions referred to above ... The precise nature of the state’s obligation in any particular case and in respect of any particular right will

³²² Liebenberg S ‘Socio-economic rights’ in Chaskalson M *et al* (eds) *Constitutional Law of South Africa* (Revision Service 3, 1998) 41-43.

³²³ O’Regan K ‘Introducing socio-economic rights’ 1999 *ESR Review* 1:4, 2.

³²⁴ *President of the Republic of South Africa v Modderklip Boerdery* 2005 (5) SA 3 (CC) paras 39-41.

depend on what is reasonable, regard being had to the nature of the right or interest that is at risk, as well as on the circumstances of each case.”³²⁵

The State’s obligations involve more than the establishment of a dispute resolution system, in the sense of putting in place the necessary legislative, policy and budgetary framework to ensure the realisation of the right to access to court. It also includes ensuring that prospective users of the dispute resolution system are able to access the system. This requires addressing the obstacles or barriers that prevent potential users from having access to system.³²⁶ As a result, in developing an effective social security adjudication system, the State must have regard to the possible obstacles that may prevent users of the system from utilising the system. These obstacles or barriers on access to courts must be considered and where they are found to be limiting access to courts, they must be eliminated. If such obstacles are not eliminated, they would constitute a breach of constitutional obligations, unless where they are shown to be reasonable and justifiable limitations on the right in terms of section 36.

In addition to obligations arising from section 34, the State also has obligations in terms of section 27. Section 27(2) of the Constitution requires the State to adopt reasonable legislative and other measures (within its available resources) to achieve the progressive realisation of the right of access to social security. When section 27(2) is read with the obligation to respect, protect, promote and fulfil the rights in the Bill of Rights, the conclusion is that there is:

“... a clear and unambiguous undertaking by the drafters of the constitution to develop a comprehensive social security system, based on, *inter alia*, two important paradigms: the right of access to social security for everyone, and financial viability. In this regard, the Constitution imposes an obligation on the state to ensure universal access to social security.”³²⁷

The duties to protect, promote and fulfil this right place a positive duty on the State to set up legislative and institutional mechanisms whereby all persons can realise their right of access to social security. Social security legislation and other measures must be formulated in a way that ensures equal and non-discriminatory access to all persons, especially needy and

³²⁵ *President of the Republic of South Africa v Modderklip Boerdery* 2005 (5) SA 3 (CC) para 43.

³²⁶ See Heywood M & Hassim A “Remedying the maladies of ‘lesser men or women’: The personal, political and constitutional imperatives for improved access to justice” (2008) 24 *SAJHR* 266. See also Budlender G “Access to Courts” (2004) 121 *SALJ* 339-358.

³²⁷ Olivier MP “Constitutional Issues” in Olivier MP *et al Social Security: A Legal Analysis* Durban, LexisNexis (2003) 58.

vulnerable people. The State is expected to set up the administrative and regulatory framework necessary for the realisation of this right and to create opportunities for its attainment. In the *Grootboom* case, the Court held that section 26(2)³²⁸ imposes a positive obligation upon the State “to devise a comprehensive and workable plan to meet its obligations in terms of the subsection”.³²⁹ The Court added that:

“the state is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation.”³³⁰

In terms of the positive duties, the State is expected to adopt legislative measures in conjunction with financial, administrative, educational and social measures with a view to progressively achieving the full realisation of the right to social security. The adopted measures must be deliberate, concrete and targeted as clearly as possible towards ensuring that everyone within the State’s jurisdiction has access to social security.³³¹

Section 27(2) requires the State to adopt reasonable legislative and other measures to realise the right. Therefore, the measures adopted by the State must be evaluated on the basis of their reasonableness. The reasonableness criterion lays down certain basic standards that must be complied with.³³²

7. LIMITATION OF THE RIGHTS OF ACCESS TO COURTS AND TO SOCIAL SECURITY

The failure to establish an effective and efficient social security dispute resolution system would constitute limitations of both rights. The State would be in breach of its constitutional

³²⁸ The wording of s 27(2) is similar to that of s 26(2), which requires the State to adopt reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right of access to adequate housing.

³²⁹ *Grootboom* para 38.

³³⁰ *Grootboom* para 42.

³³¹ In terms of the interpretation of state obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966.

³³² See para 2.9.2 for the discussion on their constitutional standard of reasonableness.

obligations, unless its failure to realise these rights conforms to the constitutional provisions on the limitation of rights. Constitutional rights are not absolute, and may be subjected to limitations of a reasonable nature. The Constitution sets out two kinds of possible limitations on the rights. Firstly, there is a limitation clause in section 36, which applies to every right in the Bill (this is sometimes referred to as external or general limitation clause). In addition, some sections provide limitations in respect of a particular right (sometimes referred to as internal or specific limitation). Where a right is to be limited, the limitation must be in accordance with the requirements of section 36. Where a right contains an internal limitation, a limitation must also be in accordance with the requirements of the internal limitation provisions. Since section 34 does not provide an internal or specific limitation clause, any limitation of the right must comply with section 36. Therefore, in addition to the internal limitation in section 27(2), a limitation of the right of access to social security must be in accordance with section 36.

A claim that the State has breached its obligation to provide access courts and to social security, must indicate that the State is in breach of its duty to respect, protect, promote, and fulfil her right. The State's failure to establish an effective social security dispute resolution system must not be justifiable in terms of the general limitation clause contained in section 36 and the internal limitations in section 27(2). In addition, in order to ascertain whether the State is in breach, such a claim must establish what the exact scope of the right is, as well as the exact scope of the State's obligation in terms of the rights.

7.1 Limitations in terms of section 36 of the Constitution

Section 36(1) of the Constitution states that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

Any infringement on the duty to respect, protect, promote, and fulfil the right of access to social assistance by current and future legislation will have to be measured against the provisions of section 36(1) of the Constitution. A court considering a constitutional challenge

will seek clarification of issues such as whether the limitation serves a legitimate purpose of sufficient importance; whether there is there a sufficient relationship between the limitation and the purpose, in other words, whether the limitation does not restrict the right in question more than is necessary; and whether there is no other reasonable alternative through which the objective can be attained.

Where either of the rights is infringed, the question which arises then is whether section 36 of the Constitution permits such an infringement. The State's action or inaction is reviewed according to the principle of proportionality or alternative means (rationality) and according to the principle of reasonableness (balance). The tests of reasonableness and justifiability require the competing interests and values that it impairs and promotes to be weighed against one another for an appraisal of their proportionality.³³³ In terms of the principle of proportionality, the court sets aside an act which restricts the right to access to social security unnecessarily or gratuitously. Consideration must also be given to the importance of the right in evaluating the proportionality of the measures taken.³³⁴ Under the principle of reasonableness or balance, an act is declared unconstitutional if there is a radical imbalance between the public interest served by the act and the limitation infringing the social and economic sphere of people's lives.

In *S v Makwanyane and Another*,³³⁵ the Constitutional Court laid down guidelines on evaluating the proportionality and reasonableness of any restriction on a right. The Court remarked that in evaluating proportionality and reasonableness, issues to be considered include:

“... the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.”

³³³ *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC), para 15.

³³⁴ *Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 1288 (CC); 2001 (8) BCLR 765 (CC).para 34.

³³⁵ *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC), para 104.

7.2 Limitations in terms of section 27(2) of the Constitution

In addition to complying with the general limitation clause in section 36(1), a limitation of the right to have access to social security must further satisfy the requirements of the specific limitation clause in section 27(2). This implies that the State's duty to respect, protect, promote, and fulfil the right to access to social security is further qualified by the phrasing of section 27(2). Section 27(2) states that the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. Therefore, although the Constitution provides everyone with a right of access to social security and imposes an obligation on the State to realise this right, section 27(2) gives it a certain degree of latitude in relation to three aspects: the progressive realisation of the right, the taking of reasonable measures and the availability of its resources. The meaning of the different provisions in section 27(2) has been highlighted by the Constitutional Court in the various cases.

7.2.1 Adoption of reasonable legislative and other measures

The Constitution requires the State to take reasonable legislative and other measures to progressively realise the right of access to social security. In *Grootboom*, the Constitutional Court stated that the State will fulfil its obligations if the measures adopted are reasonable, both in their conception and implementation.³³⁶ A court considering reasonableness will not enquire whether other, more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. In *Minster of Health and Others v Treatment Action Campaign and Others*, the court stated that a purposive reading of section 27 implies that the right should not be construed as entitling everyone to demand that a minimum core be provided to them. All that is possible, and all that can be expected of the State, is that it acts reasonably to provide access on a progressive basis.³³⁷

The Court in *Grootboom* outlined the requirements relating to the reasonableness of the State's measures. It held that:

³³⁶ *Grootboom* para 63.

³³⁷ *Grootboom* para 35.

“... reasonableness must also be understood in the context of the Bill of Rights as a whole. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.”³³⁸

The reasonableness of legislative and other measures are therefore evaluated against criteria such as the social, economic and historical context of the system the measure aims to address; whether the programme is balanced, flexible and open to review, and make appropriate provision for attention to the deficiencies in the system and to short-, medium- and long-term needs; whether the programme is inclusive and does not exclude a significant segment of society; whether the measures ensure that basic human needs are met and take into account the degree and extent of the denial of the right they endeavour to realise; and whether the programme and measures ensure that a larger number of people and a wider range of people benefit from them as time progresses.³³⁹

7.2.2 Within the available resources

The second defining aspect of the State’s obligation is in terms of the right of access to social security is that the Constitution does not require the State to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved, as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources.³⁴⁰ There is no unqualified obligation on the State to meet the existing needs of the citizens. The right to have access to social security is qualified by the availability of resources. The Constitutional Court in *Soobramoney* spelt out the implications of this limitation. It stated that:

³³⁸ *Grootboom* para 44.

³³⁹ *Grootboom* paras 42-45. See also Committee of Inquiry into a Comprehensive System of Social Security in South Africa: *Transforming the Present – Protecting the Future* (Draft Consolidated Report)(March 2002) 51.

³⁴⁰ *Grootboom* para 46.

“What is apparent from these provisions is that the obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled. This is the context within which section 27(3) must be construed.”³⁴¹

Therefore, limited resources may justify the State giving priority to the larger needs of society, rather than the specific needs of particular individuals within society. The *Grootboom* case also supported the available resources restriction, but noted that the State must make provisions for the extremely vulnerable.³⁴² The effect of this is that those in desperate need should be provided with some form of immediate relief and should not have to wait for medium or long-term measures designed to ensure the progressive realisation of their rights. Resource constraints could, therefore, be a relevant factor in accessing the State’s ability to extend or universalise the present social assistance framework, due to the fiscal and macro-economic implications of such an endeavour. The availability of resources is thus a factor in determining whether the State has taken reasonable measures. Resource constraints could be a basis for the State justifying its rate of progress in achieving the full realisation of social security rights.

7.2.3 Progressive realisation of the right

The Constitution recognises that the right to have access to social security could not be realised immediately. In *Grootboom*, the Court stated that the term “progressive realisation” shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the State must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time; and that rights must be made more accessible, not only to a larger number of people, but to a wider range of people as time progresses.³⁴³ The *Treatment Action Campaign* case further reiterated the requirement of progressive realisation when it held that although the State’s

³⁴¹ *Soobramoney v Minister of Health (Kwazulu-Natal)* para 11.

³⁴² *Grootboom* para 44.

³⁴³ *Grootboom* para 45.

policy fails to meet constitutional standards because it excludes those who could reasonably be included, that does not mean everyone can immediately claim access to the right to health services.³⁴⁴

Progressive realisation is also supported by relevant international law provisions. International law is important in delineating the scope of the State's obligation in terms of s 39(1)(b), which requires all courts, tribunals and forums to consider international law. The wording of the phrase "progressive realisation" is similar to the phrase used in Art 2(1) of the International Covenant on Economic, Social and Cultural Rights. The United Nation Committee on Economic, Social and Cultural Rights stated that progressive realisation must be read in the light of the overall objective, indeed the *raison d'être* of the Covenant, which is to establish clear obligations for state parties in respect of the full realisation of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards the goal.³⁴⁵

8. IMPACT OF CONSTITUTIONAL PRINCIPLES ON COURTS AND ADMINISTRATION OF JUSTICE

Where the right of access to justice for social security applicants and beneficiaries is realised through a court, the framework will be affected by constitutional provisions relating to courts and the administration of justice in Chapter 8. Therefore, the social security adjudication framework established in terms of section 34 must be consistent with the framework set out in Chapter 8.³⁴⁶ According to section 165(1), the judicial authority of the republic is vested in the courts. The courts must be independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice,³⁴⁷ and no person or organ of state may interfere with their functioning.³⁴⁸ In addition, organs of state are required through legislative and other measures to assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.³⁴⁹

³⁴⁴ *Treatment Action Campaign* para 125.

³⁴⁵ United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) *General Comment 3* (1990) para 10. See generally Chapter Three on international standards of social security adjudication (*infra*).

³⁴⁶ See Brickhill J and Friedman A "Access to courts" in Woolman S *et al Constitutional Law of South Africa* (2nd Edition, Original Service 07-06) Cape Town, Juta, 59-6.

³⁴⁷ Section 165(2) of the Constitution.

³⁴⁸ Section 165(3) of the Constitution.

³⁴⁹ Section 165(4) of the Constitution.

Section 166 provides that the courts are the Constitutional Court; the Supreme Court of Appeal; High Courts (including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts); Magistrates' Courts; and any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts.³⁵⁰ In accordance with section 166(e), specialist courts have been established such as income tax courts, the Labour Court and the Labour Appeal Court, the Land Claims Court, the Competition Appeal Court, the Electoral Court, divorce courts, "military courts" and equality courts. This may also be the constitutional basis for the establishment of a specialist social security court or tribunal (if necessary.)

Due to the geographical spread of Magistrates' Courts around the country, a special social security dispute resolution institution could be created in the Magistrates' Courts, in the interest of the promotion of access to courts.³⁵¹ This is by virtue of the constitutional provision that Magistrates' Courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.³⁵²

The procedures of any proposed social security adjudication system may also be outlined in an enabling legislation as section 171 of the Constitution requires all courts to function in terms of national legislation, and their rules and procedures are to be provided for in terms of national legislation. These rules and procedures must promote the spirit, purport and objects of the Bill of Rights (such as the realisation of the rights in the Bill of Rights and the promotion of constitutional values). The Constitution also states that national legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution.³⁵³ The section specifically mentions issues such as the training programmes for judicial officers; procedures for dealing with complaints about judicial officers; and the participation of people other than judicial officers in court decisions. However, this section

³⁵⁰ Section 166(a)-(e) of the Constitution.

³⁵¹ There are special Maintenance Courts at every Magistrate's Court where maintenance officers assist person who want to apply for maintenance.

³⁵² Section 170 of the Constitution.

³⁵³ Section 180 of the Constitution

could also be used to provide other issues relevant to the proper functioning of a social security system and the realisation of the right of access of social security litigants.

9. IMPACT OF CONSTITUTIONAL PRINCIPLES RELATING TO PUBLIC ADMINISTRATION

The social security adjudicative institutions and processes must also be guided by the constitutional provisions governing the operation of public administration in Chapter 10. It is accepted that the foundational constitutional values of accountability, responsiveness and openness apply to the functioning of the judiciary as much as to other branches of government.³⁵⁴ Since social security adjudication institutions are bound by the principles governing public administration, these basic values and principles are relevant to their establishment and/or functioning.

Chapter 10 of the Constitution lays down the basic values and principles that must govern public administration (and the public service). Section 195(1) provides that public administration must be governed by the democratic values and principles enshrined in the Constitution. The democratic values and principles that would be relevant to a social security adjudicative and institutional framework include the principles that a high standard of professional ethics must be promoted and maintained;³⁵⁵ efficient, economic and effective use of resources must be promoted;³⁵⁶ public administration must be development-orientated;³⁵⁷ services must be provided impartially, fairly, equitably and without bias;³⁵⁸ people's needs must be responded to, and the public must be encouraged to participate in policy-making;³⁵⁹ public administration must be accountable;³⁶⁰ transparency must be fostered by providing the public with timely, accessible and accurate information;³⁶¹ and good human-resource management and career-development practices, to maximise human potential, must be cultivated.³⁶²

³⁵⁴ *South African Broadcasting Incorporation v National Director of Public Prosecutions* 2007 (1) SA 523, para 32.

³⁵⁵ S 195(1)(a) of the Constitution.

³⁵⁶ Section 195(1)(b) of the Constitution

³⁵⁷ Section 195(1)(c) of the Constitution

³⁵⁸ Section 195(1)(d) of the Constitution

³⁵⁹ Section 195(1)(e) of the Constitution

³⁶⁰ Section 195(1)(f) of the Constitution

³⁶¹ Section 195(1)(g) of the Constitution

³⁶² Section 195(1)(h) of the Constitution

The enforcement of these principles in the social security adjudication arena will ensure the efficiency and effectiveness of the social security adjudication system, and will further ensure that aggrieved social security applicants or beneficiaries are treated equally and with dignity and that their rights of access to courts and to social security are realised. As the courts have stated, the right to seek judicial redress (and the right to receive information necessary for the realisation of the right) is vital in a country which is founded on values of accountability, responsiveness and openness.³⁶³

10. CONCLUDING REMARKS

The Constitution requires that the right of access to social security must be given effect to. By entrenching a fundamental right of access to social security and other related socio-economic rights, the Constitution aims to provide at least minimum income support to secure an adequate standard of living for those unable to support themselves and their dependants. The provision of social security is fundamental to the realisation of the society envisaged by the Constitution: an open and democratic society based on human dignity, equality and freedom. As the Constitutional Court stated, there can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied to those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in the Bill of Rights. The realisation of these rights is also critical to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential

The Constitution thus compels the State to adopt reasonable legislative and other measures, within its available resources to achieve the progressive realisation of the right of access to social security. Therefore, the State is required to develop a comprehensive social security system, based on, *inter alia*, the right of access to social security for everyone and financial viability. An appropriate dispute resolution system constitutes an integral part of any social security framework, and is considered to be included in the notion of measures aimed at ensuring comprehensive social security.

³⁶³ *Brümmer v Minister for Social Development and Others* para 62.

A social security dispute resolution system also realises the right of access to justice. It must, therefore, be consistent with the constitutional precepts of realising the right. The Constitution entrenches the right to have access to courts so as to enable the bearers of the right of access to social security and other related rights with the ability to enforce these rights. Access to courts is therefore pivotal to the enjoyment of all other rights in the Constitution. It is in this connection that the right to have access to court must be interpreted. Its role in the realisation of the Constitution is so fundamental that an effective social security adjudication system that ensures untrammelled access to (prospective) social security litigants must be established. This will guarantee the realisation of the obligations to respect, protect, promote and fulfil the rights of access to courts and to social security.

The right of access to justice requires that the institutions and mechanisms to resolve disputes must be effective. Effectiveness requires, amongst others, that courts, tribunals or forums that resolve disputes must be accessible to everyone. Everyone should have affordable and timeous access to appropriate institutions and procedures through which to claim and protect their rights. Effectiveness further requires that courts, tribunals or forums that resolve disputes must be independent and impartial in the execution of their duties. They must be able to provide claimants with appropriate redress. Finally, in order to ensure access to court, section 34 guarantees the right to have disputes resolved with procedural fairness.

The State's obligations to respect, protect, promote and fulfil the rights of access to courts and to social security do not simply entail the creation of a social security adjudication system. It also involves ensuring that social security litigants are enabled to effectively realise their rights. This implies that the adjudication system should take into account the social and economic conditions of claimants, and its impact on their ability to use the system.

CHAPTER THREE

SOCIAL SECURITY ADJUDICATION STANDARDS IN INTERNATIONAL AND REGIONAL INSTRUMENTS

1. INTRODUCTION

Current dispute resolution institutions, mechanisms and procedures³⁶⁴ and any proposed system must realise the rights in the Constitution. These adjudication systems must therefore be consistent with the nature and scope of social security applicants' and/or beneficiaries' right of access to courts. In the determination of the scope and content of a right in the Bill of Rights, the Constitution favours an international law- and comparative law-friendly approach. Adjudication standards in international and comparative law thus play a pivotal role in the evaluation of the South African social security adjudication system (and the scope and content of the right of access to courts for social security applicants and/or beneficiaries and the State's obligations in this regard).

2. ROLE AND IMPACT OF INTERNATIONAL STANDARDS ON THE SOCIAL SECURITY ADJUDICATION SYSTEM

International standards must be considered in the development of the South African social security adjudication system. The Constitution requires that when interpreting fundamental rights, international law must be considered,³⁶⁵ while foreign law may be considered.³⁶⁶ In addition, section 233 requires that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. The provisions of international instruments relating to the adjudication of social security are in the form of standards, and act as benchmarks for the evaluation of domestic adjudication frameworks.

In addition, South Africa is a member of various international organisations and/or a party to international instruments that contain provisions relating to adjudication of disputes

³⁶⁴ See Chapter Six on the current South African social security dispute resolution system.

³⁶⁵ Section 39(1)(b) of the Constitution.

³⁶⁶ Section 39(1)(c) of the Constitution.

(including social security disputes).³⁶⁷ South Africa is therefore bound by the obligations arising from these instruments. Even where South Africa is not bound by the obligations arising from an international instrument, similarities in the formulation of the right of access to courts in the South African Constitution and the provisions of some international instruments would require the consideration of such instruments in the interpretation of the rights of access to social security and to justice in the Constitution.³⁶⁸ The jurisprudence of the institutions charged with the monitoring and enforcement of these instruments which provide guidelines on the nature and content of the right in these instruments is helpful in interpreting the right in the Constitution.³⁶⁹ As the Constitutional Court has held:

“... public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].”³⁷⁰

3. PROTECTION OF THE RIGHT OF ACCESS TO JUSTICE IN INTERNATIONAL INSTRUMENTS

The right of access to justice is protected by various international, supra-national and regional instruments. Some of these include the African Charter of Human and Peoples' Rights;³⁷¹

³⁶⁷ South Africa is a member of the organisations such as the International Labour Organisation (ILO), the African Union (AU) and the Southern Africa Development Community (SADC). It is a party to the international instruments such as the International Covenant on Civil and Political Rights (ICCPR) and the African Charter of Human and Peoples' Rights.

³⁶⁸ This would be the case with the European Convention for Human Rights and Fundamental Freedoms (ECHR) which provides in Article 6(1) that, 'in the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...'

³⁶⁹ Such as the General Comments of the Committee on Economic, Social and Cultural Rights, the Committee on Civil and Political Rights, guidelines of the African Commission on Human and Peoples' Rights and judgments of the European Court of Human Rights..

³⁷⁰ *S v Makwanyane and Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) para 35; as quoted in *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 26.

³⁷¹ African [Banjul] Charter on Human and Peoples' Rights (adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986). Article 7(1) of the Charter protects access to courts.

International Covenant on Civil and Political Rights (ICCPR);³⁷² the ILO Social Security (Minimum Standards) Convention;³⁷³ the ILO Employment Promotion and Protection against Unemployment Convention;³⁷⁴ the European Convention on Human Rights;³⁷⁵ and the Code on Social Security in the SADC.³⁷⁶

The International Covenant on Civil and Political Rights requires each State Party to ensure that any person whose rights and freedoms recognised in the Covenant are violated has an effective remedy'.³⁷⁷ In addition, the Covenant provides that "all persons shall be equal before the courts and tribunals, in the determination of ... his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ..."³⁷⁸ The Committee on Civil and Political Rights has remarked that the right of access to justice in the Covenant "are aimed at ensuring the proper administration of justice, and to this end uphold a series of individual rights such as equality before the courts and tribunals and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law".³⁷⁹

The Convention on the Elimination of Discrimination Against Women enjoins all states to ensure that women are not subjected to "distinction, exclusion or restriction" when they appear "before the law". In addition, CEDAW requires that all states ensure that all courts and tribunal procedures should apply equally to women and men.

The International Labour Organisation (ILO)'s Social Security (Minimum Standards) Convention guarantees every claimant shall have a right of appeal in case of refusal of the

³⁷² UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 5 May 2013] Article 14.

³⁷³ ILO Social Security (Minimum Standards) Convention 102 of 1952 (Entry into force: 27 Apr 1955) Adoption: Geneva, 35th ILC session (28 Jun 1952) Article 70. See also ILO *Social security and the rule of law* (General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization) (Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution) Report III (Part 1B)) International Labour Conference, 100th Session, 2011 (2011).

³⁷⁴ Convention concerning Employment Promotion and Protection against Unemployment (Entry into force: 17 Oct 1991) Adoption: Geneva, 75th ILC session (21 Jun 1988).

³⁷⁵ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, Article 6.

³⁷⁶ SADC Code on Social Security (2007) Article 21.1(b).

³⁷⁷ Article 2, section (3)(a) of the ICCPR.

³⁷⁸ Article 14(1) of the ICCPR.

³⁷⁹ Committee on Civil and Political Rights *General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law* (Art. 14) (1984/04/13) para 1.

benefit or complaint as to its quality or quantity.³⁸⁰ However, the Convention states that where medical service is administered by a government department responsible to a legislature, the right of appeal may be replaced by a right to have a complaint concerning the refusal of medical care or the quality of the care received investigated by the appropriate authority.³⁸¹ In addition, where a claim is settled by a special tribunal established to deal with social security questions and on which the persons protected are represented, no right of appeal shall be required.³⁸²

The ILO Employment Promotion and Protection against Unemployment Convention 168 of 1988 requires that a dispute concerning the refusal, withdrawal, suspension, or reduction of the quantum of benefits must be resolved by the body administering the scheme, and that there should thereafter be an appeal to an independent body.³⁸³

The ILO Medical Care Recommendation requires the creation of a framework for the submission of complaints by beneficiaries concerning the care received to appropriate arbitration bodies under conditions affording adequate guarantees to all parties concerned.³⁸⁴ Beneficiaries who have submitted complaints to the competent arbitration body should have a right to appeal their decisions to an independent tribunal.³⁸⁵

The ILO Income Security Recommendation also protects the right of appeal for claimants in cases of dispute with the administrative authority concerning such questions as the right to benefit and the rate thereof. Appeals should preferably be referred to special tribunals, which should include referees who are experts in social insurance law, assisted by assessors, representative of the group to which the claimant belongs and, where employed persons are concerned, by representatives of employers also.³⁸⁶

The African Charter of Human and Peoples' Rights guarantees rights ancillary to the right of access to courts. It states that every individual has the right to have his or her cause heard.³⁸⁷

³⁸⁰ ILO Social Security (Minimum Standards) Convention 102 of 1952, Article 70: Para 1.

³⁸¹ ILO Social Security (Minimum Standards) Convention 102 of 1952, Article 70, Para 2.

³⁸² ILO Social Security (Minimum Standards) Convention 102 of 1952, Article 70, Para 3.

³⁸³ Article 27(1) of the ILO Employment Promotion and Protection against Unemployment Convention 168 of 1988.

³⁸⁴ ILO Medical Care Recommendation No. 69 of 1944, Para 63.

³⁸⁵ ILO Medical Care Recommendation No. 69 of 1944, Para 112.

³⁸⁶ ILO Income Security Recommendation No. 67 of 1944, Annex, Para 27(8).

³⁸⁷ African Charter of Human and Peoples' Rights, Article 7.

The scope of the right to have one's causes heard, as protected in Article 7, includes the right to an appeal to competent national organs against acts violating a person's fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force; the right to defence, including the right to be defended by counsel of his or her choice; and the right to be tried within a reasonable time by an impartial court or tribunal.

The African Charter makes provision for the enactment of protocols and guidelines to supplement rights within the Charter. The African Commission on Human & Peoples' Rights has adopted the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance; the Kigali Declaration,³⁸⁸ and the Grand Bay (Mauritius) Declaration and Plan of Action.³⁸⁹ The protocols and guidelines make concrete and specific interpretations of the right to a fair and public hearing by a legally constituted competent, independent and impartial judicial body in the determination of a person's rights and obligations.³⁹⁰ This is achieved by interpreting concepts such as fair and public hearings;³⁹¹ independent and impartial tribunals;³⁹² the right to an effective remedy;³⁹³ and access to legal aid and assistance.³⁹⁴ The protocols and guidelines also interpret the nature and scope of state obligations to provide fair and public hearings by independent and impartial tribunals. African Union Member States are required to guarantee independence, accessibility and affordability of their judicial systems.³⁹⁵ They further stress the need for an "independent, open, accessible and impartial judiciary which can deliver justice promptly and at an affordable cost".³⁹⁶

The Code on Social Security in the SADC requires that SADC Member States should endeavour to establish proper administrative and regulatory frameworks in order to ensure

³⁸⁸ Declaration of the 1st African Union (AU) Ministerial Conference on Human Rights in Africa meeting on 8 May 2003 in Kigali, Rwanda.

³⁸⁹ Declaration and Plan of Action of the First OAU Ministerial Conference on Human Rights, meeting from 12 to 16 April, 1999 in Grand Bay, Mauritius.

³⁹⁰ African Commission on Human & Peoples' Rights *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance* (1999) Section A, Article 1.

³⁹¹ African Commission on Human & Peoples' Rights *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance* (1999) Section A, Articles 2 and 3.

³⁹² African Commission on Human & Peoples' Rights *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance* (1999) Section A, Articles 4 and 5.

³⁹³ African Commission on Human & Peoples' Rights *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance* (1999) Section C.

³⁹⁴ African Commission on Human & Peoples' Rights *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance* (1999) Section H.

³⁹⁵ Declaration of the 1st African Union (AU) Ministerial Conference on Human Rights in Africa meeting on 8 May 2003 in Kigali, Rwanda, Section A, Article 5.

³⁹⁶ Declaration and Plan of Action of the First OAU Ministerial Conference on Human Rights, meeting from 12 to 16 April, 1999 in Grand Bay, Mauritius, Para 4.

effective and efficient delivery of social security benefits, in particular easy access for everyone to independent adjudication institutions that have the power to finally determine social security disputes, inexpensively, expeditiously and with a minimum of legal formalities.³⁹⁷

The European Convention on Human Rights provides that “in the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.³⁹⁸ The European Court of Human Rights has held that Article 6 Paragraph 1 of the Convention “embodies the right of access to a court for the determination of civil rights and obligations”,³⁹⁹ and to fairness in the judicial proceedings where access to a court was not restricted.⁴⁰⁰

4. SELECTED ADJUDICATION STANDARDS EMANATING FROM INTERNATIONAL INSTRUMENTS

International instruments have set out various standards that are relevant in the development of the South Africa social security adjudication system. Some of these relate to the need to establish independent and impartial courts or tribunals, the sequential and complementary reviews and appeals procedures, the provision of reasonable time limits for reviews (complaints) and appeals, the need for expeditious and simple proceedings, the guarantee of representation and legal assistance, and the provision of effective (enforceable) remedies.

4.1 Sequential and complementary reviews and appeals procedures

A primary consideration in the development of an adjudication system is the need to ensure an institutional separation between administrative accountability, review and revision (on the one hand) and a wholly-independent, substantive system of appeals (on the other).⁴⁰¹

³⁹⁷ Article 21.1(b) of the SADC Code on Social Security.

³⁹⁸ European Convention on Human Rights, Article 6, Para 1.

³⁹⁹ See *P, C and S v United Kingdom* (2002) 35 EHRR 31 para 89 and *Golder v the United Kingdom* judgment of 21 February 1975, Series A no. 18, p. 18, para 36.

⁴⁰⁰ See *P, C and S v United Kingdom* (2002) 35 EHRR 31 para 91. See also Interights *Right to a fair trial under the European Convention on Human Rights (Article 6)*(Manual for Lawyers), 2009, 2.

⁴⁰¹ MP Olivier, L Jansen van Rensburg & LG Mpedi “Adjudication and enforcement of social security; reviews and appeals” in MP Olivier *et al Introduction to Social Security* LexisNexis Butterworths (2004) 526. See also Committee of Inquiry into a Comprehensive Social Security System for South Africa *Transforming the Present – Protecting the Future* (Draft Consolidated Report)(March 2002) 124 where it is recommended that a uniform

International instruments stress this sequential and complementary nature of reviews (complaints) and appeals. According to the ILO:

“... social security disputes are settled in two stages: a first complaint phase, generally before the higher level administrative body within the social security institutions, and a second stage of appeal against the decision of the administrative body, generally before an administrative, judicial, labour or social security court or tribunal.”⁴⁰²

The ILO Employment Promotion and Protection against Unemployment Convention 168 of 1988 requires that a dispute concerning the refusal, withdrawal, suspension, or reduction of the quantum of benefits must be resolved by the body administering the scheme, and that thereafter there should be an appeal to an independent body.⁴⁰³ In relation to the right of appeal in cases of refusal of the benefit or complaint, as to its quality or quantity in Article 70 of the Social Security (Minimum Standards) Convention, the ILO has stated that:

“... the concept of appeal further implies the settlement of the dispute by an authority that is *independent of the administration that reviewed the initial complaint. Merely guaranteeing the right to seek review* of the decision by the same administrative authority *would not therefore be sufficient to constitute an appeal procedure* under Convention No. 102. In addition, in the absence of special appeal procedures against the decisions of an administrative authority responsible to the government which rules in the first and last resort, the Committee has previously observed that the safeguards provided for in the Convention could nonetheless be ensured by the application of the general rules governing the right of appeal to the ordinary courts in so far as these rules permit the review or annulment of any administrative ruling in the cases covered by Article 70.”⁴⁰⁴

adjudication system be established to deal conclusively with all social security claims. Such a system should, in the first place, comprise an independent internal review or appeal institution. In the second place, according to the Committee, the system should comprise a court (which could be a specialised court) that has the power to finally adjudicate upon all social security matters.

⁴⁰² ILO *Social security and the rule of law* (General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization) (Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution) Report III (Part 1B)) International Labour Conference, 100th Session, 2011 (2011) para 434.

⁴⁰³ Article 27(1) of the ILO Employment Promotion and Protection against Unemployment Convention 168 of 1988.

⁴⁰⁴ ILO *Social security and the rule of law* (General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization)(Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution) Report III (Part 1B)) International Labour Conference, 100th Session, 2011 (2011) para 406 (emphasis added).

Some South African adjudication systems, such as the Occupational Diseases in Mines and Works Act (ODMWA) framework fall foul of this principle.⁴⁰⁵

4.2 Establishment of independent and impartial courts or tribunals

The Constitution requires that disputes which can be resolved by the application of law may be decided before a court or, where appropriate, a tribunal or forum.⁴⁰⁶ International instruments also afford Member States the leeway to decide on whether a dispute (including a social security dispute) is to be resolved in a court or a tribunal. The ILO has held that:

“In accordance with Convention No. 102, the right of appeal should be guaranteed against decisions of a social security administration either to a court of a general jurisdiction or to a special tribunal.”⁴⁰⁷

A major requirement in the various international instruments for the establishment of an adjudication framework is for these to be independent and impartial. The ILO has observed that this fundamental right is intended to guarantee that courts and judges are impartial and have judicial independence to decide disputes according to the facts and the law, including freedom from improper internal and external influence.⁴⁰⁸

Under the European Convention on Human Rights, an independent tribunal is one that is independent of the parties, and of the executive. Issues that are considered in determining the independence of an adjudication institution include the manner of appointment of its members, their terms of office, the existence of guarantees against outside pressures and the question as to whether there is the appearance of independence or not.⁴⁰⁹

⁴⁰⁵ See for example section 50(1) and (2) of ODMWA which portrays a conflation of review (first-level) and appeal (second-level) adjudication procedures.

⁴⁰⁶ See section 34 of the Constitution.

⁴⁰⁷ ILO *Social security and the rule of law* (General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization) (Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution) Report III (Part 1B)) International Labour Conference, 100th Session, 2011 (2011) para 406.

⁴⁰⁸ ILO *Social security and the rule of law* (General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization) (Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution) Report III (Part 1B)) International Labour Conference, 100th Session, 2011 (2011) para 433.

⁴⁰⁹ *Interights Right to a fair trial under the European Convention on Human Rights (Article 6)* (Manual for Lawyers), 2009, 28. In *Belilos v Switzerland* (ECHR (1988) Series A, No. 132) the Court held that there was a lack of the requisite appearance of independence in a tribunal where a civil service member was in a subordinate position to an officer who was a party to the proceedings. In *Langborger v Sweden* ((1990) 12 EHRR 416 89/9), the Court also found a lack of independence where two lay assessors on a tribunal dealing with a claim for

The African Commission on Human & Peoples' Rights has laid down guidelines on the requirements for a fair hearing in all legal proceedings, including the independence and impartiality of adjudication institutions in civil matters.⁴¹⁰ It requires that the independence of judicial bodies and judicial officers shall be guaranteed by the constitution and laws of the country and respected by the government, its agencies and authorities. In order for independence to be achieved, there should not be any inappropriate or unwarranted interference with the judicial process, nor shall decisions by judicial bodies be subject to revision except through judicial review in accordance with the law. All judicial bodies should be independent from the executive branch. The process for appointments to judicial bodies should be transparent and accountable and the establishment of an independent body for this purpose is encouraged. Any method of judicial selection shall safeguard the independence and impartiality of the judiciary. The sole criteria for appointment to judicial office should be the suitability of a candidate for such office by reason of integrity, appropriate training or learning and ability. No persons should be appointed to judicial office unless they have the appropriate training or learning that enables them to adequately fulfil their functions. Judges or members of judicial bodies must have security of tenure until a mandatory retirement age or the expiry of their term of office. The tenure, adequate remuneration, pension, housing, transport, conditions of physical and social security, age of retirement, disciplinary and recourse mechanisms and other conditions of service of judicial officers shall be prescribed and guaranteed by law.⁴¹¹

The Commission requires an adjudication institution to be impartial, with its decision based only on objective evidence, arguments and facts presented before it. Judicial officers should decide matters before them without any restrictions, improper influence, inducements, pressure, threats or interference, direct or indirect, from any quarter or for any reason. The impartiality of a judicial body could be determined on the basis of whether the position of the

revision of a lease had been appointed by associations which had an interest in the continuation of the existing terms of the lease. However, in *Campbell and Fell v United Kingdom* ((1984) 7 EHRR 165), the Court found that there was no breach of the requirement of independence where members of a prison disciplinary body were appointed by the Minister responsible for prisons, but were not subject to any instructions from the Minister in their adjudicatory role. In addition, in *Stojakovic v Austria* (ECHR Case No. 30003/02 of 9 November 2006), a tribunal consisting of a judge and two civil servants, one representative of the employer and one of the employee, both with a fixed term, was also found to be in compliance with the requirement of independence in Article 6 of the Convention.

⁴¹⁰ See African Commission on Human & Peoples' Rights *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa* (1999) Section A.

⁴¹¹ African Commission on Human & Peoples' Rights *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa* (1999) Section A, Article 4.

judicial officer allows him or her to play a crucial role in the proceedings; if the judicial officer had expressed an opinion which would influence the decision-making; and if the judicial official would have to rule on an action taken in a prior capacity. The Commission believes that the impartiality of a judicial body would be undermined when a judicial official sits as a member of an appeal tribunal in a case which he or she decided or participated in on a lower judicial body. In any of these circumstances, a judicial official would be under an obligation to step down. A judicial official may also not consult a higher official authority before rendering a decision in order to ensure that his or her decision will be upheld.⁴¹²

4.3 Provision of reasonable time limits for reviews (complaints) and appeals

Time limits and notice periods are considered necessary in a dispute resolution system as they bring certainty and stability to social and legal affairs and maintain the quality of adjudication.⁴¹³ However, where a statute imposes a time limit and/or notice period requirement, an aggrieved person is barred from bringing the case to court after the expiry of the time limit. Time limits and notice requirements on the right of access to court have been described as “conditions which clog the ordinary right of an aggrieved person to seek the assistance of a court of law”,⁴¹⁴ “a very drastic provision” and “a very serious infringement of the rights of individuals”.⁴¹⁵ These requirements have the effect of “hampering as it does the ordinary rights of an aggrieved person to seek the assistance of the courts.”⁴¹⁶

The European Court of Human Rights has stated that the right of access to a court prohibits legal and factual impediments to judicial action, such as procedural rules.⁴¹⁷ One such procedural rule is the time limits and/or required notice periods for reviews (complaints) and appeals. Social security statutes provide for time limits and/or notice periods for the institution of a case or an application.⁴¹⁸

⁴¹² African Commission on Human & Peoples’ Rights *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa* (1999) Section A, Article 5.

⁴¹³ *Road Accident Fund and Another v Mdeyide* 2011 (1) BCLR 1 (CC) para 8.

⁴¹⁴ *Benning v Union Government (Minister of Finance)* 1914 AD 180 at 185.

⁴¹⁵ *Gibbons v Cape Divisional Council* 1928 CPD 198 at 200.

⁴¹⁶ See *A vex Air (Pty) Ltd v Borough of Vryheid* 1973(1) SA 617(A) at 621F-G and *Administrator, Transvaal, and Others v Traub and Others* 1989(4) SA 731 (A) at 764E.

⁴¹⁷ See the cases of *Geouffre de la Pradelle v France* (16 December 1992) and *Zvolsky and Zvolska v the Czech Republic* (12 November 2002); as quoted in Akandji-Kombe J-F *Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights* Human rights handbooks, No. 7, Council of Europe 2007, 62.

⁴¹⁸ See for example Chapter Six (*infra*) on the time limits and/or notice periods required by COIDA (section 91(1)) and ODMWA (section 50(1)).

The European Court of Human Rights believes that the interests of the proper administration of justice will justify the imposition of reasonable time-limits and procedural conditions for the bringing of claims.⁴¹⁹ The ILO suggests that although its standards do not prescribe the length of the period which should be available to the claimant to lodge a complaint, the Committee of Experts considers that such period should be of a reasonable duration.⁴²⁰ Even in the case of South Africa, the Constitutional Court has held that:

“... time-bars limit the right to seek judicial redress. However, they serve an important purpose in that they prevent inordinate delays which may be detrimental to the interests of justice. But not all time limits are consistent with the Constitution. There is no hard-and-fast rule for determining the degree of limitation that is consistent with the Constitution. The enquiry turns wholly on estimations of degree. Whether a time-bar provision is consistent with the right of access to court depends upon the availability of the opportunity to exercise the right to judicial redress. To pass constitutional muster, a time-bar provision must afford a potential litigant an adequate and fair opportunity to seek judicial redress for a wrong allegedly committed. It must allow sufficient or adequate time between the cause of action coming to the knowledge of the claimant and the time during which litigation may be launched. And finally, the existence of the power to condone non-compliance with the time-bar is not necessarily decisive.”⁴²¹

Where time limits are applicable, they must therefore afford social security litigants an opportunity to bring a case, taking into account their ability to bring the case to court. As the Constitutional court remarked, the socio-economic conditions in South Africa (the backdrop of poverty and illiteracy in our society) are important in considering the reasonableness and justifiability of time bar and notice periods. This is because in a society where the workings of the legal system remain largely unfamiliar to many citizens, due care must be taken that rights are adequately protected as far as possible.⁴²²

⁴¹⁹ See for example *MPP Golub v Ukraine* (December 2005).

⁴²⁰ ILO *Social security and the rule of law* (General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization) (Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution) Report III (Part 1B)) International Labour Conference, 100th Session, 2011 (2011) para 418.

⁴²¹ *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC) para 51.

⁴²² *Road Accident Fund and Another v Mdeyide* para 70.

4.4 Expeditious (rapid) and simple proceedings

Delay in the adjudication of disputes impairs social security litigants' rights of access to courts. South African courts have held that "inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs".⁴²³

International standards require the expeditious resolution of disputes. This aims to protect the parties against excessive delays in legal proceedings and to highlight the impact of delay on the effectiveness and credibility of justice.⁴²⁴ According to the ILO, the general principles set out in international social security instruments, which call for recourse procedures to be rapid, militate in favour of the harmonisation of the applicable procedural law throughout dispute settlement procedures in social security matters. It adds that in certain cases, due to the sometimes inadequate guarantees relating to the impartiality and independence of the administrative bodies that examine complaints in the first resort, emphasis should be placed on observance during the complaint procedures of certain fundamental principles, which should therefore be reinforced, such as the right to obtain a rapid and reasoned decision. This is because one of the most important principles of regular proceedings, namely the prompt rendition of justice, is also crucial in social security matters, since claimants often have to rely on benefits to survive. This underscores the need to establish a procedure for the rapid solution of cases where the urgency is manifest.⁴²⁵

Simple and rapid procedures are also crucial to ensure the accessibility and effectiveness of the rights of access to court. Simple and rapid procedures for the resolution of disputes are especially important in social security matters since in most cases social security benefits are the only financial support available to beneficiaries. Therefore, the language and terminology to be used should be readily understood by an individual of similar background, education and related circumstances (in this case social security applicants/beneficiaries, who may

⁴²³ *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) para 11.

⁴²⁴ Interights *Right to a fair trial under the European Convention on Human Rights (Article 6)*(Manual for Lawyers)(2009) 52.

⁴²⁵ ILO *Social security and the rule of law* (General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization) (Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution) Report III (Part 1B)) International Labour Conference, 100th Session, 2011 (2011) para 436.

either be illiterate or do not understand English).⁴²⁶ The procedures for review (complaint) and appeal of social security decisions must also be simple and rapid.⁴²⁷

The requirement for simple procedures further requires that the law and regulations relating to social security be drafted in such a way that beneficiaries and contributors can easily understand their rights and duties. Simplicity should thus be a primary consideration in devising procedures to be followed by beneficiaries and contributors.⁴²⁸

The European Convention on Human Rights requires hearings to be conducted within a reasonable time. The reasonableness of the duration of a hearing depends on the particular circumstances of each case. In assessing reasonableness, the European Convention of Human Rights takes into account the complexity of the cases, the conduct of the plaintiff and the conduct of the State.⁴²⁹

4.5 Procedural guarantees to ensure a fair hearing

It is required that the resolution of disputes must be undertaken in a fair and public manner. Fairness includes equality of arms between the parties to proceedings, whether the proceedings are administrative, civil, criminal or military in nature.⁴³⁰ The ILO is of the opinion that the right to a fair trial requires procedural equality between the parties in the dispute.⁴³¹ The principle of equality between the parties is also extremely important in social security disputes, as claimants usually come up against a government or administrative body.

⁴²⁶ ILO *Social security and the rule of law* (General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization) (Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution) Report III (Part 1B)) International Labour Conference, 100th Session, 2011 (2011) paras 428-431.

⁴²⁷ Article 27(1) of the ILO Employment Promotion and Protection against Unemployment Convention 168 of 1988.

⁴²⁸ Paras 27(3) and (4) of the Annex to the ILO Income Security Recommendation 67 of 1944.

⁴²⁹ Autheman V *Global Best Practices: Judicial Integrity Standards and Consensus Principles* IFES Rule of Law White Paper Series (April 2004) 10.

⁴³⁰ African Commission on Human & Peoples' Rights *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa* (1999) Section A, Article 2(a).

⁴³¹ ILO *Social security and the rule of law* (General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization) (Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution) Report III (Part 1B)) International Labour Conference, 100th Session, 2011 (2011) para 433. See para 3.3.3 of Chapter Two (Procedural fairness (including the requirement of a public hearing) where the various elements of the procedural equality are discussed.

Dispute settlement bodies should therefore ensure that individual claimants have reasonable opportunities to assert or defend their rights. Equality of arms between the parties to proceedings further requires equal access to evidence. This means each party should also have access to the relevant evidence, including documents, expert opinions, etc. The burden of proof should also not lie exclusively with the complainant.⁴³² Parties should have adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence.⁴³³ Parties should also be entitled to the assistance of an interpreter if they cannot understand or speak the language used in or by the judicial body.⁴³⁴

Fairness further requires that social security applicants and/or beneficiaries are not deprived of the right to adjudication due to costs. As a result, it is required that where the gratuity of the appeal procedures for the beneficiary is not ensured, the cost of appeal should be kept at the absolute minimum so as to allow for the effective exercise of the right of access to court, including by persons of small means.⁴³⁵

4.6 Guarantee of representation and legal assistance

The right to a fair trial guarantees a right to representation. The African Charter affords litigants with an entitlement to consult and be represented by a legal representative or another qualified person chosen by the party at all stages of the proceedings.⁴³⁶ This position is also supported by the ILO, which proposes that during the resolution of a dispute, both parties should be guaranteed the right to engage a lawyer or other qualified representative of their choice.⁴³⁷

⁴³² ILO *Social security and the rule of law* (General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization) (Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution) Report III (Part 1B)) International Labour Conference, 100th Session, 2011 (2011) para 436.

⁴³³ African Commission on Human & Peoples' Rights *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa* (1999) Section A, Article 2(e).

⁴³⁴ African Commission on Human & Peoples' Rights *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa* (1999) Section A, Article 2(g).

⁴³⁵ ILO *Social security and the rule of law* (General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization) (Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution) Report III (Part 1B)) International Labour Conference, 100th Session, 2011 (2011) para 436.

⁴³⁶ African Commission on Human & Peoples' Rights *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa* (1999) Section A, Article 2(f).

⁴³⁷ ILO *Social security and the rule of law* (General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization) (Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution) Report III (Part 1B)) International Labour Conference, 100th Session, 2011 (2011) para 436.

The ILO also advocates for the provision of free legal aid and legal assistance in social security disputes. The ILO advocates that the law should guarantee that claimants who cannot afford legal assistance must be entitled to be represented by a public defender or counsel for the defence appointed by the competent authority.⁴³⁸ It states that:

“The right to receive legal aid is an essential means of helping beneficiaries in their efforts to identify and understand their legal rights and obligations. It is often the case that the provisions of the relevant national legislation are not formulated in simple and readily understandable terms. Such aid is also rendered necessary by the unequal positions of the parties involved, as state institutions and bodies are in a more favourable position. Beneficiaries often feel helpless when faced with complicated provisions, and without proper assistance they may be unable to resolve the issues that arise. Assistance in social security matters enables people to understand their legal obligations and assert their legal rights more effectively.”⁴³⁹

The African Charter does not specifically regulate the issue of whether state-funded legal aid is an essential component of the right to a fair hearing. However, the African Commission on Human and Peoples’ Rights has interpreted the right to a fair hearing as incorporating the right to legal aid. The Commission provides that a party to a civil case has a right to have legal assistance assigned to him or her in any case where the interest of justice so requires, and without payment by the party to a civil case if he or she does not have sufficient means to pay for it. The interest of justice is determined in civil cases by considering the complexity of the case and the ability of the party to adequately represent himself or herself; the rights that are affected; the likely impact of the outcome of the case on the wider community.⁴⁴⁰

The absence of provisions relating to free legal assistance in social security cases may stem from lack of agreement on whether the right to a fair trial in section 34 of the Constitution entrenches a right to legal aid and legal assistance. This is due to the absence of a specific reference to such a right in section 34 (which deals with civil matters), contrary to section 35

⁴³⁸ ILO *Social security and the rule of law* (General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization) (Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution) Report III (Part 1B)) International Labour Conference, 100th Session, 2011 (2011) para 436.

⁴³⁹ ILO *Social security and the rule of law* (General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization) (Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution) Report III (Part 1B)) International Labour Conference, 100th Session, 2011 (2011) para 425.

⁴⁴⁰ African Commission on Human & Peoples’ Rights *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa* (1999) Section H.

where such a right is expressly protected.⁴⁴¹ However, differences in the formulation of the right to a fair trial between the Constitution and the Interim Constitution⁴⁴² and the similarity between section 34 of the Constitution and the Article 6(1) of the European Convention of Human Rights support the conclusion that a right to legal aid and legal assistance is intrinsic to the right to a fair hearing in section 34.⁴⁴³

Section 34 now provides for the resolution of a dispute is a fair public hearing. The European Court of Human Rights has concluded that the right to a fair and public hearing in Article 6(1) of the European Convention of Human Rights includes the right to legal aid and legal assistance in certain circumstances. In *Airey v. Ireland*, the court held that:

“Article 6(1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.”⁴⁴⁴

In the case of *P, C and S v United Kingdom*, the Court held that there is the importance of ensuring the appearance of the fair administration of justice and a party in civil proceedings must be able to participate effectively, *inter alia*, by being able to put forward the matters in support of his or her claims. Here, as in other aspects of Article 6, the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy and fairness of the procedures.⁴⁴⁵

In *Steel and Morris v. the United Kingdom*,⁴⁴⁶ the Court held that the lack of civil legal aid was a violation of Article 6. The case concerned a libel suit by the fast food chain McDonalds against the two applicants claiming compensation for damage caused by a leaflet allegedly written by the applicants, which severely criticised the practices and food of McDonalds. The applicants were refused legal aid and so represented themselves throughout the trial and

⁴⁴¹ Section 35(3)(g) of the Constitution, which guarantees states the right to a fair trial in relation to criminal matters states that Every accused person has a right to a fair trial, which includes the right to have a legal practitioner assigned to the accused person by the State and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

⁴⁴² Section 22 of the Constitution of the Republic of South Africa of 1993 provides that ‘... the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum’.

⁴⁴³ See Budlender G “Access to Courts” (2004) 121 *SALJ* 339-358 at 342.

⁴⁴⁴ *Airey v Ireland* (1979) 2 EHRR 305, para 26.

⁴⁴⁵ *P, C and S v United Kingdom* (2002) 35 EHRR 31 para 91.

⁴⁴⁶ *Steel and Morris v. the United Kingdom*, 15 February 2005.

appeal, with only some help from volunteer lawyers in a trial that lasted for 313 court days (the longest in English legal history). The European Court of Human Rights noted that the case was factually and legally complex; and that in an action of this complexity, neither the sporadic help given by the volunteer lawyers nor the extensive judicial assistance and latitude granted to the applicants as litigants in person, was any substitute for competent and sustained representation by an experienced lawyer familiar with the case and with the law of libel. It stated that the very length of the proceedings was, to a certain extent, a testament to the applicants' lack of skill and experience. The Court also stressed that it was McDonalds that had instituted the proceedings, not the applicants.⁴⁴⁷

It therefore confirms a conclusion that a right to legal aid and legal assistance is foreseen in the right to a fair public hearing in section 34. South African courts have also confirmed this conclusion.⁴⁴⁸

4.7 Provision of effective (enforceable) remedies

The right to fair trial entails the provision of effective or enforceable remedies in case of disputes. In terms of ILO standards, the right to a fair trial further guarantees that any decision has to be legally enforceable.⁴⁴⁹ The United Nations Committee on Economic, Social and Cultural Rights has also called for the availability of appropriate means of redress and accountability for violations of economic, social and cultural rights within national legal systems. It compels states to ensure that legal remedies, whether of a judicial or

⁴⁴⁷ Mole N and Harby C *The right to a fair trial: A guide to the implementation of Article 6 of the European Convention on Human Rights* (Human Rights Handbook No. 3) Council of Europe (2006) 41.

⁴⁴⁸ See for example *Nkuzi Development Association v Government of the Republic of South Africa* (2002 (2) SA 733 (LCC) 737B–D), where the Land Claims Court held that labour tenants and occupiers have a right to legal representation or legal aid at state expense if substantial injustice would otherwise result, and they cannot reasonably afford the cost thereof from their own resources.⁴⁴⁸ This approach makes a compelling case for the provision of free legal assistance to the parties in social security disputes, also in view of their socio-economic status. This approach makes a compelling case for the provision of free legal assistance to the parties in social security disputes, also in view of their socio-economic status (in *Cele v the South African Social Security Agency and 22 related cases* (2009 (5) SA 105 (D) at para 2, Wallis AJ questioned how people so impoverished that they qualify for social assistance grants can afford to pay legal fees).

⁴⁴⁹ ILO *Social security and the rule of law* (General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization)(Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution) Report III (Part 1B)) International Labour Conference, 100th Session, 2011 (2011) para 433.

administrative nature, are available to aggrieved individuals or groups. The remedies must be “accessible, affordable, timely and effective”.⁴⁵⁰

The African Charter also compels states to provide effective remedy. The African Commission on Human and Peoples’ Rights requires that everyone shall have a right to an effective remedy by competent national tribunals for acts violating rights granted in the constitution, by law or by the Charter, notwithstanding that the acts were committed by persons in an official capacity.⁴⁵¹ Member States are compelled to ensure that any remedy granted is enforced by competent authorities; and that any state body against which a judicial order or other remedy has been granted complies fully with such an order or remedy.⁴⁵²

5. CONCLUSIONS AND RECOMMENDATIONS

International instruments lay down standards relating to the establishment of dispute resolution institutions and dispute resolution procedures. Where South Africa is a party to these instruments, it is bound to implement obligations arising from them. Even where South Africa is not bound, constitutional imperatives relating to international law compel it to consider and apply international law. Similarities between the South African Constitution and other international instruments entails that these instruments are authoritative guides in the interpretation and implementation of the right of access to courts. The jurisprudence of institutions charged with the monitoring and enforcement of these international instruments on the scope and nature of this right and of the obligations on state parties is thus relevant for the development of the South African social security adjudication framework.

Therefore, the adjudication system would have to be reformed to take into account developments in international and regional instruments on the adjudication of social security. Adjudication institutions must be empowered to provide dispute resolution that is “accessible, affordable, timely and effective”.

⁴⁵⁰ Committee on Economic, Social and Cultural Rights *General comment No. 9: The domestic application of the Covenant* (19th Session, 1998), UN doc. E/C.12/1998/24, para. 9.

⁴⁵¹ African Commission on Human & Peoples’ Rights *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa* (1999) Section C.

⁴⁵² *Ibid.*

South Africa is not in compliance with most of these international standards. For example, many of the social security dispute resolution institutions/forums that have been established are not independent and impartial (they can effectively be regarded as internal organs of the social security institutions and therefore not independent of these institutions).⁴⁵³ There is also a lack of sequential and complementary reviews and appeals procedures, as most social security statutes fail to make an appropriate distinction between (internal) reviews and (external) appeal procedures.⁴⁵⁴ Social security disputes are not always resolved through expeditious and simple proceedings.⁴⁵⁵ Many social security statutes also do not guarantee representation for parties to a dispute (by a lawyer or another representative) and free legal assistance is lacking.⁴⁵⁶ Furthermore, some statutes do not provide effective (enforceable) remedies (most of the adjudication forums are not afforded the power and mechanisms to enforce their rulings).⁴⁵⁷ However, reasonable time limits for reviews (complaints) and appeals are provided in most statutes.⁴⁵⁸

⁴⁵³ See generally Chapter Six (Current South African social security dispute resolution system).

⁴⁵⁴ See for example the discussion on the resolution of disputes in terms of the Social Assistance Act, COIDA, the Occupational Diseases in Mines and Works Act, etc (see Chapter Six on the Current South African social security dispute resolution system).

⁴⁵⁵ Such as the unreasonably long delay in processing appeals for disability grants and other social grants in terms of the Social Assistance Act. In addition, many social security disputes are decided by the High Court (also in the first instance), which resolves disputes on a purely technical and legalistic basis.

⁴⁵⁶ There is also no legal assistance for social security claimants, since Legal Aid South Board provides services mainly in criminal matters (although it is increasing its assistance in civil cases such as those involving children, women in divorce proceedings, maintenance and domestic violence cases, and unlawful evictions).

⁴⁵⁷ For example, the Occupational Diseases in Mines and Works Act does not regulate whether the decisions of the Reviewing Authority can be enforced and (if so) how they can be enforced.

⁴⁵⁸ Statutes mostly provide 90 days after (notification of) the decision and 180 days in the case of COIDA.

CHAPTER FOUR

DISPUTE RESOLUTION SYSTEMS IN KEY COMPARATIVE SOUTH AFRICAN (NON-SOCIAL SECURITY) JURISDICTIONS

1. INTRODUCTION

This chapter analyses the dispute resolution systems in some key comparative South African (non-social security) jurisdictions. The institutions, mechanisms and procedures in these jurisdictions, established to resolve disputes that may arise, are reviewed to provide a possible benchmark for comparison with the current social security dispute resolution framework. Selected dispute resolution systems investigated are the labour relations system (which consists of the CCMA, the Labour Court and the Labour Appeal Court established by the LRA);⁴⁵⁹ the business competition regulation jurisdiction (which involves the Competition Commission, the Competition Tribunal and the Competition Appeal Court established in terms of the Competition Act);⁴⁶⁰ and the consumer protection jurisdiction (the National Consumer Tribunal is established in terms of the National Credit Act).⁴⁶¹

These institutions and their procedures have been established to realise the constitutional, rights of their respective users (especially the rights of access to justice and to a fair trial). Therefore, it seeks to comply with the constitutional requirements of the right. The right of access to justice in the Constitution requires that dispute resolution institutions must be accessible; that these institutions must be independent and impartial in the execution of their duties; and that disputes must be resolved in a fair and public hearing. These mechanisms and procedures are thus examined to ascertain the effectiveness of these systems in providing access to justice for their users. Such mechanisms and procedures can provide guidelines for the development of a social security dispute resolution system.

⁴⁵⁹ LRA 66 of 1995.

⁴⁶⁰ Competition Act 89 of 1998.

⁴⁶¹ National Credit Act 34 of 2005.

2. LABOUR RELATIONS DISPUTE RESOLUTION SYSTEM

The framework for the resolution of disputes in the labour relations jurisdiction was established by the LRA. One of the objectives of the LRA is to provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration, and through independent alternative dispute resolution services accredited for that purpose.⁴⁶² In order to achieve this purpose, the Act created an integrated and streamlined system consisting of specialist multi-tiered institutions that are accessible and guarantee fair dispute resolution processes that are complementary and seamless. The LRA established the CCMA and enabled other independent alternative dispute resolution services to resolve disputes. The Act also created the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act.⁴⁶³ Appeals from these courts are directed to the Supreme Court of Appeal and then to the Constitutional Court.

The multi-tiered and complementary nature of the labour relations dispute resolution institutions, their status and procedures guarantee their effectiveness in resolving labour disputes. This relates to their accessibility, procedural fairness, the scope of their jurisdiction and powers and their independence and impartiality. It has been remarked that the success of the framework lies in the fact that workplace justice has been made more accessible and less costly for unskilled workers. In the case of the CCMA, its accessibility has been enhanced by the absence of a requirement for formal pleadings and complicated referral procedures. The simplicity of the CCMA processes makes it accessible to a large number of workers (it has ensured that literacy, lack of skills and resources are not hindrances preventing entry to the system).⁴⁶⁴

The new labour relations dispute resolution framework has been able to realise the right of access to justice of users of the system. Therefore, it provides guidelines for the establishment of a framework for the resolution of social security disputes.

⁴⁶² See section 1(d)(iv) of the LRA.

⁴⁶³ Preamble of the LRA.

⁴⁶⁴ Bhorat H, Pauw K and Mncube L *Understanding the Efficiency and Effectiveness of the Dispute Resolution System in South Africa: An Analysis of CCMA Data* DPRU (September 2007) 6.

2.1 CCMA

The CCMA was established to provide simple dispute resolution procedures. In establishing a new dispute resolution system that places a premium on conciliation, mediation and arbitration (and less on litigation, amongst others), the LRA sought to satisfy the need for expeditious, efficient and affordable procedures and easily accessible, specialist, but informal institutions in specified disputes in the labour terrain.⁴⁶⁵ In addition, the dispute resolution processes before the introduction of the LRA in 1995 (mainly through adversarial litigation in the Industrial Court) resulted in only 20 percent of disputes being settled. However, since its inception, the CCMA has enjoyed national dispute settlement rates of up to 70 percent.⁴⁶⁶

2.1.1 Accessibility of the CCMA

The accessibility of the CCMA is facilitated through the location of its premises as well as its dispute lodgement procedures and time periods. The CCMA has offices in all the provinces (with more than one office in some provinces). A Commissioner is required to attempt to resolve a dispute through conciliation within 30 days of the date the Commission receives the referral. However, the parties may agree to extend the 30-day period.⁴⁶⁷

In terms of dispute lodgement procedures and time periods, any party to a dispute about a matter of mutual interest may refer the dispute in writing to the CCMA. The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute.⁴⁶⁸ Where it is required for a dispute to be resolved through arbitration, the CCMA appoints a Commissioner to arbitrate that dispute, if a Commissioner has issued a certificate stating that the dispute remains unresolved; and within 90 days after the date on which the certificate was issued, any party to the dispute has requested that the dispute be resolved through arbitration. However, the CCMA condones a party's non-observance of that timeframe and allow a request for arbitration filed by the party after the expiry of the 90-day period where good cause is shown.⁴⁶⁹

⁴⁶⁵ See van Niekerk *et al Law@Work* (2008) 399. The LRA requires that all labour disputes must be referred to the CCMA for conciliation before referral to the next stage of the dispute resolution process.

⁴⁶⁶ CCMA "About Us" accessed from <http://www.ccma.org.za/> (24 June 2011).

⁴⁶⁷ Section 135(2) of the LRA.

⁴⁶⁸ Section 134(1) and (2) of the LRA.

⁴⁶⁹ Section 136(1) of the Labour Relation Act.

2.1.2 Scope of jurisdiction and powers of the CCMA

The CCMA has a wide scope of jurisdiction and powers, although as a creation of the LRA it can only resolve disputes falling within the purview of the LRA (i.e. disputes between employers and employees).⁴⁷⁰ The LRA states that persons who can bring a case to the CCMA include one or more employees; or one or more trade unions; or one or more trade unions and one or more employees can bring a dispute to the CCMA against one or more employers; one or more employers' organisations; or one or more employers' organisations and one or more employers. The scope of matters that can be brought to the CCMA is also wide, as parties can bring lodge a dispute about *any matter* of mutual interest.⁴⁷¹

The CCMA resolves disputes referred to it in terms of the LRA through conciliation.⁴⁷² Where a dispute is not resolved after conciliation, the CCMA arbitrates the dispute (if it is required by the LRA and a party to the dispute has requested that the dispute be resolved through arbitration).⁴⁷³ The CCMA also arbitrates disputes where all the parties to a dispute in respect of which the Labour Court has jurisdiction consent to arbitration by the CCMA.⁴⁷⁴

In attempting to resolve a dispute, a Commissioner can subpoena, for questioning, any person who may be able to give information or whose presence at the conciliation or arbitration proceedings may help to resolve the dispute; subpoena any person who is believed to have possession or control of any book, document or object relevant to the resolution of the dispute, to appear before the Commissioner to be questioned or to produce that book, document or object; call, and if necessary subpoena, any expert to appear before the Commissioner to give evidence relevant to the resolution of the dispute; call any person present at the conciliation or arbitration proceedings or who was or could have been subpoenaed for any purpose set out in this section, to be questioned about any matter relevant to the dispute; administer an oath or accept an affirmation from any person called to give evidence or be questioned; at any reasonable time, but only after obtaining the necessary written authorisation enter and inspect any premises on or in which any book, document or

⁴⁷⁰ *Sapekoe Tea Estates (Pty) Ltd v Commissioner Maake & others* (2002) 23 ILJ 1603 (LC). See also Bosch C "Jurisdictional issues at the CCMA" presentation made at the 22nd Annual Labour Conference on New Challenges: Shifting Power in Uncertain Times on 12-14 August 2009.

⁴⁷¹ Section 134(1) of the Labour Relation Act (emphasis added).

⁴⁷² Sections 115(1(a) and 133(1) of the LRA.

⁴⁷³ See *Hlope v The Minister of Safety & Security* 2006 BLLR 297 (LC).

⁴⁷⁴ Sections 115(1 (b) and 133(2) of the LRA.

object, relevant to the resolution of the dispute is to be found or is suspected on reasonable grounds of being found there; and examine, demand the production of, and seize any book, document or object that is on or in those premises and that is relevant to the resolution of the dispute; and take a statement in respect of any matter relevant to the resolution of the dispute from any person on the premises who is willing to make a statement; and inspect, and retain for a reasonable period, any of the books, documents or objects that have been produced to, or seized by, the CCMA.⁴⁷⁵

An arbitration award issued by a Commissioner is final and binding and it may be enforced as if it were an order of the Labour Court, unless it is an advisory arbitration award.⁴⁷⁶ If a party fails to comply with an arbitration award that orders the performance of an act, other than the payment of an amount of money, any other party to the award may enforce it by way of contempt proceedings instituted in the Labour Court.⁴⁷⁷

The Commissioner can make any appropriate arbitration award in terms of the LRA, including, but not limited to, an award which gives effect to any collective agreement, which gives effect to the provisions and primary objects of the Act and which includes, or is in the form of a declaratory order.⁴⁷⁸ The Commissioner can make an order for the payment of costs according to the requirements of law and fairness.⁴⁷⁹

The CCMA can make any settlement agreement in respect of any dispute that has been referred to it to be an arbitration award (if agreed to between the parties or on application by a party).⁴⁸⁰ Commissioners can also include an order of costs in the arbitration award if a person or representative conducted the case in a manner which lacked seriousness or proceeded with or defended the dispute in arbitration without sufficient grounds for action just to annoy the other party.⁴⁸¹

⁴⁷⁵ Section 142 of the LRA.

⁴⁷⁶ Section 143(1) of the LRA. An arbitration award may only be enforced if the Director has certified that the arbitration award is not an advisory award - section 143(3) of the LRA

⁴⁷⁷ Section 143(4) of the LRA.

⁴⁷⁸ Section 138(9) of the LRA.

⁴⁷⁹ Section 138(10) of the LRA.

⁴⁸⁰ Section 142A of the LRA.

⁴⁸¹ See CCMA Fees and costs accessed at <http://www.ccma.org.za/Display.asp?L1=32&L2=17> on 8 May 2011.

2.1.3 Fairness of CCMA procedures

CCMA procedures promote the resolution of disputes quickly and fairly. It attempts to resolve any dispute referred to it in terms of the LRA through conciliation.⁴⁸² A Commissioner is appointed, who then attempts to resolve the dispute through conciliation within 30 days of the date the CCMA received the referral. However, the parties can agree to extend the 30-day period.⁴⁸³ The Commissioner determines the process to attempt to resolve the dispute, which includes mediating the dispute, conducting a fact-finding exercise and making a recommendation to the parties, which can be in the form of an advisory arbitration award. Legal representation is not allowed in conciliation proceedings, which means the procedure is simple.⁴⁸⁴

Where conciliation fails or after the 30-day period (or any further period agreed between the parties) the Commissioner issues a certificate stating whether or not the dispute has been resolved. The CCMA serves a copy of the certificate to each party to the dispute and the Commissioner files the original of the certificate with the CCMA.⁴⁸⁵

Where a dispute referred to the CCMA is not resolved after conciliation, the CCMA arbitrates the dispute if it is required by the LRA and any party to the dispute has requested that the dispute be resolved through arbitration, or all the parties to a dispute in respect of which the Labour Court has jurisdiction consent to arbitration by the CCMA.⁴⁸⁶

Where it is required for a dispute to be resolved through arbitration, the CCMA appoints a Commissioner to arbitrate the dispute if a Commissioner has issued a certificate stating that the dispute remains unresolved; and within 90 days after the date on which the certificate was issued, any party to the dispute has requested that the dispute be resolved through arbitration. However, the CCMA may condone a party's non-observance of that timeframe and allow a request for arbitration filed by the party after the expiry of the 90-day period if good cause is shown.⁴⁸⁷

⁴⁸² Sections 115(1(a) and 133(1) of the LRA

⁴⁸³ Section 135 of the LRA.

⁴⁸⁴ See Rule 25 (1) of the rules of conduct of Proceedings before the CCMA.

⁴⁸⁵ Section 135(5) of the LRA.

⁴⁸⁶ Sections 115(1(b) and 133(2) of the LRA.

⁴⁸⁷ Section 136(1) of the LRA.

The Commissioner who attempted to resolve the dispute through conciliation can also be appointed for arbitration (although a party may object to his/her appointment.⁴⁸⁸ The Commissioner conducts the arbitration in a manner he/she considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.⁴⁸⁹

If permitted by the Commissioner, a party to the dispute can give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments.⁴⁹⁰ If all the parties consent, the Commissioner may suspend the arbitration proceedings and attempt to resolve the dispute through conciliation.⁴⁹¹ A party to the dispute may appear in person or be represented only by a legal practitioner; a Director or employee of the party; or any member, office bearer or official of that party's registered trade union or registered employers' organisation.⁴⁹²

If a party to the dispute fails to appear in person or to be represented at the arbitration proceedings, and the party had referred the dispute to the CCMA, the Commissioner may dismiss the matter. If the party that fails to appear in person or to be represented at the arbitration proceedings had not referred the dispute, the Commissioner may continue with the arbitration proceedings in the absence of that party or adjourn the arbitration proceedings to a later date.⁴⁹³ The Commissioner issues a signed arbitration award with brief reasons within 14 days of the conclusion of the arbitration proceedings.⁴⁹⁴

When a dispute has been referred to the CCMA, the appointed Commissioner determines a process to attempt to resolve the dispute, which may include mediating the dispute, conducting a fact-finding exercise and making a recommendation to the parties, which may be in the form of an advisory arbitration award.⁴⁹⁵

⁴⁸⁸ Section 136(2) & (3) of the LRA.

⁴⁸⁹ Section 138(1) of the LRA.

⁴⁹⁰ Section 138(2) of the LRA.

⁴⁹¹ Section 138(3) of the LRA.

⁴⁹² Section 138(4) of the LRA.

⁴⁹³ Section 138(5) of the LRA.

⁴⁹⁴ Section 138(7) of the LRA.

⁴⁹⁵ Section 135(3) of the LRA.

In relation to disputes about dismissals based on operational requirements by employers with more than 50 employees, the CCMA is required to appoint a facilitator to assist the parties engaged in consultations if the employer has requested facilitation; or consulting parties representing the majority of employees whom the employer contemplates dismissing have requested facilitation and have notified the Commission within 15 days of the notice.⁴⁹⁶

In relation to individual unfair labour practices and unfair dismissals, the LRA permits the implementation of a process known as “con-arb” (conciliation-arbitration). Con-arb is a speedier one-stop process of conciliation and arbitration which allows for conciliation and arbitration to take place as a continuous process on the same day, if required.⁴⁹⁷

There is also a preference by the CCMA for the private resolution of disputes (a dispute cannot be referred to the CCMA where a private agreement exists for resolving the dispute, such as through private arbitration).⁴⁹⁸

The LRA states that any Commissioner who has issued an arbitration award or ruling or any other Commissioner appointed by the Director for that purpose, may on that Commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling erroneously sought or erroneously made in the absence of any party affected by that award; an arbitration award in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or an arbitration award granted as a result of a mistake common to the parties to the proceedings.⁴⁹⁹

The CCMA serves a copy of that award on each party to the dispute or the person who represented a party in the arbitration proceedings within 14 days of the conclusion of the arbitration proceedings and the CCMA files the original of that award with the registrar of the Labour Court.⁵⁰⁰ The Director may extend the period within which the arbitration award and the reasons are to be served and filed if good cause is shown.⁵⁰¹

⁴⁹⁶ Section 189A(3) of the LRA.

⁴⁹⁷ Section 191 of the LRA.

⁴⁹⁸ See CCMA *Referring a dispute* accessed at <http://www.ccma.org.za/Display.asp?L1=32&L2=9> on 8th May 2011.

⁴⁹⁹ Section 144 of the LRA.

⁵⁰⁰ Section 138(7) of the LRA.

⁵⁰¹ Section 138(8) of the LRA.

2.1.4 Independence and impartiality of the CCMA

The CCMA was established as an institution that is independent of the State, any political party, trade union, employer, employers' organisation, federation of trade unions or federation of employers' organisations.⁵⁰² The CCMA's independence and impartiality is promoted through the appointment and conditions of service of members;⁵⁰³ its funding;⁵⁰⁴ human resource and administrative support;⁵⁰⁵ managerial framework;⁵⁰⁶ governance,

⁵⁰² Section 113 of the LRA.

⁵⁰³ The CCMA is governed by a Governing Body - section 116(1) of the LRA. The Governing Body consists of a chairperson and nine other members, each nominated by NEDLAC and appointed by the Minister; and the Director of the CCMA (who has non-voting power). The chairperson, who is an independent person, is nominated by NEDLAC; three members of the Governing Body are nominated by NEDLAC to represent organised labour; three members of the Governing Body are nominated by NEDLAC to represent organised business; and three members of the Governing Body are nominated by NEDLAC to represent the State. The Members of the Governing Body are appointed for a period of three years - section 116(2) of the LRA.

The Governing Body appoints the Director of the CCMA. The Director is a person who is skilled and experienced in labour relations and dispute resolution; and has not been convicted of any offence involving dishonesty - section 118(1) of the LRA.

The Director is required to perform the functions that are conferred on him/her by or in terms of the LRA or by any other law; to perform functions that delegated to the Director by the Governing Body; manage and direct the activities of the Commission; and supervise the Commission's staff - section 118(2) of the LRA.

The Governing Body determines the Director's remuneration, allowances and any other terms and conditions of appointment not contained in Schedule 3 of the LRA - section 118(3) of the LRA. A person appointed as the Director of the CCMA automatically holds the office of a Senior Commissioner. However, only the requirement that the Governing Body must prepare a code of conduct for the Commissioners and ensure that they comply with the code of conduct in performing their functions in section 117 applies to the Director) - section 118(4) of the LRA. The Director, in consultation with the Governing Body, may delegate any of the functions of his or her office to a Commissioner, except the functions mentioned in sections 120 and 138(8) - section 118(6) of the LRA.

The Governing Body appoints as Commissioners as many adequately qualified persons as it considers necessary to perform the functions of Commissioners by or in terms of the LRA or any other law - section 117(1) of the LRA. The Governing Body appoints each Commissioner on either a full-time or a part-time basis; and to be either a Commissioner or a Senior Commissioner. The Governing Body appoints each Commissioner for a fixed term determined by it at the time of appointment. The Governing Body may appoint a Commissioner, who is not a Senior Commissioner, for a probationary period. When making appointments, the Governing Body must have due regard to the need to constitute a Commission that is independent and competent and representative in respect of race and gender - section 117(2) of the LRA. The Governing Body determines the Commissioners' remuneration, allowances and any other terms and conditions of appointment not contained in the LRA - section 117(4) of the LRA.

The Governing Body is required to prepare a code of conduct for Commissioners and ensure that they comply with the code of conduct in performing their functions - section 117(6) of the LRA. A Commissioner may resign by giving written notice to the governing body - section 117(5) of the LRA. The Governing Body may remove a Commissioner from office for serious misconduct; incapacity; or a material violation of the Commission's code of conduct - section 117(7) of the LRA. See also *Maepe v Commission for Conciliation, Mediation and Arbitration and Another* (2008) 29 ILJ 2189 (LAC).

⁵⁰⁴ The CCMA is funded through moneys that the Minister of Labour (with the agreement of the Minister of Finance) allocates from public funds; moneys that Parliament appropriate to it; fees payable to the CCMA; grants, donations and bequests made to it; and income earned on the surplus moneys deposited or invested - section 122 of the LRA.

⁵⁰⁵ The CCMA is composed of a Governing Body, the Director and Commissioners - sections 117,118 and 119 of the LRA. In addition, the Director appoints staff of the CCMA after consulting the Governing Body. The Governing Body determines the remuneration and allowances and any other terms and conditions of appointment of staff members - section 120 of the LRA.

oversight and supervision;⁵⁰⁷ and accountability and reporting.⁵⁰⁸ These attributes are to enable the CCMA to effectively undertake its objectives; and to eliminate any undue influence in its activities so that it can function independently and impartially.

2.2 The Labour Court

The Labour Court is a court of law and equity. It is a superior court of record that has authority, inherent powers and standing, in relation to the matters under its jurisdiction (such as labour matters) equal to that which a High Court has in relation to the matters under its jurisdiction. It is also a court of record.⁵⁰⁹

2.2.1 Accessibility of the Labour Court

The Labour Court is accessible to any party that intends to apply to the court. Labour Courts are currently situated in Cape Town, Durban, Johannesburg and Port Elizabeth. However, sessions of the Labour Court can be held in other locations if there are available judges (in which case the court sits as a circuit court).⁵¹⁰

In addition, Labour Court dispute lodgement procedures and time periods promote access to the court. Generally, referral of a dispute to the Labour Court must be made within 90 days after the CCMA certifies that the dispute remains unresolved. However, the Labour Court may condone non-observance of that timeframe where good cause is shown.⁵¹¹ An application to the Labour Court for the review of a CCMA arbitration award must be made

⁵⁰⁶ The CCMA is headed by the Director who manages and directs its activities; and supervises the staff – section 118(2) of the LRA.

⁵⁰⁷ Governance, oversight and supervision of the CCMA are undertaken by a Governing Body as the supreme policy-making body responsible for policy-making of the CCMA - section 116 of the LRA.

⁵⁰⁸ The CCMA is listed in Schedule 3A of the Public Finance Management Act (PFMA) 1 of 1999 as a national public entity. This implies autonomous financial accountability of the CCMA. Financial accountability and reporting for the CCMA is undertaken by the Director. In each financial year, the CCMA is required to submit to the Minister a statement of the Commission's estimated income and expenditure, and requested appropriation from Parliament, for the following financial year – section 122(3) of the LRA. In addition, the CCMA is required to provide the Minister of Labour with a report concerning its activities and the financial position during the previous financial year. The Minister tables the annual report in Parliament within 14 days of receiving it from the CCMA. However, if Parliament is not in session at that time, the Minister tables the report within 14 days of the beginning of the next session of Parliament - Item 9(1) and (2) of Schedule 4 of the LRA.

⁵⁰⁹ Section 151 of the LRA.

⁵¹⁰ Section 152 of the LRA.

⁵¹¹ Section 191(11) of the LRA and Rule 12(3) of the Rules of the Labour Court.

within 6 weeks of the award.⁵¹² The Court may also condone the late filing of an application for review where good cause is shown for such late filing.⁵¹³

In the case of dismissals based on operational requirements by employers with more than 50 employees, if an employer does not comply with a fair procedure a consulting party may approach the Labour Court by way of an application for an order. Such an application must be brought not later than 30 days after the employer has given notice to terminate the employee's services or, if notice is not given, the date on which the employees are dismissed. The Labour Court may, on good cause shown, condone a failure to comply with the time limit for making an application.⁵¹⁴

In disputes about unfair dismissals and unfair labour practices, the employee may refer the dispute to the Labour Court for adjudication. This is the case where the employee alleges that the reason for the dismissal is automatically unfair; is based on the employer's operational requirements; is based on the employee's participation in a strike that does not comply with the provisions of Chapter IV; or is because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed shop agreement.⁵¹⁵

2.2.2 Scope of jurisdiction and powers of the Labour Court

In disputes about a matter of mutual interest, one or more trade unions; one or more employees; or one or more trade unions and one or more employees can bring a case against one or more employers' organisations; one or more employers; or one or more employers' organisations and one or more employers (and vice versa).⁵¹⁶

The Labour Court has exclusive jurisdiction in respect of all matters that are provided in the LRA (except where the LRA provides otherwise) and in matters provided in other laws to be determined by the Labour Court (such as in sections 41 and 66 of the Unemployment Insurance Act).⁵¹⁷

⁵¹² Section 145(1) of the LRA.

⁵¹³ Section 145(1A) of the LRA

⁵¹⁴ Section 189A(17) of the LRA.

⁵¹⁵ Section 191(5)(b) of the LRA.

⁵¹⁶ Section 134 of the LRA.

⁵¹⁷ Section 157(1) of the LRA.

The Labour Court also determines disputes between a registered trade union or registered employers' organisation, and any one of the members or applicants for membership thereof, about any alleged non-compliance with the constitution of that trade union or employers' organisation (as the case may be).⁵¹⁸

It reviews the performance or purported performance of any function provided for in the LRA on any grounds that are permissible in law (subject to section 145 of the Act).⁵¹⁹ It also reviews any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law.⁵²⁰ The Court hears and determines appeals in terms of section 35 of the Occupational Health and Safety Act;⁵²¹ and undertakes arbitration of disputes referred to it at any stage that it becomes apparent that the dispute ought to have been referred to arbitration.⁵²²

The Labour Court has concurrent jurisdiction with the High Court on the violation of constitutional rights in the area of employment and labour relations; in disputes on the constitutionality of acts or conduct of the State as employer; and in the application of laws administered by the Minister of Labour.⁵²³ This implies that as a rule, in a labour matter with constitutional implications, a party should approach the Labour Court.⁵²⁴ The Labour Court has jurisdiction in all the provinces of the Republic.⁵²⁵

The Labour Court has wide powers in order to carry out its functions. The Labour Court is empowered to make any appropriate order, including the grant of urgent interim relief; an interdict; an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of the LRA; a declaratory order; an award of compensation in any circumstances contemplated in the LRA;

⁵¹⁸ Section 158(1)(e) of the LRA.

⁵¹⁹ Section 158(1)(g) of the LRA. See also *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC).

⁵²⁰ Section 158(1)(h) of the LRA.

⁵²¹ Occupational Health and Safety Act 85 of 1993. See section 158(1)(i) of the LRA.

⁵²² Section 158(2) of the LRA.

⁵²³ Section 157(2) of the LRA.

⁵²⁴ See *Chirwa v Transnet Limited and Others* (2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC)) and the *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC); (2010) 31 ILJ 296 (CC); [2009] 12 BLLR 1145 (CC).

⁵²⁵ Section 156(1) of the LRA.

an award of damages in any circumstances contemplated in the LRA; and an order for costs.⁵²⁶

It can also order compliance with any provision of the LRA; make any arbitration award or any settlement agreement an order of the Court; request the CCMA to conduct an investigation to assist the Court and to submit a report to the Court; determine a dispute between a registered trade union or registered employers' organisation, and any one of the members or applicants for membership thereof, about any alleged non-compliance with the constitution of that trade union or employers' organisation (as the case may be); condone the late filing of any document with, or the late referral of any dispute to, the Court; review the performance or purported performance of any function provided for in the LRA on any grounds that are permissible in law; review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law; hear and determine any appeal in terms of section 35 of the Occupational Health and Safety Act; and deal with all matters necessary or incidental to performing its functions in terms of the LRA or any other law.⁵²⁷

The Labour Court, acting of its own accord or on the application of any affected party may vary or rescind a decision, judgment or order that was erroneously sought or was erroneously granted in the absence of any party affected by that judgment or order. It can also do this in the case where there is an ambiguity, or an obvious error or omission. However, this will be only to the extent of that ambiguity, error or omission; or granted as a result of a mistake common to the parties to the proceedings.⁵²⁸

The jurisdiction and powers of the Labour Court also enable it to provide a wide array of remedies. The Court can provide any appropriate order, including the grant of urgent interim relief; an interdict; an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of the LRA; a declaratory order; an award of compensation in any circumstances contemplated in the LRA; an award of damages in any circumstances contemplated in the LRA; and an order for costs; a compliance order; and making an arbitration award or any settlement agreement an order of

⁵²⁶ Section 158(1) of the LRA.

⁵²⁷ Section 158 of the LRA.

⁵²⁸ Section 165 of the LRA.

the Court.⁵²⁹ Any decision, judgment or order of the Labour Court may be served and executed as if it were a decision, judgment or order of the High Court.⁵³⁰ As a result, it is in a position to provide appropriate redress and give effect to the rights of parties to labour relations disputes.

2.2.3 Fairness of Labour Court procedures

A hearing of the Labour Court is constituted before a single judge.⁵³¹ In any proceedings before the Labour Court, a party may appear in person or be represented by a legal practitioner; a Director or employee of the party; any member, office-bearer or official of that party's registered trade union or registered employers/ organisation; a designated agent or official of a council; or an official of the Department of Labour.⁵³²

The Labour Court resolves disputes on the basis of law and fairness. For example, the LRA states that the Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.⁵³³

Where the Labour Court is of the opinion that a dispute that has been referred to it ought to have been referred to arbitration, the Court may stay the proceedings and refer the dispute to arbitration; or, with the consent of the parties and if it is expedient to do so, continue with the proceedings with the Court sitting as an arbitrator. In this case, the Court may only make any order that a Commissioner or Arbitrator would have been entitled to make.⁵³⁴

Generally speaking, where the parties to a dispute agree to the resolution of the dispute through private arbitration, the Labour Court (and CCMA) gives preference to the resolution of the dispute through private arbitration. The LRA states that if the CCMA is of the opinion that the dispute ought to have been resolved through private dispute resolution in terms of a private agreement between the parties to the dispute, the Commission may refer the dispute to the appropriate person or body for resolution through private dispute resolution procedures.⁵³⁵

⁵²⁹ Section 158 of the LRA.

⁵³⁰ Section 163 of the LRA.

⁵³¹ Section 152(2) of the LRA.

⁵³² Section 161 of the LRA.

⁵³³ Section 162(1) of the LRA.

⁵³⁴ Section 158(2)(b) of the LRA.

⁵³⁵ Section 147(6)(a) of the LRA.

2.2.4 Expertise, independence and impartiality of the Labour Court

The institutional framework, status and composition of the Labour Court have been designed to comply with the constitutional requirement for the independence of courts. The Labour Court consists of a Judge President, a Deputy Judge President, as many judges as the President deems necessary (on the advice of NEDLAC and in consultation with the Minister of Justice and the Judge President of the Labour Court).⁵³⁶

The President (of the Republic) appoints the Judge President and Deputy Judge President of the Court on the advice of NEDLAC and the Judicial Service Commission and after consultation with the Minister of Justice. The Judge President is also consulted in the appointment of the Deputy Judge President.⁵³⁷ The President also appoints (acting) judges of the Labour Court on the advice of NEDLAC and the Judicial Service Commission and after consultation with the Minister of Justice and the Judge President.⁵³⁸

The Judge President and the Deputy Judge President must be judges of the High Court and they must have knowledge, experience and expertise in labour law.⁵³⁹ A judge of the Labour Court must also be a judge of the High Court, or a person who is a legal practitioner, and must have knowledge, experience and expertise in labour law.⁵⁴⁰

The appointment of judges and the operational arrangements of the Labour Court are geared towards empowering the Court to carry out its duties efficiently, independently and impartially. These relate to the conditions of appointment;⁵⁴¹ discipline and termination of service of judges;⁵⁴² funding of the Court;⁵⁴³ its human resource and administrative support

⁵³⁶ Section 152(1) of the LRA.

⁵³⁷ Section 153 of the LRA.

⁵³⁸ Section 153(4) of the LRA.

⁵³⁹ Section 153(2) of the LRA.

⁵⁴⁰ Section 153(6) of the LRA.

⁵⁴¹ A judge of the Labour Court is appointed for a period determined by the President at the time of appointment – section 154(1) of the LRA. The remuneration as well as terms and conditions of appointment of a judge of the Labour Court are the same as that of a judge of the High Court - section 154(5)(a) and (b) of the LRA.

⁵⁴² A judge of the Labour Court may resign by giving written in the office to the President - section 154(2) of the LRA. A judge of the Labour Court who is also a judge of the High Court is removed from the office of judge of the Labour Court only if that person has first been removed from the office of a judge of the High Court. When he or she is removed as judge of the High Court must be removed from office as a judge of the Labour Court - section 154(7)(a) of the LRA. The President may remove any other judge of the Labour Court from office for misbehaviour or incapacity on the advice of NEDLAC, and in consultation with the Minister of Justice and the Judge President of the Labour Court - section 154(7)(b) of the LRA.

arrangements;⁵⁴⁴ governance, oversight and supervision of the Court;⁵⁴⁵ and accountability and reporting of the Court.⁵⁴⁶

3. COMPETITION REGULATION DISPUTE RESOLUTION SYSTEM

The competition regulation dispute resolution system, as is the case with any other dispute resolution system, is required to comply with the constitutional framework (including the right of access to justice). The Competition Act established the Competition Commission, the Competition Tribunal and the Competition Appeal Court as independent bodies for the achievement of the objectives of the Act, which include the resolution of disputes.⁵⁴⁷ The system that has been established is made up of accessible and independent, specialist, multi-tiered institutions with appropriate jurisdiction and powers, as well as fair, sequential and complementary procedures.

A judge of the Labour Court who is also a judge of the High Court holds office until the judge's period of office in the Labour Court ends; the judge resigns; the judge is removed from office; the judge ceases to be a judge of the High Court; or the judge dies - Section 154(3)(a) of the LRA. Any other judge of the Labour Court holds office until the judge's period of office ends; the judge's resignation takes effect; the judge is removed from office; or the judge dies - Section 154(3)(b) of the LRA.

Judges are also subject to professional and judicial discipline. Professional and judicial discipline of a judge is undertaken by the (Judicial Conduct Committee and Judicial Conduct Tribunal of the) Judicial Services Commission - see Chapters 2 and 3 of the Judicial Service Commission Act 9 of 1994. A judge or magistrate is also subject to the discipline of another judge or other judges of a higher court. A judge of a higher court supervises the manner in which a judge of a lower court discharges his or her functions - see *S and Others v van Rooyen & Others* 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) para 24. This implies that the Labour Court is supervised by the Labour Appeal Court and higher courts.

⁵⁴³ The administration of the Court is undertaken by the Department of Justice in terms of the national budget - See Department of Justice and Constitutional Development *Annual Report 2009/2010*. However, the Office of the Chief Justice has been established (through a Proclamation by the President in terms of the Public Service Act (Proclamation No 103 of 1994) in anticipation of the enactment of the Superior Courts Act. The Superior Courts Bill [B 7 2011] proposes the creation of this Office, comprising an Executive Director appointed by the Minister with the concurrence of the Chief Justice. This is a transition to the establishment of a separate court administration for the judiciary as a separate branch of government. The court administration will be responsible for the administration of all courts - section 12 of the Superior Courts Bill.

In terms of section 15 of the Superior Courts Bill, the budget of the courts will be determined by the Chief Justice in consultation with the heads of courts. The Minister is entrusted with the responsibility of processing the budget requests through the normal budgetary channels and processes prescribed by the PFMA. The Director-General is charged with the responsibility of accounting for the budget of the courts.

⁵⁴⁴ In addition to the Judge President, Deputy Judge President(s), and Judges of the Court, the Minister of Justice appoints the Registrar, Deputy Registrar(s) and officers to undertake administrative duties, subject to the laws governing the public service - section 155(1) and (2) of the LRA.

⁵⁴⁵ Governance, oversight and supervision of the Court are undertaken by the Judicial Services Commission established in terms of section 178 of the Constitution.

⁵⁴⁶ Financial (and other) administration of the Labour Court and all other courts is undertaken by the Department of Justice and Constitutional Development. As a result, financial accountability for purposes of the Public Finance Management Act is done by the Director-General of Justice and Constitutional Development as the accounting officer - see Department of Justice and Constitutional Development *Annual Report 2009/2010*. Accountability and reporting of the Court is to the Judicial Services Commission established in terms of section 178 of the Constitution.

⁵⁴⁷ Introduction to the Competition Act.

The Competition Commission is the investigation and enforcement agency. It investigates and makes decisions on intermediate mergers.⁵⁴⁸ The Commission makes a recommendation to the Tribunal after conducting an investigation. A party that is unhappy with a decision of the Competition Commission can appeal to the Competition Tribunal or apply for a review of the decision.⁵⁴⁹ The Competition Tribunal is the adjudicative body under the Competition Act. The Competition Appeal Court considers appeals against decisions of the Tribunal.⁵⁵⁰ Further rights of appeal are to the Supreme Court of Appeal and the Constitutional Court.

3.1 Competition Tribunal

3.1.1 Accessibility of the Competition Tribunal

The Competition Tribunal has a national office in Pretoria, which implies appeals and review applications must be forwarded to this single office. However, access to Tribunal is facilitated through its dispute lodgement procedures and time periods. In terms the Act, the Competition Commissioner can initiate a complaint against an alleged prohibited practice. A person can also submit information concerning an alleged prohibited practice to the Competition Commission in any manner or form; or in the prescribed form.⁵⁵¹

A dispute can be referred to the Tribunal through a Complaint Referral filed by the Competition Commission or by a complainant in the prescribed form (Form CT 1(1) and

⁵⁴⁸ Section 13B of the Competition Act. Three categories of mergers are regulated by the Competition Act (large mergers, intermediate mergers and small mergers). Large mergers are mergers where the combined annual turnover in, into or from South Africa of the acquiring firm/s and the target firm/s are valued at R6.6 billion or more; or the combined assets in South Africa of the acquiring firm/s and the target firm/s are valued at R6.6 billion or more; or the annual turnover in, into or from South Africa of the acquiring firm/s plus the assets in South Africa of the target firm/s are valued at R6.6 billion or more; or the annual turnover in, into or from South Africa of the target firm/s plus the asset/s in South Africa of the acquiring firm/s are valued at R6.6 billion or more. In addition, the annual turnover in, into or from South Africa or the asset value of the target firm/s must be R190 million or more.

Intermediate mergers are mergers where the combined annual turnover in, into or from South Africa of the acquiring firm/s and the target firm/s are valued at R560 million or more; or the combined assets in South Africa of the acquiring firm/s and the target firm/s are valued at R560 million or more; or the annual turnover in, into or from South Africa of the acquiring firm/s plus the assets in South Africa of the target firm/s are valued at R560 million or more; or the annual turnover in, into or from South Africa of the target firm/s plus the asset/s in South Africa of the acquiring firm/s are valued at R560 million or more. In addition, the annual turnover in, into or from South Africa or the asset value of the target firm/s must be R80 million or more.

Small mergers are those that fall below the thresholds for intermediate and large mergers.

⁵⁴⁹ Section 27(1)(c) of the Competition Act.

⁵⁵⁰ Section 37 of the Competition Act.

⁵⁵¹ Section 49B(1) and (2) of the Competition Act.

Form CT 1(2) respectively.⁵⁵² Complaints can be delivered by hand, by mail, or communicated by telephone, fax or email.⁵⁵³

A complaint against a prohibited practice can be made up to three years after the practice was stopped.⁵⁵⁴ However, a complaint cannot be made to the Competition Tribunal against a firm that has been a respondent in proceedings completed by the Tribunal in terms the same or another section of the Competition Act, which relates substantially to the same conduct.

After a complaint is submitted to the Commission, the Commissioner must refer the complaint to the Competition Tribunal within one year if he or she determines that a prohibited practice has been established. If the Competition Commission does not refer the complaint, it must issue a notice of non-referral to the complainant in the prescribed form within the one year period.⁵⁵⁵ However, the Competition Commission and the complainant may agree to extend the one-year period. The Competition Tribunal can also extend that period on application by the Competition Commission made before the end of the one-year period.⁵⁵⁶

Where a complainant files a complaint, it must be done within 20 business days after the Commission has issued, or is deemed to have issued a Notice of non-referral to that complainant.⁵⁵⁷ However, the Competition Tribunal can condone any non-compliance of its rules or a prescribed time limit if good cause is shown.⁵⁵⁸

The Competition Act also promotes access to justice by promoting the quick resolution of disputes. Although the Act does not specify a timeframe for the review of the Competition Commission's decisions, it requires the Competition Tribunal to conduct its hearings as expeditiously as possible.⁵⁵⁹

⁵⁵² Rule 14 of the Rules for the Conduct of Proceedings in the Competition Tribunal.

⁵⁵³ Rule 4 of the Rules for the Conduct of Proceedings in the Competition Tribunal.

⁵⁵⁴ Section 67(1) of the Competition Act.

⁵⁵⁵ Section 50(2) of the Competition Act.

⁵⁵⁶ Section 50(4) of the Competition Act.

⁵⁵⁷ Rule 16 of the Rules for the Conduct of Proceedings in the Competition Tribunal (Published in GN No. 22025 in GG 428 on 1 February 2001).

⁵⁵⁸ Section 58(1)(c) of the Competition Act.

⁵⁵⁹ Section 52(2)(a) of the Competition Act.

3.1.2 Scope of jurisdiction and powers of the Competition Tribunal

The Competition Tribunal has jurisdiction throughout South Africa in the adjudication of competition matters.⁵⁶⁰ The Tribunal adjudicates on any conduct prohibited and adjudicates on any other matter that may be considered by it in terms of the Competition Act (such as making a decision on large mergers on the recommendation of the Competition Commission). It also hears appeals from, or reviews decisions of, the Competition Commission that are referred to it in terms of the Act.⁵⁶¹

Furthermore, the Tribunal has a wide personal scope of jurisdiction. A complainant can be referred by the Competition Commission.⁵⁶² At any time after initiating a complaint, the Competition Commission may refer the complaint to the Competition Tribunal.⁵⁶³ When a complaint is submitted to the Commission, the Commissioner refers the complaint to the Competition Tribunal, if it determines that a prohibited practice has been established. In any other case, the Commission issues a notice of non-referral to the complainant.⁵⁶⁴ The Competition Commission may refer all the particulars of the complaint, as submitted by the complainant, to the Tribunal or refer only some of the particulars of the complaint. Where it refers only some of the particulars, it must issue a notice of non-referral on any particulars of the complaint not referred to the Competition Tribunal.⁵⁶⁵ If the Competition Commission has not referred a complaint to the Competition Tribunal nor issued a notice of non-referral within the prescribed time (or within the extended period), it is considered that the Commission has issued a notice of non-referral on the expiry of the relevant period.⁵⁶⁶

A private individual or an entity can then refer a complaint directly to the Competition Tribunal, in terms of its rules of procedure (where he or she or it has been issued or is deemed to have been issued with a Notice of Non-referral by the Competition Commission). Where the Competition Commission issues a notice of non-referral in response to a complaint, the complainant may refer the complaint. A private individual or an entity can also approach the

⁵⁶⁰ Section 26(1)(a) of the Competition Act.

⁵⁶¹ Section 27(1) of the Competition Act.

⁵⁶² Section 50(1) or 50(2)(a) of the Competition Act.

⁵⁶³ Section 50(1) of the Competition Act.

⁵⁶⁴ Section 50(2) of the Competition Act.

⁵⁶⁵ Section 50(3) of the Competition Act.

⁵⁶⁶ Section 50(5) of the Competition Act.

Tribunal for interim relief in prohibited practice cases.⁵⁶⁷ A party to an action in a civil court that has been referred to the Tribunal could also be a complainant.⁵⁶⁸

The wide scope of jurisdiction implies that the Tribunal is able to provide access to justice in competition matters to every person and entity in South Africa. However, such a wide scope is limited to matters within its jurisdiction. As the Competition Appeal Court has held, the Competition Tribunal is an administrative tribunal which can exercise jurisdiction only to the extent permitted by the Competition Act.⁵⁶⁹ The Tribunal's jurisdiction is, therefore, confined to a consideration of the complaint as referred. The terms of the complaint to be decided by the Tribunal are also constrained by the terms of the complaint initiated by the Competition Commissioner or made by some other person or entity. Accordingly, if the original ground for the complaint is that there was a prohibited agreement,⁵⁷⁰ the Tribunal cannot determine it on the basis that there was a concerted practice⁵⁷¹ or vice versa.⁵⁷²

The Competition Tribunal also has considerable powers in undertaking its duties. The Competition Commission conducts investigations on large mergers and makes a recommendation to the Tribunal for decision.⁵⁷³ It also investigates and refers prohibited practices to the Tribunal for prosecution when it determines them.⁵⁷⁴ The Commission is empowered to agree the terms of a settlement with a party, in which case the Tribunal must decide whether to confirm the agreement in order to give it the force of law.⁵⁷⁵

The Competition Tribunal adjudicates on any prohibited conduct to determine whether a prohibited conduct has occurred, and if so, to impose any remedy provided for in the Act. It

⁵⁶⁷ Section 51(1) of the Competition Act.

⁵⁶⁸ Section 65(2) of the Competition Act.

⁵⁶⁹ See *Omnia Fertilizer Ltd v The Competition Commission in re: The Competition Commission of South Africa v Sasol Chemical Industries (Pty) Ltd* (CAC Case No: 77/CAC/Jul08).

⁵⁷⁰ Chapter 2 of the Competition Act deals with certain conduct which is prohibited because it is harmful to competition in the relevant market. Commercial activities which are prohibited under the Competition Act are concerned with conduct relating to a firm's interaction with its competitors (horizontal relationship); interaction with its customers and suppliers (vertical relationship); and unilateral conduct by a dominant firm (abuse of dominance).

⁵⁷¹ In terms of section 1 of the Competition Act, 'concerted practice' means co-operative, or co-ordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement.

⁵⁷² See *Netstar (Pty) Ltd and Others v Competition Commission* (CAC Cases No.99/CAC/MAY10; 98/CAC/MAY10 and 97/CAC/MAY10) para 26.

⁵⁷³ Section 14B of the Competition Act.

⁵⁷⁴ Section 21(c) and (g) of the Competition Act.

⁵⁷⁵ Section 49D of the Competition Act. See also *The Competition Commission v Pioneer Foods (Pty) Ltd & Others* (CT Case No. 15/CR/MAR 10).

adjudicates on any other matter that it may consider in terms of the Act, and makes any order provided for in the Act. It also hears appeals from or reviews decisions of the Competition Commission that are referred to it. It can make any ruling or order necessary or incidental to the performance of its functions.⁵⁷⁶ The Tribunal also has the power to provide interim relief to private parties in prohibited practice cases.⁵⁷⁷

The member of the Competition Tribunal presiding at a hearing also has wide powers in conducting a hearing.⁵⁷⁸ However, it can only exercise powers provided in the Competition Act. It has been held that:

“... as a creature of statute, the Tribunal does not enjoy inherent jurisdiction; nor is it entitled to extend any of its substantive powers beyond the four corners of the statute. Where powers incidental and necessary are required for it to perform its functions, it must read such powers into its statute only by necessary implication.”⁵⁷⁹

The Competition Tribunal can make an appropriate order in relation to a prohibited practice, including interdicting any prohibited practice; ordering a party to supply or distribute goods or services to another party on terms reasonably required to end a prohibited practice; imposing an administrative penalty, with or without the addition of any other order; ordering divestiture; declaring conduct of a firm to be a prohibited practice; declaring the whole or any part of an agreement to be void; ordering access to an essential facility on terms reasonably required; and confirm a consent agreement as an order of the Tribunal.⁵⁸⁰

The Competition Act requires that each party participating in a Competition Tribunal’s hearing must bear its own costs.⁵⁸¹ However, if the Competition Tribunal does not make a finding against a respondent, the Tribunal member presiding at a hearing can award costs to

⁵⁷⁶ Section 27 of the Competition Act.

⁵⁷⁷ Section 49C of the Competition Act)

⁵⁷⁸ He or she can direct or summon any person to appear at any specified time and place; question any person under oath or affirmation; summon or order any person to produce any book, document or item necessary for the purposes of the hearing; or to perform any other act in relation to this Act; give directions prohibiting or restricting the publication of any evidence given to the Competition Tribunal; accept oral submissions from any participant; and accept any other information that is submitted by a participant – see section 54 of the Competition Act.

⁵⁷⁹ See *Sasol Chemical Industries (Pty) Ltd v The Competition Commission and others; In re The Competition Commission v Sasol Chemical Industries (Pty) Ltd and others* [2008] 2 CPLR 351 (CT) at para 33.

⁵⁸⁰ Section 58 of the Competition Act.

⁵⁸¹ Section 57(1) of the Competition Act.

the respondent and against a complainant who referred the complaint.⁵⁸² If the Competition Tribunal makes a finding against a respondent, the Tribunal member presiding at a hearing may award costs against the respondent, and to a complainant who referred the complaint.⁵⁸³ Therefore, costs in such hearings are discretionary and only between private parties as costs cannot be ordered for or against the Competition Commission in such proceedings.⁵⁸⁴

A decision, judgment or order of the Competition Tribunal may be served, executed and enforced as if it were an order of the High Court.⁵⁸⁵ The Competition Commission may institute proceedings in the High Court on its own behalf for recovery of an administrative penalty imposed by the Competition Tribunal.⁵⁸⁶

3.1.3 Fairness of Competition Tribunal Procedures

The Chairperson of the Competition Tribunal publishes each referral made to the Tribunal by notice in the *Gazette*. The notice includes the name of the respondent; and the nature of the conduct that is the subject of the referral.⁵⁸⁷ The Competition Tribunal then holds hearings on a matter.⁵⁸⁸ Its proceedings are open to the public. They are conducted as expeditiously as possible, and in accordance with the principles of natural justice. Hearings may also be conducted informally or in an inquisitorial manner.⁵⁸⁹ However, the Tribunal member presiding at a hearing may exclude members of the public, specific persons or categories of persons from attending proceedings if evidence to be presented is confidential information.⁵⁹⁰ The exclusion of persons can only be done to the extent that the information cannot otherwise be protected; if the proper conduct of the hearing requires such exclusion; or for any other reason that would be justifiable in civil proceedings in a High Court.

⁵⁸² Section 57(2)(a) of the Competition Act.

⁵⁸³ Section 57(2)(b) of the Competition Act.

⁵⁸⁴ See *Omnia Fertilizer Ltd v The Competition Commission in re: The Competition Commission of South Africa v Sasol Chemical Industries (Pty) Ltd* (CAC Case No: 77/CAC/Jul08); and *Mainstreet 2 (Pty) Ltd t/a New United Pharmaceutical Distributors (Pty) Ltd & others v Novartis SA (Pty) Ltd & others* [2006] JOL 18314 (CT).

⁵⁸⁵ Section 64(1) of the Competition Act.

⁵⁸⁶ Section 64(2) of the Competition Act. Proceedings in the High Court may not be initiated more than three years after the imposition of the administrative penalty - section 64(3) of the Competition Act.

⁵⁸⁷ Section 51(3) and (4) of the Competition Act.

⁵⁸⁸ Section 50(1) of the Competition Act.

⁵⁸⁹ Section 52(2)(a) and (b) of the Competition Act.

⁵⁹⁰ Section 52(3) of the Competition Act.

Except in case of few procedural type hearings, a matter must be heard and decided by three Tribunal members.⁵⁹¹ The Chairperson of the Tribunal may order that a matter be heard in chambers, if no oral evidence will be heard. He or she can also order that oral submissions be made at the hearing; or that they are made by telephone or video conference, if it is the interests of justice and expediency to do so.⁵⁹²

Parties to a hearing of the Competition Tribunal have a right to personal appearance and to representation.⁵⁹³ They can also put questions to witnesses and inspect any books, documents or items presented at the hearing.⁵⁹⁴ Interpreters and translators are provided during Tribunal hearings for persons who do not understand the language of the hearing.⁵⁹⁵ Parties to a hearing of the Tribunal may participate in the hearing, in person or through a representative,

The Competition Act also provides for the carrying out of alternative dispute resolution processes in furtherance of the objectives of the Act. A member of the Tribunal assigned by the Chairperson may convene a pre-hearing conference. Such a pre-hearing conference is convened on a date and at a time determined by the member with the Competition Commission, each complainant who has filed a Complaint Referral, intervenors and the respondent.⁵⁹⁶ A pre-hearing conference is used (*inter alia*) to give directions in respect of clarifying and simplifying issues in dispute; obtaining admissions of particular facts or documents; the production and discovery of documents whether formal or informal; witnesses to be called by the Tribunal at the hearing, the questioning of witnesses and the language in which each witness will testify; the determination of the procedure to be followed at the hearing, and its expected duration; a date, time and schedule for the hearing; and any other matters that may aid in resolving the complaint.⁵⁹⁷

Where a point of law is raised at a pre-hearing conference, and the assigned member of the Tribunal considers it practical to resolve that question before proceeding with the Conference, he or she member can direct the registrar to set only that question down for hearing by the Tribunal. He or she can also adjourn the pre-hearing conference pending the

⁵⁹¹ Section 52 of the Competition Act.

⁵⁹² Section 52(2A) of the Competition Tribunal

⁵⁹³ Rule 44 of the Rules for the Conduct of Proceedings in the Competition Tribunal.

⁵⁹⁴ Section 53 of the Competition Act.

⁵⁹⁵ Rule 49 of the Rules for the Conduct of Proceedings in the Competition Tribunal.

⁵⁹⁶ Rule 21(1) of the Rules for the Conduct of Proceedings in the Competition Tribunal.

⁵⁹⁷ Rule 22 of the Rules for the Conduct of Proceedings in the Competition Tribunal

resolution of that question by the Tribunal (and the Competition Appeal Court, if applicable).⁵⁹⁸ A pre-hearing conference may be conducted in person or by telephone or both. It is not required that the pre-hearing conference must follow formal rules of procedure, and is not open to the public.⁵⁹⁹

The Competition Act also does not specify timeframes for the Competition Tribunal to make a decision on a merger, to finalise the prosecution of a prohibited practice, or for the review of the Competition Commission's decisions. It merely requires the Tribunal to conduct its hearings as expeditiously as possible.⁶⁰⁰ As a result, the average number of days per hearing between 2008 and 2010 was 1.13 days per matter.⁶⁰¹

The registrar of the Tribunal is required to compile a record of any proceeding in which a hearing has been held.⁶⁰² The Competition Tribunal provides the participants and other members of the public reasonable access to the record of each hearing, subject to any ruling to protect confidential information.⁶⁰³ Once the Tribunal has arrived at a decision, it also publishes its reasons on its website.⁶⁰⁴

3.1.4 Expertise, independence and impartiality of the Competition Tribunal

The Competition Tribunal is able to effectively perform its obligations due to its status and nature and the expertise and independence of its members. The Tribunal is a juristic person and a Tribunal of record.⁶⁰⁵ The President of the Republic appoints ten persons as members of the Tribunal. Tribunal members are appointed on the recommendation of the Minister of Trade and Industry, from among persons nominated by the Minister, either on the Minister's initiative or in response to a public call for nominations.⁶⁰⁶ Together, the Chairperson and other members of the Competition Tribunal represent a broad cross-section of the population

⁵⁹⁸ Rule 21(2) of the Rules for the Conduct of Proceedings in the Competition Tribunal

⁵⁹⁹ Rule 21(4) of the Rules for the Conduct of Proceedings in the Competition Tribunal.

⁶⁰⁰ Section 52(2)(a) of the Competition Act.

⁶⁰¹ See Competition Tribunal *Annual Report 2009-2010*, 25.

⁶⁰² Rule 57 of the Rules for the Conduct of Proceedings in the Competition Tribunal.

⁶⁰³ Section 52(5) of the Competition Act.

⁶⁰⁴ See <http://www.comtrib.co.za/> accessed on 8th May 2011.

⁶⁰⁵ Section 26(1) of the Competition Act.

⁶⁰⁶ Section 26(2) of the Competition Act. Two members (the Chairperson and one other member) are full-time executive members of the Tribunal, while eight (including the deputy chairperson) are part-time non-executive members. These members constitute the pool from which the chairperson appoints adjudicative panels comprising three members - see Competition Tribunal "About us" in www.comtrib.co.za accessed in May 2011.

of the Republic; and have sufficient legal training and experience.⁶⁰⁷ They are also required to have suitable qualifications and experience in economics, law, commerce, industry or public affairs and to be committed to the purposes and principles of the Act.⁶⁰⁸ In addition, a person cannot be a member of the Competition Tribunal if he or she is an office-bearer of a party, movement, organisation or body of a partisan political nature. A person is also disqualified from membership if he or she is an un-rehabilitated insolvent; is subject to an order of a competent court holding that person to be mentally unfit or disordered; or has been convicted of an offence committed after the Constitution of 1993 took effect and sentenced to imprisonment without the option of a fine.

The conditions of appointment;⁶⁰⁹ and discipline and termination of service of Competition Tribunal members;⁶¹⁰ as well as the operational arrangements of the Tribunal (such as funding;⁶¹¹ human resource and administrative support;⁶¹² management;⁶¹³ governance,

⁶⁰⁷ Section 28(1) of the Competition Act.

⁶⁰⁸ They must also be citizens of South Africa, ordinarily resident in the country - section 28(2) of the Competition Act.

⁶⁰⁹ The Chairperson and each other member of the Competition Tribunal are appointed for five years, although the President may re-appoint a member of the Competition Tribunal at the expiry of that member's term of office. However, no person may be appointed to the office of the Chairperson of the Tribunal for more than two consecutive terms - section 29 of the Competition Act. If a member is still considering a matter before the Tribunal on the expiry of his or her term, the member can continue to act as a member in respect of that matter only - section 33 of the Competition Act.

The Minister of Trade and Industry determines the remuneration, allowances, and other benefits of the Chairperson, Deputy Chairperson and other members of the Competition Tribunal (in consultation with the Minister of Finance) - section 34(1) of the Competition Act. The Minister also determines other conditions of appointment of members of the Competition Tribunal. The Minister cannot reduce a member's salary, allowances or benefits during his or her term of office once these are determined.

⁶¹⁰ The Chairperson can resign from the Competition Tribunal; or resign as the Chairperson but remain as a member of the Tribunal if he or she gives one month's written notice to the Minister. Any other member of the Tribunal can resign by giving at least one month's written notice to the Minister - section 29(3) & (4) of the Competition Act.

The President can remove the Chairperson or another member of the Competition Tribunal from office (on the recommendation of the Minister) if that person becomes an office-bearer of a party, movement, organisation or body of a partisan political nature. The Chairperson or member can also be removed if the person becomes an un-rehabilitated insolvent; becomes subject to an order of a competent court holding him or her to be mentally unfit or disordered; or is convicted of an offence committed after the Constitution of the Republic of South Africa of 1993 took effect, and is sentenced to imprisonment without the option of a fine - section 29(5)(a) of the Competition Act.

The President can also remove the Chairperson or a member of the Competition Tribunal from office (on the recommendation of the Minister) for serious misconduct, permanent incapacity, or for engaging in an activity that may undermine the integrity of the Tribunal - section 29(5)(b) of the Competition Act.

⁶¹¹ The Competition Commission is financed from money appropriated by Parliament for the Commission; fees payable to the Commission in terms of the Act; income derived by the Commission from its investment and deposit of surplus money; and money received from any other source – section 40(1) of the Competition Act.

⁶¹² The Chairperson of the Tribunal appoints staff, or contracts with other persons, to assist the Competition Tribunal in carrying out its functions; and determines the remuneration, allowances, benefits, and other terms and conditions of appointment of a member of the staff (in consultation with the Minister and the Minister of Finance) - section 35 of the Competition Act.

oversight and supervision;⁶¹⁴ and accountability and reporting⁶¹⁵) also foster its independence and impartiality. These enable the Tribunal and its members to function without any undue interference and influence.

3.2 Competition Appeal Court

The Competition Appeal Court is a court contemplated in section 166(e) of the Constitution with a status similar to that of a High Court. It is a court of record.⁶¹⁶ The Court hears appeals on and reviews the decisions of the Competition Tribunal referred to it by a person affected by the decision.⁶¹⁷ A person who is unhappy with a decision of the Competition Appeal Court must appeal to the Supreme Court of Appeal, or Constitutional Court.⁶¹⁸

3.2.1 Accessibility of the Competition Appeal Court

The Court convenes in different locations around the Republic. The registry function of the Appeal Court is performed by the Tribunal in Pretoria and the Tribunal's Registrar acts as its Registrar.⁶¹⁹

In merger proceedings, any party to the merger or a person who is required to be given notice of the merger (provided the person had been a participant in the proceedings of the Competition Tribunal) may appeal that decision to the Competition Appeal Court. The appeal

⁶¹³ The Chairperson is responsible to manage the caseload of the Competition Tribunal, and assigns each matter referred to the Tribunal to a panel composed of any three members of the Tribunal – section 31(1) of the Competition Act.

⁶¹⁴ Governance, oversight and supervision are undertaken by the National Assembly as the Minister of Trade and Industry is required to table in the National Assembly the annual report of the Tribunal (and Commission) submitted to him or her - section 41(1) and (2) read with s 42 of the Competition Act.

⁶¹⁵ The Competition Tribunal (together with the Competition Commission) is listed as a national public entity in Schedule 3A of the PFMA. The Chairperson of the Tribunal is the accounting authority of the Competition Tribunal for the purposes of the PFMA - section 40(7) read with section 42 of the Competition Act. Each year, the Chairperson submits to the Minister a statement of the Competition Tribunal's estimated income and expenditure, and requested appropriation from Parliament, in respect of the next financial year - Section 40(3) read with section 42 of the Competition Act.

Within six months after the end of each financial year, the Chairperson is required to prepare financial statements in accordance with established accounting practice, principles and procedures, comprising a statement reflecting, with suitable and sufficient particulars, the income and expenditure of the Competition Tribunal during the preceding financial year; and a balance sheet showing the state of its assets, liabilities and financial position as at the end of that financial year. The Competition Tribunal's financial records are audited each year by the Auditor General - section 40(9) and (10) read with section 42 of the Competition Act.

⁶¹⁶ Section 36(1) of the Competition Act.

⁶¹⁷ Section 61(1) of the Competition Act.

⁶¹⁸ Section 62(4) of the Competition Act.

⁶¹⁹ Competition Tribunal *Annual Report 2009-2010*, 50.

is made in terms of the Competition Appeal Court rules, within 20 business days after notice of a decision by the Competition Tribunal.⁶²⁰

3.2.2 Scope of jurisdiction and powers of the Competition Appeal Court

The Competition Appeal Court is a court contemplated in section 166(e) of the Constitution with a status similar to that of a High Court.⁶²¹ It has a wide scope of jurisdiction and powers, with jurisdiction throughout the Republic.⁶²² It has exclusive and final jurisdiction in respect of certain matters specified in the Competition Act.⁶²³ However, it has been stated that the Court is a “creature of statute and derives its powers, obligations and jurisdiction from the four corners of the statute”.⁶²⁴ Appeals and reviews heard by the Court relate to both mergers and cases of prohibited practice. These include procedural issues (such as the right to intervene in merger hearings and the management of confidential information) and substantive issues (such as the test for determining excessive pricing).

The Competition Appeal Court has shared exclusive jurisdiction with the Competition Tribunal on the interpretation and application of chapters 2 (prohibited practices), 3 (merger control) and 5 (investigation and adjudication procedures) of the Act.⁶²⁵ However, the Court cannot review a certificate on a merger issued by the Minister of Finance to the Competition Commissioner specifying the names of the parties to the merger and certifying that the merger constitutes an acquisition of shares for which permission is required in terms of section 37 of the Banks Act,⁶²⁶ or it constitutes a transaction for which consent is required in terms of section 54 of the Banks Act; and it is in the public interest that the merger is subject to the jurisdiction of the Banks Act only.⁶²⁷

⁶²⁰ Section 17(1) of the Competition Act.

⁶²¹ Section 36(1)(a) of the Competition Act.

⁶²² Section 36(1)(b) of the Competition Act.

⁶²³ Section 62(1) and (3) of the Competition Act. See also *Seagram Africa Ltd v Stellenbosch Farmers' Winery Group Ltd and others* 2001 2 SA 1129 (C) 1141F-1142I.

⁶²⁴ *Old Mutual Properties (Pty) Ltd & Another v The Competition Tribunal & Others* Competition Appeal Court Case No: 21/CAC/JUL02.

⁶²⁵ Section 62(1)(a) of the Competition Act.

⁶²⁶ Banks Act 94 of 1990.

⁶²⁷ Section 62(1)(a) read with section 18(2) of the Competition Act.

The Competition Tribunal and Competition Appeal Court also share exclusive jurisdiction in respect of the functions of the Competition Commission in section 21(1); the functions of the Competition Tribunal in section 27(1) and the Appeal Court's own functions in section 37.⁶²⁸

The Court has jurisdiction over the question whether an action taken or proposed to be taken by the Competition Commission or the Competition Tribunal is within their respective jurisdictions in terms of the Act. It also has jurisdiction over any constitutional matter arising in terms of the Act; and the question whether a matter falls within the shared exclusive jurisdiction of the Tribunal and the Appeal Court.⁶²⁹ In a bid to ensure greater certainty, the Competition Tribunal and the Competition Appeal Court have no jurisdiction over the assessment of the amount and awarding of damages arising out of a prohibited practice.⁶³⁰

The Competition Appeal Court is empowered to review any decision of the Competition Tribunal. It can also consider an appeal arising from the Competition Tribunal in respect of any of its final decisions, other than a consent order made in terms of section 63; or any of its interim or interlocutory decisions that may be taken on appeal in terms of the Act.⁶³¹ The Court can give any judgment or make any order, including an order to confirm, amend or set aside a decision or order of the Competition Tribunal; or remit a matter to the Tribunal for a further hearing on any appropriate terms.⁶³²

In an appeal against the decision of the Competition Tribunal in merger proceedings, the Competition Appeal Court may set aside the decision of the Competition Tribunal; amend the decision by ordering or removing restrictions, or by including or deleting conditions; or confirm the decision.⁶³³ If the Court sets aside a decision of the Competition Tribunal, the Court must approve the merger; approve the merger subject to any conditions; or prohibit implementation of the merger.⁶³⁴

⁶²⁸ Section 62(1)(a) of the Competition Act

⁶²⁹ Section 62(2) of the Competition Act.

⁶³⁰ Section 62(5) of the Competition Act.

⁶³¹ Section 37(1) of the Competition Act.

⁶³² Section 37(2) of the Competition Act.

⁶³³ Section 17(2) of the Competition Act.

⁶³⁴ Section 17(3) of the Competition Act.

The Competition Appeal Court must confirm an order by the Competition Tribunal for the divestiture of assets by parties who have merged in contravention of chapter 3 of the Act.⁶³⁵

The Court may also make an order for the payment of costs against any party in the hearing, or against any person who represented a party in the hearing, according to the requirements of the law and fairness.⁶³⁶

3.2.3 Fairness of Competition Appeal Court procedures

Adjudication in the Competition Appeal Court (as a division of the High Court) is conducted in terms of litigation in public (open court) except if the court directs otherwise in special cases. Adjudication is conducted in terms of litigation in public (open court) except the court directs otherwise in special cases.⁶³⁷ Parties have a right to representation (which includes representation by a legal practitioner).⁶³⁸

The sheriff or deputy executes all sentences, decrees, judgments, writs, summonses, rules, orders, warrants, commands and processes of the court.⁶³⁹ A decision, judgment or order of the Appeal Court is served, executed and enforced as if it were an order of the High Court.⁶⁴⁰

3.2.4 Independence and impartiality of the Competition Appeal Court

The independence and impartiality of the Competition Appeal Court is protected in the same way as other judges. The court is made up of High Court judges specifically appointed to the court by the President of the Republic on the advice of the Judicial Services Commission.⁶⁴¹ The Minister of Justice can also second any number of judges of the High Court to serve as acting judges of the Competition Appeal Court (after consultation with the Judge President of the Court).⁶⁴²

⁶³⁵ Section 60(3) of the Competition Act.

⁶³⁶ Section 61(2) of the Competition Act.

⁶³⁷ Section 16 of the Supreme Court Act 59 of 1959.

⁶³⁸ Rule 31 of the Competition Appeal Court Rules.

⁶³⁹ Section 36 of the Supreme Court Act 59 of 1959.

⁶⁴⁰ Section 64(1) of the Competition Act.

⁶⁴¹ Section 36(2) of the Competition Act.

⁶⁴² Section 36(4) of the Competition Act.

The Judge President and any other judge of the Competition Appeal Court are appointed for a fixed term determined by the President at the time of appointment. They serve in the court until the expiry of the term; until the date the judge ceases to be a judge of the High Court; or when the judge resigns from the Court by giving written notice to the President.⁶⁴³ As a judge of the High Court, a judge of the Competition Appeal Court is removed from office by the President if the Judicial Service Commission finds that the judge is incapable, is grossly incompetent or is guilty of gross misconduct; and the National Assembly calls for the judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.⁶⁴⁴

The Judge President or another judge continues to act as a judge on any matter before the court when the term of office of the Judge President and another judge of the Court expires.⁶⁴⁵ The tenure of office, the remuneration, and the terms and conditions of service applicable to a judge of the High Court are not affected by the appointment and concurrent tenure of office of that judge who is appointed as a judge of the Competition Appeal Court.⁶⁴⁶

Some of the administrative and operational arrangements of the Competition Appeal Court (such as governance, oversight and supervision⁶⁴⁷) are regulated in the same way as other courts. However, even where these are different, they are regulated in a manner that does not affect the independence of the court. This includes its funding,⁶⁴⁸ human resource and administrative support;⁶⁴⁹ managerial framework;⁶⁵⁰ and accountability and reporting.⁶⁵¹

⁶⁴³ Section 39(1) of the Competition Act.

⁶⁴⁴ Section 177(1) and (2) of the Constitution.

⁶⁴⁵ Section 39(2) read with section 33 of the Competition Act.

⁶⁴⁶ Section 39(3) of the Competition Act.

⁶⁴⁷ Governance, oversight and supervision of the Court are undertaken by the Judicial Services Commission established in terms of section 178 of the Constitution.

⁶⁴⁸ Funding for the Appeal Court is received from the Department of Trade and Industry and its budget appears as a line item on the Competition Tribunal's budget. The budget is managed by the Judge President and administered by the secretariat of the Competition Tribunal secretariat on behalf of the Appeal Court - see Competition Tribunal *Annual Report 2009/10*, 50.

⁶⁴⁹ The Competition Appeal Court does not have a distinct human resource and administrative structure. Human resource and administrative support for the Court is provided by the secretariat of the Competition Tribunal - see Competition Tribunal *Annual Report 2009/10*, 50.

⁶⁵⁰ The Judge President of the Competition Appeal Court supervises and directs the work of the Court. He or she also presides at proceedings of the Court or designates another judge of Court to preside at particular proceedings of the Court; and makes rules for the proceedings of the Court by notice in the *Gazette* - section 38 of the Competition Act.

However, when the Superior Courts Bill is passed, the administration of the Court (together with the other courts) will be done by the Office of the Chief Justice. The Office of the Chief Justice has been established (through a Proclamation by the President in terms of the Public Service Act 103 of 1994) in anticipation of the enactment of the Superior Courts Act. The Superior Courts Bill proposes the creation of this Office, comprising

4. CONSUMER PROTECTION DISPUTE RESOLUTION SYSTEM

The consumer protection dispute resolution system comprises the National Consumer Tribunal and National Credit Regulator established by the National Credit Act. They have been established “to make it easier and less expensive for consumers and credit providers to resolve their disputes” and are important mechanisms in the promotion of consumer rights in South Africa.⁶⁵²

The National Consumer Tribunal is a tribunal of record which acts as the adjudicative body.⁶⁵³ The National Consumer Tribunal resolves disputes referred to it by consumers, credit providers, credit bureaux, debt counsellors and the National Credit Regulator; and matters referred by the National Credit Regulator or complainants related to allegations of prohibited conduct.⁶⁵⁴

4.1 Accessibility of the National Consumer Tribunal

The National Credit Tribunal has a single national location in Centurion, Pretoria. Persons who want to submit complaints to the Tribunal must forward these to this office. In addition, forms for the referral of complaints to the Tribunal are in English, which might adversely affect person who are not proficient in the language.

A person or entity that is registered with the National Credit Regulator or an applicant for registration may file a complaint within 20 business days after the National Credit Regulator

an Executive Director appointed by the Minister with the concurrence of the Chief Justice. This is a transition to the establishment of a separate court administration for the judiciary as a separate branch of government. The court administration will be responsible for the administration of all courts - see section 12 of the Superior Courts Bill.

⁶⁵¹ The Court’s budget appears as a line item on the Tribunal’s budget. Therefore, financial accountability and reporting is by the Chairperson of the Tribunal as the accounting authority of the Competition Tribunal for the purposes of the PFMA - section 40(7) read with section 42 of the Competition Act.

The Judge President and other judges of the Competition Appeal Court report to the Judicial Services Commission established in terms of section 178 of the Constitution.

⁶⁵² Woker T “A critical examination of the role that the National Consumer Tribunal plays in debt relief with suggestions for reform” accessed at <http://web.up.ac.za/sitefiles/file/47/327/Law%20Clinic%20Draft%20Papers%20from%20Conference/Tanya%20Woker%20Draft.pdf> (26 April 2012).

⁶⁵³ Section 26 of National Credit Act 34 of 2005.

⁶⁵⁴ Section 27(a) of the National Credit Act.

makes the decision that is the subject of the application.⁶⁵⁵ However, the Tribunal may allow a party to file a complaint at a later time where good cause shown for the delay.

A consumer or credit provider who has unsuccessfully attempted to resolve a dispute directly with another party, or through an alternative dispute resolution process, may also file an application at any time within 20 business days after the failure of the attempted alternative dispute resolution.⁶⁵⁶ The Tribunal may also allow such a party to file a complaint at a later time where good cause shown for the delay.

4.2 Scope of jurisdiction and powers of the National Consumer Tribunal

The National Consumer Tribunal adjudicates applications made in terms of the National Credit Act, and exercises its functions in accordance with the Act.⁶⁵⁷ The Tribunal cannot resolve contractual disputes;⁶⁵⁸ disputes relating to damages and the award of damages (except where it confirms a consent order which includes an award of damages); criminal matters, the rearrangement of debt (where a consumer is over-indebted) and whether credit has been granted recklessly.⁶⁵⁹ However, the Act affords it a wide scope of jurisdiction and powers (with its orders having the status of orders of the High Court).⁶⁶⁰

On the application of the National Credit Regulator, the Tribunal can make an order resolving a dispute over information held by a credit bureau in terms of Part B of Chapter 4.⁶⁶¹ It can also make an order compelling the delivery of a statement of account or a review of a statement in terms of Part D of Chapter 5. It can further review the conduct of a sale of goods in terms of section 127 or the distribution of proceeds from such a sale;⁶⁶² and grant leave to bring a complaint directly before the Tribunal; and for an order condoning late filing. It can make any order provided for in the Act in respect of such an application.

⁶⁵⁵ Section 137(2) of the National Credit Act.

⁶⁵⁶ Section 137(3) of the National Credit Act.

⁶⁵⁷ Section 27 of the National Credit Act. See also *Malan v Amalgamated Banks of South Africa (Absa)* Case No NCT/22/2008/149(1) (P) 30 Oct 2008.

⁶⁵⁸ *Global Pact 417 (Pty) Ltd and others v Mercedes Benz Financial Services (Pty) Ltd (MBFS)* Case No NCT/40/2009/149 (1) (P) 20 April 2010.

⁶⁵⁹ Woker T "A critical examination of the role that the National Consumer Tribunal plays in debt relief with suggestions for reform" accessed at <http://web.up.ac.za/sitefiles/file/47/327/Law%20Clinic%20Draft%20Papers%20from%20Conference/Tanya%20Woker%20Draft.pdf> (26 April 2012).

⁶⁶⁰ Section 152 of the National Credit Act.

⁶⁶¹ Section 137(1) of the National Credit Act.

⁶⁶² See *Mapeka vs Wesbank* NCT/29/2009/128(1) (P), 5 November 2009.

The Tribunal can confirm a resolution or agreement as a consent order, which may include an award of damages to a complainant (with the consent of the complainant).⁶⁶³ It also adjudicates allegations of prohibited conduct by determining whether prohibited conduct has occurred. The Tribunal can make an appropriate order in relation to prohibited conduct or required conduct in terms of Act.⁶⁶⁴ This includes the power to grant interim relief;⁶⁶⁵ declaring conduct to be prohibited in terms of the Act; interdicting any prohibited conduct; imposing an administrative fine in terms of section 15 with or without the addition of any other order; confirming a consent agreement as an order of the Tribunal; condoning any non-compliance of its rules and procedures on good cause shown; confirming an order against an unregistered person to cease engaging in any activity that is required to be registered in terms of the Act; suspending or cancelling the registrant's registration; requiring repayment to the consumer of any excess amount charged (together with interest at the rate set out in the agreement); or any other appropriate order contemplated in the Act which is required to give effect to a right.

If the Tribunal does not make a finding against a respondent, the presiding member at a hearing can award costs to the respondent and against a complainant who referred the complaint.⁶⁶⁶ If the Tribunal makes a finding against a respondent, the member of the Tribunal presiding at a hearing can also award costs against the respondent and to a complainant who referred the complaint.

The member of the Tribunal presiding at a hearing has the power to direct or summon any person to appear at any specified time and place.⁶⁶⁷ He or she can question any person under oath; order any person to produce any book, document or item necessary for the purposes of the hearing; and perform any other action in relation to the Act. He or she can also give directions prohibiting or restricting the publication of any evidence given to the Tribunal.

⁶⁶³ Section 138 of the National Credit Act and *Liphoko v Absa Bank and others* Case No NCT/253/2009/138(1) (P) April 2010.

⁶⁶⁴ Sections 149 and 150 of the National Credit Act. See also *Motitsoe v Randburg Finance* Case No NCT/253/2009/138 (1) (P) April 2010; and *National Credit Regulator v Chatspare Pty Ltd* NCT/08/2008/140 (1) (P) July 2008.

⁶⁶⁵ See *Malan v Amalgamated Banks of South Africa (Absa)* Case No NCT/22/2008/149(1) (P) 30 Oct 2008.

⁶⁶⁶ Section 147 of the National Credit Act.

⁶⁶⁷ Section 144 of the National Credit Act.

4.3 Fairness of National Consumer Tribunal procedures

A matter before of the Tribunal is considered by a single member or by a panel of three members.⁶⁶⁸ When assigning a matter to a panel, the Chairperson ensures that at least one member of the panel has suitable qualifications and experience. A decision of a single member of the Tribunal hearing a matter or of a majority of the members of a panel in any other case is the decision of the Tribunal. The decision of a panel is delivered in writing and includes reasons for the decision.

The Tribunal conducts its hearings in public and in an inquisitorial manner.⁶⁶⁹ However, the Tribunal member presiding at a hearing may exclude members of the public or specific persons or categories of persons from attending the hearing if evidence to be presented is confidential information. This can only be done to the extent that the information cannot otherwise be protected; if the proper conduct of the hearing requires it; or for any other reason that would be justifiable in civil proceedings in a High court.

Tribunal proceedings are conducted as expeditiously and informally as possible, and in accordance with the principles of natural justice.⁶⁷⁰ Hearings are relatively simple to follow, which means parties do not need legal representation. There are also very few costs involved. It has been remarked that:

“The complaint can be expressed in a laymen’s undefined narratory style And proof on a balance of probabilities is adequate. ... The approach of the NCT should be that, subject to statute, the NCT is guided only by the rules of natural justice. In that context the object and test for using the inquisitorial power is not to pursue to a point against anyone who is not a consumer as if he were the enemy. The inquisitorial power exists to get to the bottom of facts that are material to reaching a correct finding on the properly raised complaint.”⁶⁷¹

There are specific matters that the Chairperson of the Tribunal assigns for hearing by a single member of the Tribunal.⁶⁷² These include any application to the Tribunal by a consumer or credit provider who has unsuccessfully attempted to resolve a dispute directly with the other

⁶⁶⁸ Section 31 of the National Credit Act.

⁶⁶⁹ Section 142(2) of the National Credit Act.

⁶⁷⁰ Section 142(1) of the National Credit Act.

⁶⁷¹ Fleming J in *National Credit Regulator v Chatspare Pty Ltd (supra)* paras 7-9.

⁶⁷² Section 142(3) of the National Credit Act.

party and through alternative dispute resolution; consent orders; applications to permit late filing; review of requests for additional information; review of an order to cease engaging in an activity in terms of section 54; applications for an order limiting consumer requests; or applications for an order concerning the remittance of proceeds of sale. At the end of such hearings, the Tribunal makes any order permitted by the Act in the circumstances and issues written reasons for its decision.⁶⁷³

Parties to a hearing of the Tribunal and any other person who has a material interest in the hearing may participate in the hearing in person or through a representative.⁶⁷⁴ They may put questions to witnesses and inspect any books, documents or items presented at the hearing.

In order to promote the informal resolution of disputes between parties, the Act requires that in any dispute between a credit provider and a consumer that may be referred to the Tribunal (excluding complaints that could be resolved informally or investigated) and before a party may apply directly to the Tribunal, they must attempt to resolve the matter directly between themselves.⁶⁷⁵ If they are unable to resolve the matter, they must refer the matter to the ombud with jurisdiction for resolution in accordance with the National Credit Act or (if the credit provider concerned is a financial institution and a participant in a recognised scheme as defined in the Financial Services Ombud Schemes Act) in terms of the Financial Services Ombud Schemes Act.⁶⁷⁶ In other cases, they are required to apply to either a consumer court for resolution in accordance with the National Credit Act and any provincial legislation establishing that consumer court. They can also apply to an alternative dispute resolution agent, for resolution by conciliation, mediation or arbitration.⁶⁷⁷

If an alternative dispute resolution agent concludes that either party to conciliation, mediation or arbitration is not participating in that process in good faith; or that there is no reasonable probability of the parties resolving their dispute through that process, the alternative dispute resolution agent must issue a certificate in the prescribed form stating that the process has failed.⁶⁷⁸

⁶⁷³ Section 142(4) of the National Credit Act.

⁶⁷⁴ Section 143 of the National Credit Act.

⁶⁷⁵ Section 134(4)(a) of the National Credit Act.

⁶⁷⁶ Financial Services Ombud Schemes Act 37 of 2004.

⁶⁷⁷ Section 134(4)(b) of the National Credit Act.

⁶⁷⁸ Section 134(5) of the National Credit Act.

The ombud with jurisdiction, consumer court or alternative dispute resolution agent that resolves or assists parties in resolving a dispute in terms of alternative dispute resolution may record the resolution of that dispute in the form of an order. If the parties to the dispute consent to that order, the agent can submit it to a court to be made a consent order, in terms of the court's rules; or to the Tribunal to be made a consent order in terms of section 138.⁶⁷⁹

The Tribunal provides the participants and members of the public reasonable access to the record of each hearing, subject to any ruling made to protect confidential information.⁶⁸⁰ A participant in a hearing before a single member of the Tribunal may appeal a decision by that member to a full panel of the Tribunal.⁶⁸¹ Except in decisions relating to consent orders, a participant in a hearing before a full panel of the Tribunal may apply to the High Court to review the decision of the Tribunal; or appeal to the High Court against the decision of the Tribunal.⁶⁸²

A decision, judgment or order of the National Consumer Tribunal is served, executed and enforced as if it were an order of the High Court, and is binding on the National Credit Regulator; provincial credit regulators; a consumer court; an alternative dispute resolution agent or the ombud with jurisdiction; a debt counsellor; and a Magistrate's Court.⁶⁸³

4.4 Expertise, independence and impartiality of the National Consumer Tribunal

The institutional framework, status and composition of the National Consumer Tribunal indicate the desire for it to resolve consumer disputes independently, impartially and efficiently. The Tribunal has 11 members appointed by the President of the Republic on a full- or part-time basis.⁶⁸⁴ A member of the Tribunal serves for a term of five years, although he or she may be reappointed at the expiry of their term of office.⁶⁸⁵ However, a person cannot be appointed as Chairperson of the Tribunal for more than two consecutive terms.

⁶⁷⁹ Section 135(1) of the National Credit Act.

⁶⁸⁰ Section 142(5) of the National Credit Act.

⁶⁸¹ Section 148(1) of the National Credit Act.

⁶⁸² Section 148(2) of the National Credit Act.

⁶⁸³ Section 152 (1) of the National Credit Act.

⁶⁸⁴ Section 26(2) of the National Credit Act.

⁶⁸⁵ Section 29(2) of the National Credit Act.

A person cannot be a member of the Tribunal if he or she is an office-bearer of any party, movement, organisation or body of a partisan political nature.⁶⁸⁶ This will also be the case if the person acquires a direct or indirect financial interest in a registrant with the National Credit Regulator personally or through a spouse, partner or associate. A person who acquires an interest in a business or enterprise, which may conflict or interfere with the proper performance of his or her duties, also cannot be appointed. Other situations which bar a person from becoming a member of the National Consumer Tribunal include if the person is an un-rehabilitated insolvent or becomes insolvent and the insolvency results in the sequestration of that person's estate; if the person is removed from an office of trust on account of misconduct in respect of fraud or the misappropriation of money; if the person is subject to an order of a competent court holding that person to be mentally unfit or disordered; if the person is convicted in the Republic or elsewhere of theft, fraud, forgery or uttering a forged document, perjury, an offence under the Prevention and Combating of Corrupt Activities Act;⁶⁸⁷ or an offence under the Financial Intelligence Centre Act;⁶⁸⁸ or an offence involving dishonesty; or is convicted of any other offence and sentenced to imprisonment without the option of a fine.

Collectively, the members of the Tribunal represent a broad cross-section of the population of the South Africa and have sufficient persons with legal training and experience. A member is required to have suitable qualifications and experience in economics, law, commerce, industry or consumer affairs, and to be committed to the purposes of the Act experience.⁶⁸⁹

The conditions of employment of Tribunal members;⁶⁹⁰ their discipline and termination of the service;⁶⁹¹ and the operational arrangements of the Tribunal (including funding;⁶⁹² human

⁶⁸⁶ Section 26(4) read with s 20(2) of the National Credit Act.

⁶⁸⁷ Prevention and Combating of Corrupt Activities Act 12 of 2004.

⁶⁸⁸ Financial Intelligence Centre Act 38 of 2001.

⁶⁸⁹ Section 28 of the National Credit Act. Current members come from diverse backgrounds including law, academia, business, government and non-governmental organisations – see Woker T “A critical examination of the role that the National Consumer Tribunal plays in debt relief with suggestions for reform” accessed at <http://web.up.ac.za/sitefiles/file/47/327/Law%20Clinic%20Draft%20Papers%20from%20Conference/Tanya%20Woker%20Draft.pdf> (26 April 2012). A member must also be a South African citizen who is ordinarily resident in the country.

⁶⁹⁰ The National Credit Act states that during the term of office of a member of the Tribunal, the member's salary, allowances or benefits may not be reduced - section 34 of the National Credit Act.

⁶⁹¹ The Chairperson may resign from the Tribunal; or resign as Chairperson but remain as a member of the Tribunal if he or she gives the Minister one month written notice - section 29(3) of the National Credit Act. A member of the Tribunal other than the Chairperson may resign by giving at least month written notice to the Minister - section 29(4) of the National Credit Act.

resource and administrative support;⁶⁹³ managerial framework;⁶⁹⁴ governance, oversight and supervision;⁶⁹⁵ and accountability and reporting⁶⁹⁶) also foster its independence and impartiality.

5. CONCLUSIONS

Comparative adjudication institutions or forums were created either as independent institutions that are autonomous of the administrative and/or delivery institutions (the CCMA is independent of employees/trade unions and employers/employers' organisations; while the Competition Commission, Competition Tribunal are independent of business); or as courts of law (the Competition Appeal Court has the status of a High Court).

Various modalities are utilised for the appointment of members of comparative adjudication institutions. Members of some of the institutions are appointed by the President of the Republic (e.g. Judges in the Competition Appeal Court; Members of the Competition Tribunal; and Members of the National Consumer Tribunal), or by a Governing Body (such as the Governing Body of the CCMA). The President or Governing Body determines the remuneration and other conditions of appointment of the members. They are also empowered to discipline the members of these institutions and to terminate their appointment.

The President removes the Chairperson or any other member of the Tribunal from office on the recommendation of the Minister if he or she is disqualified from being a member of the Tribunal - section 29(5)(a) read with section 20(2) of the National Credit Act. In addition, the President can also remove the Chairperson or a member of the Tribunal from office for serious misconduct; permanent incapacity; or engaging in any activity that may undermine the integrity of the Tribunal - section 29(5)(a) of the National Credit Act.

⁶⁹² The National Consumer Tribunal is financed from funds appropriated by Parliament; any fees payable in terms of the Act; income derived from their respective investment and deposit of surplus funds; and other funds accruing from any source - section 35 of the National Credit Act.

⁶⁹³ The registry of the Tribunal (which is led by the Registrar) provides administrative support and secretarial functions to the Chairperson and CEO – see National Consumer Tribunal *Annual Report 2008*, 60.

⁶⁹⁴ The head of the Tribunal is the Chairperson, who is responsible to manage the caseload of the Tribunal. The Deputy Chairperson performs the functions of Chairperson in his or her absence - section 31(1) of the National Credit Act.

⁶⁹⁵ Governance, oversight and supervision of the National Consumer Tribunal are undertaken by Parliament. Every five years the Minister is required to conduct an audit review of the exercise of the functions and powers of the National Consumer Tribunal. The Minister also receives an annual report the National Consumer Tribunal on its activities, as required by the Public Finance Management Act. When the Minister conducts an audit review of the exercise of the functions and powers of the National Consumer Tribunal or receives an annual report on the Tribunal's activities, he or she forwards a copy of the report to the Premier of each province. He or she also tables it in Parliament as soon as practicable - section 36 of the National Credit Act.

⁶⁹⁶ The National Consumer Tribunal (and the National Credit Regulator) must each report to the Minister annually on its activities, as required by the Public Finance Management Act - section 36 of the National Credit Act.

For comparative adjudication institutions that are not courts of law, their independence and impartiality is further bolstered by their financial autonomy. In the case of the CCMA, the Competition Commission and Tribunal, and the National Consumer Tribunal, funding is from moneys appropriated by Parliament. Funding for the Competition Appeal Court is received from the Department of Trade and Industry as a line item on the Competition Tribunal's budget.

The financial autonomy of the CCMA, Competition Tribunal and the Competition Commission is further reflected by their inclusion as Schedule 3A (national public) entities in the PFMA. This indicates autonomous financial accountability for these institutions.

The enabling statutes regulate the management of these institution by persons appointed for that purpose. Human resource and administrative support is also managed by most of the institutions themselves. Governance and supervision is by either parliament, or by a Governing Body. This prevents any undue influence on the institutions in the performance of their duties.

The statutes establishing comparative social security institutions promote the effectiveness of the institutions by requiring that only suitably qualified persons are appointed as members. This is done by stipulation minimum academic qualifications and relevant professional and other experience.

The scope of jurisdiction and powers of these institutions are also fairly wide. This is ensured by the use of terms such as "any matter in the Act". In addition, the institutions have extensive powers, such as the power to subpoena persons. This implies that the institutions are also able to provide a wide range of remedies, including (in some cases and in matters within their jurisdiction) making an order which any court of law may make, providing interim relief and making cost orders. Effectiveness is further promoted by providing some of the institutions that are not courts of law with powers to enforce their decisions. The decisions of such institutions are deemed to be the judgment of a court and are therefore enforceable as such.

Attempts to make the institutions accessible are not always appropriately made. Some of the institutions convene in as many places as is necessary; while other have a single centrally-

located presence. Accessibility is however facilitated by appropriate dispute lodgement procedures and time limits. The institutions also allow non-individual claimants to bring disputes in some cases; and also allowing the personal appearance of parties to a dispute and other interested parties in most cases. Institutions are also empowered to determine adjudication procedures, which gives scope for the adoption of flexible procedures.

Dispute resolution in the labour relations, competition and the consumer protection spheres provide examples of systems established to resolve disputes in an efficient and effective manner. They thus present useful guidelines for the establishment and functioning of any proposed social security dispute adjudication.

CHAPTER FIVE

SOCIAL SECURITY DISPUTE RESOLUTION SYSTEMS IN COMPARATIVE INTERNATIONAL JURISDICTIONS

1. INTRODUCTION

This chapter reviews the systems established for the resolution of social security disputes in jurisdictions that are comparable to South Africa. The jurisdictions examined include countries in the Southern African Development Community (SADC) region, Australia, New Zealand, United Kingdom and Germany. Institutions and procedures established for the resolution of social security disputes are investigated. These countries have been selected in view of their developed, longstanding and well-established social security systems and adjudication institutions and procedures that ensure the realisation of social security claimants' right of access to justice.

These institutions and their procedures have been established to realise constitutional, statutory and/or common law rights of social security claimants (such as the right of access to justice, the right to a fair hearing and the right (of access) to social security). They are also established in compliance with the international law obligations of (some of) these countries. The variety of the social security adjudication institutions (tribunals and other forums in Australia, New Zealand and the United Kingdom; and courts in Germany) and their procedures is also in line with the institutions and procedures proposed in section 34 of the Constitution as possible avenues for realising the right of access to courts. The effectiveness of the institutions and procedures in achieving access to justice and/or a fair hearing for social security claimants could therefore be instructive in proposing a social security dispute resolution system for South Africa.

2. SADC COUNTRIES

Rights that have a bearing on the establishment of a social security adjudication framework are provided for in the constitutions of SADC countries. In the first instance, these constitutions regulate the right (of access) to social security and ancillary rights. Whilst some

constitutions provide for directly enforceable rights,⁶⁹⁷ other constitutions provide for the rights in more general unenforceable terms.⁶⁹⁸ Examples of the general protection of the right to social security include the “principles of national policy” in the Malawian Constitution⁶⁹⁹ and the “directive principles of state policy” in the Zambian Constitution.⁷⁰⁰ However, there is no reference to social security in some SADC constitutions.⁷⁰¹ The right (of access) to social security requires the availability of certain procedural guarantees for their enforcement, such as the establishment of an appropriate adjudication framework that ensures access to justice.⁷⁰²

Access to justice and related rights are also guaranteed in some of the constitutions. These include the right of access to courts;⁷⁰³ the right to have a dispute resolved by an independent and impartial tribunal;⁷⁰⁴ the right to a fair hearing;⁷⁰⁵ and the right to secure protection of the

⁶⁹⁷ Examples include the Constitution of Angola which guarantees as fundamental rights the rights to health and social protection (Article 77), protection to the elderly (Article 82) and protection to the disabled (Article 83). The Constitution of Seychelles (Article 37) provides that “the State recognises the right of every citizen to a decent and dignified existence and, with a view to ensuring that its citizens are not left unprovided for by reason of incapacity to work or involuntary unemployment, undertakes to maintain a system of social security.

⁶⁹⁸ See for example the Constitution of Malawi (section 30); the Constitution of Namibia (Article 95); the Constitution of Swaziland (section 60); the Constitution of Tanzania (sections 11 and 23); and the Constitution of Zambia (section 112).

⁶⁹⁹ Section 30(1) of the Malawi Constitution states that “all persons and peoples have a right to development and therefore to the enjoyment of economic, social, cultural and political development and women, children and the disabled in particular shall be given special consideration in the application of this right.” In terms of section 30(2), “the State shall take all necessary measures for the realization of the right to development. Such measures shall include amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure.” However, according to Section 13, the State is required to actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving gender equality, adequate nutrition, adequate health care, enhancing the quality of rural life, providing adequate resources to the education sector, to support the disabled, promote the full development of children, respect and support the elderly and to achieve a sensible balance between the creation of and distribution of wealth through the nurturing of a market economy and long term investment in health, education, economic and social development programmes.

⁷⁰⁰ In terms of the Directive Principles of State Policy of the Zambian Constitution, the State will endeavour to provide social protection to its citizens (section 112) subject to the ability of resources (section 110(2)).

⁷⁰¹ There is no reference to social security and other socio-economic rights in the Bill of Rights of the Botswana Constitution. The Zimbabwe Constitution also has no reference to social security.

⁷⁰² See generally Olivier M “Social security adjudication in the light of international standards: the need for reform in Southern Africa” 2011 *International Journal of Social Security and Workers Compensation* Vol. 3, No. 1, 29-54.

⁷⁰³ See for example Article 29(1) of the Angola Constitution; Article 82 of the Mozambique Constitution and Article 107A(2)(e) of the Tanzania Constitution.

⁷⁰⁴ See Article 41(2) of the Malawi Constitution.

⁷⁰⁵ Articles 29(4) and (5) and 72 of the Angola Constitution; Section 12(8) of the Lesotho Constitution; Article 12(1)(a) of the Namibia Constitution; Article 19(1) of the Seychelles Constitution; and Section 21(10) of the Swaziland Constitution.

law.⁷⁰⁶ The realisation of these rights for social security applicants and beneficiaries requires the establishment of an adjudication system.

Some constitutions also provide for a right to just administrative action.⁷⁰⁷ This has an impact on the decisions, conduct and actions of social security administering institutions and adjudication tribunals.⁷⁰⁸

Few countries have adopted legislation to provide for the establishment of an adjudication framework for the whole social security system. Some countries have established adjudication systems for public social security schemes, while others regulate the establishment of a dispute resolution system for private social security schemes. However, some countries provide dispute resolution frameworks for certain social security schemes only;⁷⁰⁹ and in some cases only the adjudication of particular types of disputes is regulated.⁷¹⁰ In some countries social security statutes do not provide for the resolution of disputes.⁷¹¹

Where provision has been made for the resolution of social security disputes, no dedicated social security adjudication institutions have been created. In these cases, the resolution of social security disputes is undertaken by labour courts,⁷¹² or by ordinary civil courts. An appropriate social security adjudication framework that can be considered as a benchmark for the development of an effective and efficient social security adjudication system in South Africa is therefore lacking.

⁷⁰⁶ Section 10(9) of the Botswana Constitution; Article 10(8) of the Mauritius Constitution; Article 18(8) of the Zambia Constitution and Article 18(9) of the Zimbabwe Constitution.

⁷⁰⁷ Such as the Malawi Constitution (section 43) and the Swaziland Constitution (section 33).

⁷⁰⁸ Olivier M “Social security adjudication in the light of international standards: the need for reform in Southern Africa” 2011 *International Journal of Social Security and Workers Compensation* Vol. 3, No. 1, 29-54.

⁷⁰⁹ Such as in section 45 of Namibia’s Social Security Act 34 of 1994; sections 34A-36 of the National Pensions Act of Mauritius (Act 44 1976); and sections 35-37 of the National Social Security Authority Act of Zimbabwe.

⁷¹⁰ See Article 10 of the Social Welfare Act of Zimbabwe which provides for an appeal in social assistance disputes to the relevant minister,

⁷¹¹ There is no explicit provision for the resolution of social security disputes in the Swaziland National Provident Fund Order of 1974 and Zambia’s National Social Security Authority Act 12 of 1989 which regulates the National Pension Scheme Authority (NAPSA).

⁷¹² This is the case in Lesotho, Malawi and Swaziland.

3. AUSTRALIA

Australia has established institutions and procedures for the resolution of social security disputes. These institutions and procedures seek to realise the common law and statutory right to a fair hearing; and Australia's international law obligations in this regard. The established institutions and procedures must therefore comply with the scope and contents of the right to a fair hearing. Therefore, the social security adjudication systems ensure access to justice for parties to social security disputes; as access to justice is considered as an essential aspect of the right to a fair hearing (and the right to equality before the law).⁷¹³ As Australian courts have held, “[t]he inherent duty to ensure a fair trial and the human rights of equality before the law and access to justice may be said to breathe the same air”.⁷¹⁴

According to the Human Rights Law Resource Centre,⁷¹⁵ the basic minimum elements of the right to a fair trial which these institutions are required to comply with include equal access to, and equality before the courts; provision of legal advice and representation;⁷¹⁶ elimination or reduction of costs of litigation; right to procedural fairness; positive duties to self-represented litigants; right to an expeditious hearing; right to a competent, independent and impartial tribunal established by law; right to a public hearing;⁷¹⁷ and the right to have the free assistance of an interpreter, where necessary.

⁷¹³ Human Rights Law Resource Centre *The Right to a Fair Hearing and Access to Justice: Australia's Obligations* (Submission to the Senate Legal and Constitutional Affairs Committee: Inquiry into Australia's Judicial System, the Role of Judges and Access to Justice) 6 March 2009, 8.

⁷¹⁴ Bell J in *Tomasevic v Travaglini & Anor* [2007] VSC 337.

⁷¹⁵ Human Rights Law Resource Centre *The Right to a Fair Hearing and Access to Justice: Australia's Obligations* (Submission to the Senate Legal and Constitutional Affairs Committee: Inquiry into Australia's Judicial System, the Role of Judges and Access to Justice) 6 March 2009, 3.

⁷¹⁶ The Law Council of Australia has stated that “[e]quality before the law is meaningless if there are barriers that prevent people from enforcing their rights. True equality requires that all these barriers – financial, social and cultural – be removed for all Australians. The legal assistance system is critical in overcoming these barriers” - see Law Council of Australia *Legal Aid and Access to Justice Funding 2009-10 Federal Budget*, (9 January 2009).

⁷¹⁷ It has been held that “the publicity of a trial includes both the public nature of the hearings and the publicity of the judgment eventually made in a case. The court or tribunal is obliged to make information about the time and venue of the hearing available and to provide adequate facilities for attendance by interested members of the public, within reasonable limits. The right to a public hearing means that the hearing should be conducted orally and publicly. While the right to a fair and public hearing generally implies the right to an oral hearing, in certain circumstances, it may be permissible for a court to determine a matter by written submissions in the interests of efficient administration of justice. However, where the hearing is a first instance hearing rather than appeal, only exceptional circumstances will justify departure from an oral hearing” - see Human Rights Law Resource Centre *The Right to a Fair Hearing and Access to Justice: Australia's Obligations* (Submission to the Senate Legal and Constitutional Affairs Committee: Inquiry into Australia's Judicial System, the Role of Judges and Access to Justice) 6 March 2009, 31-32).

The social security dispute resolution system as a whole; and the institutional framework and procedures of each of these institutions are geared towards the achievement of access to justice for social security applicants and beneficiaries. As a result, the system is guided by the principles for access to justice policy-making (objectives of the Australian justice system).⁷¹⁸ The principles or objectives are accessibility,⁷¹⁹ appropriateness,⁷²⁰ equity,⁷²¹ efficiency⁷²² and effectiveness.⁷²³

The Australian social security dispute resolution system is a multi-level system of sequential and complementary internal review (review by the ministry or agency responsible for the administration of social security) and external review of decisions by the SSAT, the AAT, the Federal Court, the High Court, the Court of Appeals and finally the Supreme Court. However, the inquiry into the effectiveness of the Australian system is limited to the first four levels, as the bulk of disputes are resolved at these levels (appeals proceed to the Federal Court, the High Court, the Court of Appeals and the Supreme Court only on questions of law).

3.1 Review of decision by ministry or social security administration agency

The first step in the resolution of social security disputes is the internal review of the decision. Internal review occurs where a decision made by an officer of ministry or social security administration agency is reconsidered by the officer and/or reviewed by another person in the ministry or agency. It is a requirement for most (social security) agencies to implement appropriate internal review processes. Applicants or beneficiaries must also be informed of their rights to a review if they are adversely affected by a decision of the agency. This is because an internal review is easy for social security applicants or beneficiaries to

⁷¹⁸ See Australian Government *A Strategic Framework for Access to Justice in the Federal Civil Justice System: A Guide for Future Action* (September 2009) 8.

⁷¹⁹ The principle of accessibility requires that the net complexity of the dispute resolution system should be reduced, and there must be mechanisms that enable people to understand and exercise their rights.

⁷²⁰ The dispute resolution system should be structured to create incentives to encourage people to resolve disputes at the post appropriate level.

⁷²¹ The dispute resolution system should be fair and accessible for all, including those facing financial and other disadvantage.

⁷²² The dispute resolution system should deliver fair outcomes in the most efficient manner possible. This may include dispute resolution outside a formal dispute resolution process, the prevention of disputes and the provision of early assistance and support to prevent a dispute from escalating.

⁷²³ The various elements of the system should be designed to deliver the best outcomes for users. The elements should be directed towards the prevention and resolution of disputes, delivering fair and appropriate outcomes and maintaining and supporting the rule of law.

access, and it enables a quicker and less expensive means of re-examining decisions where applicants or beneficiaries believe a mistake has been made and resolving disputes.⁷²⁴

The internal review process involves a review by the Original Decision-Maker, followed by a review by an Authorised Review Officer. A social security applicant or beneficiary who is unhappy with a decision by an administration agency (such as Centrelink, Child Support Agency or Family Assistance Office) has the right to discuss it with original decision-maker. The Original Decision-Maker is given an opportunity to review the decision made. Review by the Original Decision-Maker gives the applicant or beneficiary an opportunity to correct misunderstandings, present new information or evidence, and to get an incorrect decision changed quickly. It thus promotes the resolution of a dispute at an expeditious manner.

A person who is still unhappy with a decision of the Original Decision-Maker can apply for a review by an Authorised Review Officer (of Centrelink) or an Objections Officer (of the Child Support Agency). An Authorised Review Officer is a person with due delegations to review a decision made.⁷²⁵ In an attempt to expedite the review process, the applicant or beneficiary is not required to apply for a review by the Original Decision-Maker before applying for a review by an Authorised Review Officer.

When an application is made to an Authorised Review Officer, he or she considers the information that formed the basis of the original decision. Where possible, he or she contacts the review applicant by phone or in person to discuss the issue(s); checks any new and relevant information that may be available; clears up any misunderstandings that may be present; corrects any mistakes that were made; changes the original decision (where appropriate); and informs the review applicant of the result, explaining the reasons for his or her decision.⁷²⁶

⁷²⁴ Commonwealth of Australia *Australian Administrative Law Policy Guide* (2011) 14.

⁷²⁵ Authorised Review Officers are senior and experienced officials with more specialised legal knowledge who have had no involvement in the matter.

⁷²⁶ Olivier M (assisted by Govindjee A & Nyenti M) *Project to set up internal remedy units at district, regional and national offices at SASSA (Report prepared for the South African Social Security Agency (SASSA))* May 2009, 47.

3.2 Review of a social security decision by the SSAT

After the review by the ARO or an Objections Officer, an applicant or beneficiary who is still unhappy can appeal the decision to the SSAT. Such an appeal is an external review process, as it is an application to an institution that is independent of the institution that took the original decision. The SSAT, which can be considered as the first level of appeals (external reviews) of social security decisions, reviews the decisions agencies such as Centrelink (relating to social security, family assistance, and education or training payments) and the Child Support Agency (on the provision of child support).

The SSAT was established with the objective of achieving access to justice for parties to disputes within its jurisdiction. The SSAT was established to conduct merits review of administrative decisions made under the social security law, the family assistance law and various other pieces of legislation in a fair, just, economical, informal and quick manner.⁷²⁷ The institutional framework and procedures of the SSAT are therefore geared towards the achievement of its objective. This relates to its accessibility; its practices and procedures; the scope of its jurisdiction and powers; the competency of its members; and its independence and impartiality.

3.2.1 Accessibility of the SSAT

In order for the SSAT to be effective (to conduct merits review of administrative decisions in a fair, just, economical, informal and quick manner), it must be accessible to (potential) users of the Tribunal. This requires that the institutional framework, practices and procedures and all relevant aspects of the Tribunal should enable affected persons to get redress. As was stated in the Foreword to the Report by the Access to Justice Taskforce:

“an effective justice system must be accessible in all its parts. Without this, the system risks losing its relevance to, and the respect of, the community it serves. Accessibility is about more than ease of access to sandstone buildings or getting legal advice. It involves an appreciation and understanding of the needs of those who require the assistance of the legal system.”⁷²⁸

⁷²⁷ Section 141 of the Social Security (Administration) Act.

⁷²⁸ Commonwealth of Australia *A Strategic Framework for Access to Justice in the Federal Civil Justice System (Report by the Access to Justice Taskforce)* September 2009, ix.

The accessibility of the SSAT ensures, through the location of its offices, the requirements and procedures for making an application and the provision of information about the review process. In relation to the location of its offices, the National Office of the SSAT is located in Melbourne; while regional SSAT offices are based in Sydney (for the Australian Capital Territory and New South Wales), Brisbane (for Queensland / Northern Territory), Adelaide (for South Australia / Tasmania), Melbourne (for Victoria) and Western Australia (Perth). Hearings are generally conducted in the SSAT's offices in Adelaide, Brisbane, Canberra, Hobart, Melbourne, Perth and Sydney. However, SSAT hearings are also conducted in other regional centres.⁷²⁹ In addition, the SSAT facilitates the participation of parties by arranging hearings through tele- or video-conference for persons living in regional areas and those unable to attend the hearing at the SSAT premises.⁷³⁰ All SSAT premises are wheelchair accessible, and the Tribunal provides typewriter and hearing loop services. Applicants and other parties can also advise the SSAT of any special needs.⁷³¹

Access to the SSAT is further facilitated through the requirements and procedures for making an application. Applications to the SSAT for review can be lodged easily and without undue formality. There are no costs for SSAT review applications,⁷³² and they can be lodged by telephone, in writing or by teletype machine (for hearing impaired applicants). In addition, applications for review of Child Support Agency decisions can be lodged in writing at a range of government department offices.⁷³³

Applications for review of Centrelink decisions can be lodged any time after a review of the original decision by a Centrelink Authorised Review Officer. If the review is about payment of a Centrelink benefit, it should be lodged as soon as possible (within 13 weeks), because back-pay may not be possible if a successful application for review is lodged more than 13 weeks after the Centrelink ARO's decision.⁷³⁴ For persons resident in Australia, Child Support Agency appeals must be lodged within 28 days of receiving an objection decision.

⁷²⁹ During 2010-2011 the SSAT also conducted hearings in Townsville, Newcastle, Wollongong, Bunbury, Whyalla and Launceston.

⁷³⁰ Social Security Appeals Tribunal *Annual Report 2010-2011*, 13. See also Section 161(5) of the Social Security (Administration) Act.

⁷³¹ Social Security Appeals Tribunal *Annual Report 2010-2011*, 13.

⁷³² Legal Aid NSW and Welfare Rights Centre *Appealing to the Social Security Appeals Tribunal: A self-help guide for people who want to appeal against a Centrelink decision* (July 2010) 4.

⁷³³ See Social Security Appeals Tribunal *Annual Report 2009-2010*, 21.

⁷³⁴ Section 145 of the Social Security (Administration) Act

Persons living out of Australia must lodge an appeal within 90 days.⁷³⁵ However, a person may make a written extension application asking the SSAT Principal Member⁷³⁶ to consider the application for review despite the late submission of the review. The extension application must state the reasons for the person's failure to apply for the review within the required period.⁷³⁷

An applicant whose appeal is urgent can ask the SSAT to give priority to his or her appeal. This would be the case for applicants who have no income or are experiencing financial problems.⁷³⁸

The SSAT assists parties to a hearing by providing information about the review process. Where an application for review is sent or delivered to an office of the SSAT, the Principal Member of the SSAT gives the applicant and the Secretary written notice that the application has been received.⁷³⁹ The Principal Member also gives each party (other than the Secretary) a copy of the statement about the decision under review.⁷⁴⁰ The Principal Member gives the applicant and any other parties to the review written notice of the day, time and place fixed for the hearing of the application. It is required that the notice be given a reasonable time before the day fixed for the hearing.⁷⁴¹

The Principal Member takes reasonable steps to give written notice that an application has been made to the SSAT for the review of a decision to a person who is not a party to the review but whose interests are affected by the decision. Such notice is given at any time before the determination of the review.⁷⁴² It is in writing and includes information about the

⁷³⁵ Section 90 of the Child Support (Registration and Collection) Act of 1988.

⁷³⁶ See "Expertise, independence and impartiality of the SSAT" in para 3.2.4 of this Chapter (below) for the description of the Principal Member.

⁷³⁷ Section 91 of the Child Support (Registration and Collection) Act of 1988.

⁷³⁸ Legal Aid NSW and Welfare Rights Centre *Appealing to the Social Security Appeals Tribunal: A self-help guide for people who want to appeal against a Centrelink decision* (July 2010) 4.

⁷³⁹ Section 157(2) of the Social Security (Administration) Act.

⁷⁴⁰ Section 158(1) of the Social Security (Administration) Act. The statement about the decision sets out the findings of fact made by the person who made the decision. It refers to the evidence on which those findings were based, and gives the reasons for the decision. It also contains the original or a copy of every document or part of a document that is in the possession, or under the control, of the Secretary which relates to the applicant and is relevant to the review of the decision - section 157(3) of the Social Security (Administration) Act.

⁷⁴¹ Section 159(3) and (4) of the Social Security (Administration) Act.

⁷⁴² Section 160(1) and (2) of the Social Security (Administration) Act.

person's right to apply to the Principal Member to be added as a party to the review. The Principal Member also gives each party to the review a copy of the notice.⁷⁴³

The SSAT does not provide legal assistance to parties to a review. However, it provides parties seeking legal assistance with details of community legal centres.⁷⁴⁴ The Tribunal also seeks to improve access to justice through activities and meetings intended to raise awareness of the availability of this mechanism.

Access to the Tribunal is also promoted through the regulation of costs. Although the general practice is for a party to a SSAT review to bear any expenses incurred in connection with the review, the Tribunal may determine that the National Government (Commonwealth) pays the reasonable costs that are incurred by a party for travel and accommodation in connection with the review.⁷⁴⁵

3.2.2 Scope of jurisdiction and powers of the SSAT

The scope of jurisdiction and powers of the SSAT in reviewing decisions are as set out in various statutes.⁷⁴⁶ The enabling statutes grant the Tribunal powers to review a wide range of decisions. For example, the Social Security (Administration) Act states that the SSAT can review all decisions of an officer under the social security law.⁷⁴⁷ Therefore, almost every decision made by Centrelink can be appealed to the SSAT. The SSAT also reviews most CSA decisions.⁷⁴⁸

However, due to the need to ensure that disputes are resolved at the appropriate levels (sequential and complementary resolution of disputes), the SSAT cannot review a decision made by an officer of Centrelink or of the Child Support Agency, unless that decision has been reviewed by an Authorised Review Officer or Objections Officer, respectively.⁷⁴⁹ In

⁷⁴³ Section 160(3) of the Social Security (Administration) Act.

⁷⁴⁴ Social Security Appeals Tribunal *Annual Report 2010-2011*, 13.

⁷⁴⁵ Section 176 of the Social Security (Administration) Act.

⁷⁴⁶ Social Security Appeal Tribunal *Annual Report 2010-2011*, 6. These include the Social Security (Administration) Act 1999, the A New Tax System (Family Assistance) (Administration) Act 1999, the Child Support (Registration and Collection) Act 1988, the Paid Parental Leave Act 2010, the Health Insurance Act 1973, the Veterans' Entitlements Act 1986, the Child Support (Assessment) Act 1989 and the Child Support (Registration and Collection) Act 1988.

⁷⁴⁷ Section 140 Social Security (Administration) Act.

⁷⁴⁸ See Social Security Appeals Tribunal *Annual Report 2009-2010*, 6-7.

⁷⁴⁹ Social Security Appeal Tribunal *Annual Report 2010-2011*, 5.

addition, the SSAT can also conduct a hearing for the purpose of determining whether it has jurisdiction to hear an appeal (this is the case where the Child Support Agency rejects an objection on the basis that it is not “valid”, and adopts the view that the SSAT has no jurisdiction).

The personal scope of jurisdiction of the SSAT is also wide. Any person whose interests are affected by the decision of the Ministry for Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), the Child Support Agency or Centrelink, or another relevant agency) may apply to the SSAT for review of that decision.⁷⁵⁰ This implies that not only the person who is directly affected, but any other person whose interests are affected by the decision can apply.

The wide scope of decisions that can be reviewed and the granting of access to the Tribunal to a wide range of persons ensure that the Tribunal is able to afford access to justice for as many social security applicants/beneficiaries as possible.

The SSAT effectiveness in reviewing the decisions of social security agencies is facilitated by the extensive powers granted to it. In reviewing a decision, the Tribunal is not bound by legal technicalities, legal forms or rules of evidence. The SSAT was established to conduct merits review of decisions made in terms of the enabling social security statutes. Merits review is defined as the “process by which a person or body, other than the primary decision-maker, reconsiders the facts, law and policy aspects of the original decision and determines the ‘correct or preferable decision.’” In this case the whole decision is made again on the facts.⁷⁵¹ The objectives of merit review are to ensure administrative decisions are correct or preferable (that decisions are lawfully-made or, if there is a range of decisions that can be lawfully made, that the best decision is made on the relevant facts); to ensure fair treatment of all persons affected by a decision; and to improve the quality and consistency of primary decision-making.⁷⁵²

⁷⁵⁰ Section 142(1) of the Social Security (Administration) Act.

⁷⁵¹ Administrative Review Council (Australia) *What decisions should be subject to merits review?* (1999).

⁷⁵² The ‘correct’ decision is made in a situation where only one decision is possible on either the facts or the law (non-discretionary matter). Where a decision requires the exercise of a discretion or a selection between possible outcomes, it is required that the decision taken is the ‘preferable’ one (see Administrative Review Council (Australia) *What decisions should be subject to merits review?* (1999); and Commonwealth of Australia *Australian Administrative Law Policy Guide* (2011) 13).

Merits review of an administrative decision by the Tribunal involves considering afresh the facts, law and policy relating to that decision. Merits review is made up of three aspects: substantive, procedural and remedial aspects. The substantive element requires that in considering the material before it and in making a decision, the Tribunal must seek to ensure that the correct or (in a discretionary area) preferable decision is made. As the Tribunal has stated:

“The question for the determination of the Tribunal is not whether the decision which the decision maker made was the correct or preferable one on the material before him. The question for the determination of the Tribunal is whether that decision was the correct or preferable one on the material before the Tribunal.”⁷⁵³

In terms of the procedural aspect of merits review, the reviewer is empowered to exercise the powers and discretions of the original decision-maker. In addition, when the reviewer varies the primary decision or makes a substitute decision, the reviewer’s decision is deemed to be the decision of the original decision-maker. Hence it is said that when undertaking a review, the reviewer ‘stands in the shoes of the primary decision-maker’.⁷⁵⁴

By placing the reviewer in the shoes of the original decision-maker, merits review empowers the reviewer to exercise the powers of the original decision-maker. Merits review also affords wide powers on the reviewer to make a decision and provide a remedy. The SSAT may therefore exercise the powers and discretions of the decision-maker, subject to some exceptions.

When the SSAT reviews a decision, it can affirm it, vary it or set it aside. Where the Tribunal sets aside a decision, it can substitute it with a new decision or send the matter back to the relevant agency for reconsideration, in accordance with directions or recommendations that it may provide.⁷⁵⁵

⁷⁵³ Per Bowen CJ and Dean J in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589 (1979) 2 ALD 60 at 68.

⁷⁵⁴ *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139, 143.

⁷⁵⁵ Social Security Appeals Tribunal *Annual Report 2010-2011*, 6. See also Section 149(1) of the Social Security (Administration) Act.

If necessary, the SSAT can take evidence on oath or affirmation for the purposes of a review of a decision.⁷⁵⁶ The Tribunal can ask an agency to provide it with information or a document that is in the possession of the Agency and that is relevant to the review of a decision.⁷⁵⁷ The SSAT may require a person to furnish any information or document which it believes is in the possession of the person and is relevant to a review.⁷⁵⁸ The Tribunal may also inspect any such document produced and may make and retain copies of the document.⁷⁵⁹

3.2.3 Fairness of SSAT procedures

The practices and procedures at the hearing of the SSAT are also aimed at ensuring that the Tribunal is accessible and is able to achieve its objectives. Given the number and diversity of persons who apply to the Tribunal for review of decisions, its practices and procedures are flexible and informal.

In reviewing a decision, the SSAT is not bound by legal technicalities, legal forms or rules of evidence. It is to act as speedily as a proper consideration of the review allows. In determining what a proper consideration of the review requires, it must have regard to its objective of providing a mechanism of review that is fair, just, economical, informal and quick. In reviewing a decision, the SSAT may inform itself on any matter relevant to a review of a decision in any manner it considers appropriate.⁷⁶⁰

The hearing of a review is to be in private, although the Tribunal may give directions for other persons to be present at a review hearing.⁷⁶¹ Such a direction takes into account the wishes of the parties and the need to protect their privacy.

The SSAT conducts hearings at its offices in rooms which do not have the formality of court rooms.⁷⁶² Hearings are conducted in private with only the applicant and SSAT members, except where the applicant gives permission for someone else to attend, or a representative of

⁷⁵⁶ Section 164 of the Social Security Administration Act.

⁷⁵⁷ Section 165 of the Social Security (Administration) Act.

⁷⁵⁸ Section 165A of the Social Security (Administration) Act.

⁷⁵⁹ Section 165B of the Social Security (Administration) Act.

⁷⁶⁰ Section 167 of the Social Security (Administration) Act.

⁷⁶¹ Section 168 of the Social Security (Administration) Act

⁷⁶² Social Security Appeals Tribunal *Annual Report 2010-2011*, 13.

a social security agency is required to attend.⁷⁶³ Hearings are conducted face-to-face with the applicant and other parties to an appeal in the same room. This is due to the belief that the interests of the applicant and other parties are best served and protected when members, applicants and other parties have the opportunity to speak directly in an informal environment.⁷⁶⁴ However, hearings are also conducted telephonically where a party is unable to attend the hearing at the premises of the Tribunal.⁷⁶⁵

With the exception of the social security agency, a party to a SSAT review is permitted to make oral and/or written submissions. The Tribunal also permits another person to make submissions on behalf of a party to a review of a decision. The party or the party's representative can make the submission by telephone or by means of other electronic communications equipment.⁷⁶⁶ This is the case where the review application is urgent; where the party lives in a remote area and would incur unreasonable expenses in travelling to the venue of the hearing; where the party fails to attend the hearing and does not indicate that he or she intends to attend the hearing; and where the applicant is unable to attend the hearing because of illness or infirmity.⁷⁶⁷

However, the social security agency may request permission to make oral and/or written submissions, if this would assist the Tribunal in achieving its objectives. The Tribunal may grant such a request for submissions if it promotes the Tribunal's objectives. Oral submissions by the social security agency can be made by telephone or by means of other electronic communications equipment.⁷⁶⁸

The SSAT can hear an appeal without oral submissions if it considers that it can be determined fairly on the basis of written submissions by the parties; and all parties consent to the hearing being conducted without oral submissions.⁷⁶⁹ The Tribunal can also ask the social

⁷⁶³ Legal Aid NSW and Welfare Rights Centre *Appealing to the Social Security Appeals Tribunal: A self-help guide for people who want to appeal against a Centrelink decision* (July 2010) 11.

⁷⁶⁴ Olivier M, Govindjee A & Nyenti M *Project to set up internal remedy units at district, regional and national offices at SASSA (Report prepared for the South African Social Security Agency (SASSA))* May 2009, 54.

⁷⁶⁵ Social Security Appeals Tribunal *Annual Report 2010-2011*, 13.

⁷⁶⁶ Section 161 of the Social Security (Administration) Act.

⁷⁶⁷ Section 161(5) of the Social Security (Administration) Act.

⁷⁶⁸ See section 163A of the Social Security (Administration) Act.

⁷⁶⁹ Section 162(1) of the Social Security (Administration) Act.

security agency to provide the SSAT with information or a document that the Secretary has and that is relevant to the review of a decision.⁷⁷⁰

A party to a SSAT hearing is permitted to have a representative (such as a friend, relative or legal practitioner). However, in most cases a legal practitioner is unnecessary for a SSAT hearing, as hearings are informal and parties are given an opportunity to present their case.⁷⁷¹

In furtherance of its objectives, the SSAT is empowered to utilise alternative dispute resolution processes if it considers that this will assist in the conduct and consideration of the appeal.⁷⁷² A pre-hearing conference is aimed at clarifying the issues in dispute, explaining the hearing process to the parties and identifying additional information required for the hearing.⁷⁷³ At a pre-hearing conference, the Tribunal may fix a date for the hearing; give directions about the time for submissions to be made; give directions about the time within which evidence is to be brought before the SSAT; and give directions about what evidence is to be brought before the SSAT and the time the evidence is to be brought.⁷⁷⁴

If the parties reach an agreement at the pre-hearing conference before a review hearing the terms of the agreement are put in writing, signed by or on behalf of the parties; and lodged with the SSAT. If the agreement is within the SSAT's powers; it may make a decision in accordance with the terms of the agreement without holding a hearing of the review.⁷⁷⁵ Pre-hearing conferences therefore promote the SSAT's objective to fair, just, economical, informal and quick review mechanism. Tribunal is able to assist parties to reach agreement as a result of a pre-hearing conference in about one quarter of cases in which a conference is held.⁷⁷⁶

The SSAT provides an interpreter to assist an applicant or another party (where necessary), free of charge. The SSAT also arranges for and pays for the translation of documents in a

⁷⁷⁰ Section 165 of the Social Security (Administration) Act.

⁷⁷¹ Legal Aid NSW and Welfare Rights Centre *Appealing to the Social Security Appeals Tribunal: A self-help guide for people who want to appeal against a Centrelink decision* (July 2010) 10.

⁷⁷² Section 166A(1) of the Social Security (Administration) Act.

⁷⁷³ Social Security Appeals Tribunal *Annual Report 2009-2010*, 17.

⁷⁷⁴ Section 166A(2) and (3) of the Social Security (Administration) Act.

⁷⁷⁵ Section 166B(2) of the Social Security Administration Act.

⁷⁷⁶ Social Security Appeals Tribunal *Annual Report 2009-2010*, 1.

foreign language.⁷⁷⁷ The provision of interpretation and translation services is vital in such a hearing as it ensures a fair hearing and access to justice for the parties. It has been observed that:

“in order to have true access to justice, applicants must be able to understand the proceedings and processes. In some circumstances, applicants will require the assistance of an interpreter, either for their own benefit or to be used with witnesses. Therefore, the right to, and access to, an interpreter is a vital part of access to justice. There are two aspects to the access to interpreters: availability of an interpreter, and ability to either secure the services of a free interpreter or pay the costs of an interpreter.... The unavailability of interpreting services in the courts presents a major barrier to access to justice. A party’s ability to participate in the legal process is severely undermined where he or she is unable to afford to pay for an interpreter to attend a hearing.”⁷⁷⁸

There are no statutory time periods for the finalisation of appeals by the SSAT. However, it is required to act as expeditiously as possible, while giving a proper consideration to the review.⁷⁷⁹ The SSAT’s determination of what a proper consideration requires is guided by its statutory objective of providing a mechanism of review that is fair, just, economical, informal and quick. In order to fulfil its objective of providing a mechanism of review that is quick, the Service Charter of the SSAT commits the SSAT to ensuring timely service to applicants and other parties to reviews.⁷⁸⁰ Timeliness standards in the Service Charter include confirmation of receipt of applications within five days; allocation of hearing or pre-hearing conference dates as soon as possible; provision to the parties of copies of the documents that will be before the SSAT at least seven days before scheduled hearings; written notification of the SSAT’s decision within 14 days of the decision; and finalisation of the review within three months of lodgement of the application for review.

Although SSAT review hearings may be adjourned, the SSAT will not postpone a review hearing if the hearing has already been postponed two or more times. The Tribunal will also not postpone a review hearing if this is inconsistent with its objective of ensuring a fair, just,

⁷⁷⁷ Social Security Appeals Tribunal *Annual Report 2010-2011*, 13. See also section 161(6) of the Social Security (Administration) Act.

⁷⁷⁸ Human Rights Law Resource Centre *The Right to a Fair Hearing and Access to Justice: Australia’s Obligations (Submission to the Senate Legal and Constitutional Affairs Committee: Inquiry into Australia’s Judicial System, the Role of Judges and Access to Justice)* 6 March 2009, 33-34.

⁷⁷⁹ Social Security Appeal Tribunal *Annual Report 2010-2011*, 6.

⁷⁸⁰ Social Security Appeals Tribunal *Service Charter*. See also Social Security Appeals Tribunal *Annual Report 2010-2011*, 11.

economical, informal and quick review process. A review will also not be postponed if social security benefits are paid pending outcome of the review application.⁷⁸¹

Where the SSAT affirms a decision on a review, it prepares a written statement, setting out the decision. It gives each party to the review a copy of the statement within 14 days after making the decision. It also give reasons for the decision, orally, to each party to the review and explains that the party may make a written request for a written statement within 14 days after the copy of the statement is given; or gives each party to the review a written statement that sets out the reasons for the decision, sets out the findings on any material questions of fact and refers to evidence or other material on which the findings of fact are based.⁷⁸² A party make request to the SSAT for the copy of the written statement. The SSAT is required to comply with a request for a written statement within 14 days after receipt of the request.⁷⁸³

Where the SSAT varies or sets a decision aside, it also prepares a written statement. The statement sets out the decision of the SSAT on the review, the reasons for the decision and the findings on any material questions of fact. It refers to evidence or other material on which the findings of fact are based. The SSAT gives each party to the review a copy of the written statement within 14 days after the making of the decision.⁷⁸⁴

The Tribunal also gives each party to the review (other than the social security agency) a written notice on the right to apply to the AAT for review of the decision.⁷⁸⁵

3.2.4 Expertise, independence and impartiality of the SSAT

The institutional framework of the SSAT indicates recognition of the fact that for it to be effective in resolving disputes, it must be competent to resolve dispute within its jurisdiction. It must also be independent of the institutions whose decisions they are reviewing and to be impartial. The importance of competence, independence and impartiality in the promotion of access to justice system in Australia was captured by the Human Rights Law Resource Centre when it stated that:

⁷⁸¹ Section 170 of the Social Security (Administration) Act.

⁷⁸² Section 177(1A) of the Social Security Administration Act.

⁷⁸³ Section 177(1B) and (1C) of the Social Security Administration Act.

⁷⁸⁴ Section 177(1) of the Social Security Administration Act.

⁷⁸⁵ Section 177(2) of the Social Security (Administration) Act.

“The broad concepts of competence, independence and impartiality provide necessary safeguards against violation of the right to a fair hearing and promote the right to equality. The fact that these elements of the right to a fair hearing are considered as absolute demonstrates that they are crucial for effective access to justice.”⁷⁸⁶

The SSAT consists of a Principal Member; Senior Members; Assistant Senior Members; and other members. The Principal Member is appointed as a full-time member; while other members are appointed as either full-time or part-time members.⁷⁸⁷ Most members of the SSAT are appointed on a part-time basis to allow the SSAT flexibility in meeting its review workload.⁷⁸⁸

SSAT members are drawn from varied backgrounds and areas of expertise, including expertise in law, social welfare, medicine, accounting and government.⁷⁸⁹ Members are appointed on the basis of their specialist knowledge, communication skills, knowledge of the social security system or child support scheme and their understanding of, and commitment to the principles of administrative review.⁷⁹⁰

A SSAT hearing panel normally consists of a single member. However, in complicated cases such as child support reviews, a panel is made up of two or more members. The constitution of the SSAT by one member for most reviews fulfils the Tribunal’s statutory objective of providing a mechanism of review that is not only fair, just, informal and quick but also economical. It also increases the Tribunal’s capacity to hear matters and reduces the time from application to finalisation of a review.⁷⁹¹

The SSAT is within the portfolio of FaHCSIA. FaHCSIA provides for the funding of the Tribunal;⁷⁹² human resource and administrative support;⁷⁹³ governance, oversight and

⁷⁸⁶ Human Rights Law Resource Centre *The Right to a Fair Hearing and Access to Justice: Australia’s Obligations (Submission to the Senate Legal and Constitutional Affairs Committee: Inquiry into Australia’s Judicial System, the Role of Judges and Access to Justice)* 6 March 2009, 31.

⁷⁸⁷ Clause 3(2) and (3) of Schedule 3 of the Social Security (Administration) Act.

⁷⁸⁸ Social Security Appeals Tribunal *Annual Report 2010-2011*, 7.

⁷⁸⁹ Legal Aid NSW and Welfare Rights Centre *Appealing to the Social Security Appeals Tribunal: A self-help guide for people who want to appeal against a Centrelink decision* (July 2010) 10.

⁷⁹⁰ See Social Security Appeals Tribunal *Annual Report 2009-2010*, 10.

⁷⁹¹ Social Security Appeals Tribunal *Annual Report 2010-2011*, 1.

⁷⁹² Funding for the SSAT’s running costs (salary, administration, property and information technology) is provided in the FaHCSIA portfolio budget. The SSAT prepares and submits budget bids to FaHCSIA in aggregate, to be incorporated into the Ministry’s total portfolio requirements (see Social Security Appeals

supervision⁷⁹⁴ and accountability and reporting of the Tribunal.⁷⁹⁵ However, the Tribunal was established to provide an independent merits review of decisions. It contributes to the portfolio of FAHCSIA, as it ensures that the administrative decisions of Centrelink, the Child Support Agency and other agencies are consistent with legislation.⁷⁹⁶ As a result, it is independent of these agencies whose decisions it reviews. The independence and impartiality of the SSAT is further facilitated by the procedure for the appointment and discipline of members;⁷⁹⁷ and the management of the Tribunal.⁷⁹⁸

Tribunal *Annual Report 2009-2010*, 5). The Principal Member and National Manager determine the distribution of funds within the SSAT, with a mid-year funding review carried out in close co-operation with SSAT State Office Senior Members. However, the SSAT is responsible for managing its own financial resources.

⁷⁹³ The Principal Member of the SSAT is supported by staff and members located in registries (offices) around Australia (in all capital cities except Darwin), as well as in the National Office (See Social Security Appeals Tribunal *Annual Report 2009-2010*, 10). The National Manager is responsible to the Principal Member for the management of the National Office, including the provision of support services (corporate, information technology, legal research and financial management) to the local SSAT registries and all staff. Business Managers support the National Manager (see Social Security Appeals Tribunal *Annual Report 2009-2010*, 11). All staff in the local SSAT registries and in the National Office are public servants employed under the Public Service Act of 1999. Administrative arrangements are also in place between FaHCSIA and the SSAT which allows the Tribunal to utilise the Department's administrative infrastructure. However, the SSAT undertakes most payroll, personnel management, IT support, budgeting and finance functions in-house. It also has its own national case management system to manage and administer applications for review and administer the payment of fees to members (see Social Security Appeals Tribunal *Annual Report 2009-2010*, 5).

⁷⁹⁴ Since the SSAT is within the portfolio of the FaHCSIA, the Principal Member is responsible to the Minister for FaHCSIA for the operation and administration of the SSAT (see Social Security Appeals Tribunal *Annual Report 2009-2010*, 5 and 10).

⁷⁹⁵ The Principal Member is required, as soon as practicable after the end of a financial year, to give to the Minister a report of the operations of the SSAT during that year. The Minister must cause the report to be laid before each House of the Parliament within 15 sitting days of that House after the Minister receives the report (Clause 25 of Schedule 3 to the Social Security (Administration) Act). Financial accountability for the SSAT is undertaken by FaHCSIA, since the budget of the SSAT is provided in the FaHCSIA portfolio budget. The SSAT prepares and submits budget bids to FaHCSIA in aggregate, to be incorporated into total portfolio requirements (see Social Security Appeals Tribunal *Annual Report 2009-2010*, 5).

⁷⁹⁶ Social Security Appeals Tribunal *Annual Report 2010-2011*, 5.

⁷⁹⁷ A member of the SSAT is appointed by the Governor-General (the Queen of England's representative and Heads of State of Australia)(Clause 3(1) of Schedule 3 of the Social Security (Administration) Act).⁷⁹⁷ Members are usually appointed for five year terms and may be reappointed (see Social Security Appeals Tribunal *Annual Report 2010-2011*, 17 and Clause 4 of Schedule 3 of the Social Security (Administration) Act). The terms and conditions of appointment of SSAT members are as provided in the Social Security (Administration) Act or as determined by the Governor-General (Clause 5 of Schedule 3 of the Social Security (Administration) Act). A member is paid remuneration as determined by the Remuneration Tribunal or as prescribed (Clause 13 of Schedule 3 of the Social Security (Administration) Act). The Minister may suspend a SSAT member but it is the Governor-General who can remove a member from office. The Governor-General can also retire a SSAT member from office (Clause 17 of Schedule 3 of the Social Security (Administration) Act).

⁷⁹⁸ In terms of Clause 2 of Schedule 3 of the Social Security (Administration) Act, the Principal Member is responsible for the overall operation and administration of the SSAT. He or she is required to monitor the operations of the SSAT, take reasonable steps to ensure that SSAT decisions are consistent and that it efficiently and effectively performs its functions. He or she may give directions for the purpose of increasing the efficiency of the operations of the SSAT; and as to the arrangement of the business of the SSAT. The Principal Member also exercises powers in relation to finance and staffing by delegation of the Secretary of FaHCSIA. The Principal Member also delegates some of his/her powers to the Senior Members, members, the National Manager and other relevant managers within the SSAT (where appropriate)(see Social Security Appeals Tribunal *Annual Report 2009-2010*, 10). The National Manager is responsible to the Principal Member for the

3.3 Review of social security decisions by the AAT

The AAT was established to provide independent merits review of administrative decisions. The objective of the Tribunal is to improve the quality of administrative decision-making through the provision of a review mechanism that is fair, just, economical, informal and quick. Its mission is to deliver high-quality and independent merits review of administrative decisions in a timely fashion, using alternative dispute resolution processes where appropriate.⁷⁹⁹

Therefore, the establishment of the Tribunal and its processes facilitate its achievement of its mission and objectives. For example, measures have been adopted to ensure that the AAT is accessible to review applicants. In addition, the AAT has broad and general jurisdiction to review government decisions. The practices and procedures of the Tribunal are also geared towards meeting its mission and objectives. Furthermore, the Tribunal has the required expertise to hear applications brought before it; and is independent of the institutions whose decisions it reviews and impartial.

3.3.1 Accessibility of the AAT

Various mechanisms have been adopted to ensure that the AAT is accessible to review applicants. The accessibility of the Tribunal is promoted by the location of its offices and venues for its hearing; the requirements for making an application to the Tribunal; provision of information about the Tribunal review process to parties (especially self-represented parties); the practices and procedures at the hearing; and (where necessary) the use of alternative dispute resolution processes.⁸⁰⁰

The AAT has a principal registry (head office) and district registries (district offices). The principal registry has offices in Brisbane, Perth and Sydney. The Tribunal also has district registries in each of the state capital cities and in Canberra. The registry service for Tasmania

management of the National Office, including the provision of support services (corporate, information technology, legal research and financial management) to the local SSAT registries and all staff. Business Managers support the National Manager (see *Social Security Appeals Tribunal Annual Report 2009-2010*, 11).

⁷⁹⁹ Section 2A of the AAT Act 1975. See also *Administrative Appeals Tribunal Annual Report 2009-10*, 4 and 10.

⁸⁰⁰ See the discussion in the preceding paragraphs.

(in Hobart) is provided by the Federal Court. The Brisbane (Queensland) registry is responsible for applications from Northern Territory.⁸⁰¹

There is also little formality and technicality in applying to the AAT for the review of a decision. The absence of formality and technicality facilitates access for applicants to the Tribunal, especially unassisted applicants.⁸⁰² The procedures for making an application to the AAT are simple. The main requirements for making an application are that it must be in writing and it must contain a statement of reasons for the application. The application must also be lodged within the prescribed time limit and where required, an application fee is paid.⁸⁰³ Although an application form is available, it is not mandatory for applicants to use it. Applications can be made in the form of a letter. The statement of reasons is also not expected to be a detailed outline of the grounds of the application.⁸⁰⁴

Once an application is made, the AAT itself notifies the decision-maker of the application. The decision-maker is then required to send to the AAT and the applicant a statement of reasons for the decision under review and every document in the decision-maker's possession or control that is relevant to the review within 28 days.⁸⁰⁵

The AAT assists parties (especially self-represented parties) to participate as fully as possible in the review process. The Tribunal offers information on its role and procedures in multiple formats. It has published brochures for self-represented applicants to explain the Tribunal's role, when it can assist and the stages in a review. The brochures are designed to be clear and easy to understand, and are available in a range of languages and in large print.⁸⁰⁶ The letter of acknowledgement of receipt of an application that is sent to an applicant also sets out basic information about the review process.⁸⁰⁷

⁸⁰¹ Administrative Appeals Tribunal *Annual Report 2009–2010*, 12.

⁸⁰² Downes G "Practice, procedure and evidence in the Administrative Appeals Tribunal" Paper presented by the President of the Administrative Appeals Tribunal at the NSW Land and Environment Court Annual Conference, Sydney, 5 May 2011, 6.

⁸⁰³ Section 29(1) of the AAT Act.

⁸⁰⁴ Downes G "Practice, procedure and evidence in the Administrative Appeals Tribunal" Paper presented by the President of the Administrative Appeals Tribunal at the NSW Land and Environment Court Annual Conference, Sydney, 5 May 2011, 6.

⁸⁰⁵ Sections 37(1) and (1AE) of the AAT Act.

⁸⁰⁶ Administrative Appeals Tribunal *Annual Report 2009–2010*, 16.

⁸⁰⁷ Downes G "Practice, procedure and evidence in the Administrative Appeals Tribunal" Paper presented by the President of the Administrative Appeals Tribunal at the NSW Land and Environment Court Annual Conference, Sydney (5 May 2011) 7.

The AAT also has an Outreach Programme which aims to help self-represented parties understand the Tribunal's processes and gives them the opportunity to ask questions about practices and procedures. Outreach services are usually provided telephonically. Outreach services are also used to ascertain whether a person will require an interpreter or assistance because of a disability, and to assess what further information may assist the person.⁸⁰⁸ During the Outreach, the AAT staff member explains the documents required in terms of section 37 of the AAT Act (i.e. statement of reasons for the decision under review and documents in the decision-maker's possession or control that are relevant to the review). He or she also explains the next steps in the review and other procedural matters, such as how to make an application to stay the decision under review.

A DVD (titled *Getting Decisions Right*) has also been produced to illustrate the Tribunal's practices and procedures for applicants. The DVD is subtitled in English for people with a hearing impairment and available in Arabic, Greek, Italian, Mandarin, Serbian, Spanish, Turkish and Vietnamese.⁸⁰⁹ Comprehensive information about the Tribunal and its procedures is also available on its website.⁸¹⁰

Together with legal aid institutions in each of its registries (regional offices), the AAT has established legal advice schemes to provide assistance to self-represented parties.⁸¹¹ Self-represented parties are invited to consult the legal aid person for advice and minor assistance. Self-represented parties may also be provided legal assistance if they are eligible for legal aid. The Tribunal also refers self-represented parties to community legal centres and other legal service providers that may be able to advise or represent such persons. These measures enhance the accessibility of the AAT for persons without legal representation.

Access to the Tribunal for persons with disabilities is also facilitated. The Tribunal promotes easy access for people with a disability by making electronic and printed material available in appropriate formats; providing portable hearing loop systems in Tribunal premises; facilitating telephone contact for those with a hearing or speech impairment; making all

⁸⁰⁸ Administrative Appeals Tribunal *Annual Report 2009–2010*, 16.

⁸⁰⁹ See Administrative Appeals Tribunals *Brochures and Fact Sheets* available at <http://www.aat.gov.au/Publications/BrochuresAndFactsheets.htm#Video>.

⁸¹⁰ See www.aat.gov.au.

⁸¹¹ Administrative Appeals Tribunal *Annual Report 2009–2010*, 17. See also Downes G "Practice, procedure and evidence in the Administrative Appeals Tribunal" Paper presented by the President of the Administrative Appeals Tribunal at the NSW Land and Environment Court Annual Conference, Sydney, 5 May 2011, 7-8.

premises wheelchair accessible, and providing facilities for participation in conferences or hearings by telephone or video link.⁸¹²

3.3.2 Scope of jurisdiction and powers of the AAT

The AAT has the power to review a decision where national (Commonwealth) legislation statute accords it jurisdiction. Therefore, the Tribunal does not have a general power to review decisions, but can only review a decision if an Act, regulation or other legislative instrument states that the decision is subject to review by the Tribunal. Despite this, the jurisdiction of the Tribunal covers a wide range of executive decisions, as it currently has jurisdiction to review decisions made under more than 400 Acts and legislative instruments.⁸¹³ However, the Tribunal does not have jurisdiction over decisions that relate to government policy, although its jurisdiction it includes operational policy.⁸¹⁴

As a general purpose tribunal, the Tribunal consists of several divisions. These include the General Administrative Division; the Taxation Appeals Division; the Veterans' Appeals Division and the Security Appeals Division. The Medical Appeals Division and the Valuation and Compensation Division are not yet in operation.⁸¹⁵ The Tribunal reviews decisions relating to social security and family assistance, workers' compensation, taxation, veterans' affairs, bankruptcy, civil aviation, citizenship and immigration, corporations law, customs, freedom of information, industry assistance, passports and security assessments by the Australian Security Intelligence Organisation.⁸¹⁶

In most instances, the Tribunal acts as a second-tier appeal institution. This means it can only review a decision after an internal review of the original decision has been conducted; or after a review by an intermediate review by a specialist tribunal. In the case of social security appeals, this involves internal reviews by an original decision-maker and an authorised review officer and an initial review by the SSAT. The Social Security (Administration) Act states that an application may be made to the AAT for review of the decision of the SSAT if a decision has been reviewed by the SSAT; and the decision has been affirmed, varied or set

⁸¹² Administrative Appeals Tribunal *Annual Report 2009–2010*, 17.

⁸¹³ Administrative Appeals Tribunal *Annual Report 2009–2010*, 10.

⁸¹⁴ Downes G "Australian Tribunal Reforms" Paper presented by the President of the Administrative Appeals Tribunal at the Commonwealth Law Conference 2009, 4.

⁸¹⁵ See section 19(2) of the AAT Act and Administrative Appeals Tribunal *Annual Report 2009–2010*, 10.

⁸¹⁶ Administrative Appeals Tribunal *Annual Report 2009–2010*, 10.

aside by the SSAT.⁸¹⁷ In addition, the AAT may only review a decision that has been reviewed by the SSAT.⁸¹⁸

The Tribunal also has a wide scope of applicants. An application may be made to the Tribunal for a review of a decision by or on behalf of any person or persons whose interests are affected by the decision (including the Commonwealth or an authority of the Commonwealth or Norfolk Island or an authority of Norfolk Island).⁸¹⁹ In addition, an organisation or association can apply to the Tribunal as it is considered to have interests that are affected by a decision if the decision relates to a matter included in the objects or purposes of the organisation or association.⁸²⁰

The parties in a tribunal review proceeding are the person who has applied to the Tribunal for a review of the decision; the person who or agency that made the decision; the Attorney-General (if the Attorney-General intervenes in the proceeding);⁸²¹ and any other person who has applied and has been made a party to the proceeding by the Tribunal.⁸²²

The AAT has wide review powers, as it conducts a merits review of administrative decisions.⁸²³ The Tribunal has held that it is not bound by government policy, although it cannot easily depart from such policy.⁸²⁴ Merits review of an administrative decision by the Tribunal involves considering afresh the facts, law and policy relating to that decision. When the Tribunal makes a decision, it takes the place of (stands in the shoes of) the original decision-maker.⁸²⁵ For example, the AAT Act states that for the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision and shall make a decision affirming; varying; or setting aside the decision under review. Where it sets a decision aside, it makes a decision in substitution for the decision that is set aside; or remits the decision to the original

⁸¹⁷ Section 179 of the Social Security (Administration) Act.

⁸¹⁸ Section 181 of the Social Security (Administration) Act.

⁸¹⁹ Section 27(1) of the AAT Act.

⁸²⁰ Section 27(2) of the AAT Act.

⁸²¹ Sections 30A and 39A of the AAT Act empowers the Attorney-General to intervene in proceedings before the Tribunal.

⁸²² Section 30(1)(a)-(d) read with section 30(1AA) of the AAT Act.

⁸²³ Administrative Appeals Tribunal *Annual Report 2009–2010*, 10. The Tribunal reviews a wide range of administrative decisions made by Australian Government ministers, departments, agencies, authorities and other tribunals. In limited circumstances, the Tribunal can also review administrative decisions made by state government and non-government bodies.

⁸²⁴ *Becker v Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158 at 161; [1977] AATA 12.

⁸²⁵ Section 43(1) of the AAT Act 1975.

decision-maker for reconsideration in terms of any directions or recommendations of the Tribunal.⁸²⁶ Therefore, it is able to substitute the decision of the original decision-maker with its own.⁸²⁷

In reviewing a decision, the Tribunal has the power to take evidence on oath or affirmation; proceed in the absence of a party who has had reasonable notice of the proceeding; and adjourn the proceeding from time to time.⁸²⁸ The Tribunal can also summon a person to appear before the Tribunal at that hearing to give evidence; or to give evidence and produce any books, documents or things in his or her possession, custody or control.⁸²⁹

The Tribunal may require a person who appears before a Tribunal hearing to give evidence to take an oath or to make an affirmation. Appropriate arrangements for the administration of an oath or affirmation are also be made if a person participates by telephone, by closed-circuit television or any other means of communication.⁸³⁰

Although an application to the Tribunal for a review of a decision does not affect the operation of the decision or prevent the taking of action to implement the decision,⁸³¹ the Tribunal can make an order to halt implementation of the decision or otherwise affecting the operation of the decision or a part of that decision.⁸³² The Tribunal can make such an order if it considers it appropriate for the purpose of securing the effectiveness of the hearing and determination of the application for review. The Tribunal takes into account the interests of any persons who may be affected by the review. Before the Tribunal makes such an order, it must give the person who made the decision a reasonable opportunity to make a submission to the Tribunal.⁸³³ The Tribunal can make an order without giving a reasonable opportunity to make a submission if the Tribunal is satisfied that it is not practicable to give the person such an opportunity due to the urgency of the case or otherwise.⁸³⁴ This enables the AAT to extend protection to applicants or beneficiaries who may be negatively affected by the

⁸²⁶ Section 43(1) of the AAT Act.

⁸²⁷ Section 43(6) of the AAT Act.

⁸²⁸ Section 40(1) of the AAT Act.

⁸²⁹ Section 40(1A) of the AAT Act.

⁸³⁰ Section 40(2) of the AAT Act.

⁸³¹ Section 41(1) of the AAT Act.

⁸³² Section 41(2) of the AAT Act.

⁸³³ Section 41(4)(a) of the AAT Act.

⁸³⁴ Section 41(5) of the AAT Act.

implementation of a decision that is under review. Access to social security benefits can thus continue pending the review of a decision.

3.3.3 Fairness of AAT procedures

The AAT Act outlines the practices and procedures of the AAT. It states that, in carrying out its functions, the Tribunal must provide a review process that is fair, just, economical, informal and quick.⁸³⁵ It further states that any proceeding is to be conducted with as little formality and technicality, and with as much expedition, as the requirements of the Act and other relevant legislation and a proper consideration of the matters before the Tribunal permit.⁸³⁶

The AAT has thus developed its practices and procedures in terms of these requirements. Such provisions are considered “to free tribunals, at least to some degree, from constraints otherwise applicable to courts of law, and regarded as inappropriate to tribunals”.⁸³⁷ The AAT’s practice and procedure are flexible due to the wide range of its jurisdiction and the variety of applicants. Its practices and processes must thus be flexible so as to “facilitate access to, and participation in, the review process and allow each application to be dealt with in the most appropriate manner.”⁸³⁸

The practices and procedures developed by the AAT are aimed to deliver justice in the context of the Tribunal. These enable it to provide fair and just review of a broad range of administrative decisions in a flexible and appropriate way to a variety of applicants. It has been remarked that:

“... the Tribunal has been given a degree of flexibility to deal with proceedings before it as it sees fit. The experience of the Tribunal has been that ... there is no one level of formality or informality which is appropriate for all cases.”⁸³⁹

⁸³⁵ Section 2A of the AAT Act 1975.

⁸³⁶ Section 33(1)(b) of the AAT Act 1975.

⁸³⁷ Gleeson CJ and McHugh J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [49].

⁸³⁸ Downes G “Practice, procedure and evidence in the Administrative Appeals Tribunal” Paper presented by the President of the Administrative Appeals Tribunal at the NSW Land and Environment Court Annual Conference, Sydney, 5 May 2011, 5.

⁸³⁹ *Re Hennessy and Secretary to Department of Social Security* (1985) 7 ALN N113 at N117.

AAT practices and procedures can thus be tailored in each case to facilitate the participation of all of the parties in the review process and ensure that applications move towards resolution in an effective and efficient manner.

All applications that are not resolved in the pre-hearing conference are determined in a hearing. However, where all the parties agree and the AAT is satisfied that it is appropriate, the AAT can determine the application on the basis of the application documents.⁸⁴⁰ Hearings before the Tribunal are held in public.⁸⁴¹ However, the Tribunal is empowered to make orders, where appropriate, to protect the identity of parties and witnesses. It can also make orders to restrict or prohibit the disclosure of oral evidence or documents given to the Tribunal.⁸⁴² Where a hearing is in public but a person participates in the hearing by telephone or closed-circuit television or another means of communication, the Tribunal takes such steps as are reasonably necessary to ensure the preservation of the public nature of the hearing.⁸⁴³

A panel for an AAT hearing can be constituted by one, two or three members.⁸⁴⁴ The composition of the Tribunal panel is influenced by the legal and factual issues to be determined. The AAT Act specifies factors that the President must have regard to in constituting a Tribunal panel.⁸⁴⁵ These include the degree of public importance or complexity of the issues of the hearing; the status of the position or office held by the person who made the decision under review; the financial importance of the issues of the hearing; the purpose or object underlying the statute (whether or not that purpose or object is expressly stated, if the hearing is the review of a decision made in the exercise of powers conferred by a particular statute); the desirability for any or all of the persons who are to constitute the Tribunal to have knowledge, expertise or experience in relation to the matters to which that proceeding relates; and such other matters as the President considers relevant (if any).

At AAT hearings, parties present evidence and make submissions in the same manner as court proceedings. However, the conduct of a hearing depends on the nature of the decision under review and the parties in the hearing. AAT hearing procedures are thus adapted to

⁸⁴⁰ Section 34J of the AAT Act.

⁸⁴¹ Section 35(1) of the AAT Act.

⁸⁴² Section 35(2) of the AAT Act.

⁸⁴³ Section 35(1A) of the AAT Act.

⁸⁴⁴ Section 21(1) of the AAT Act.

⁸⁴⁵ Section 23B of the AAT Act.

ensure that the hearing is effective and all relevant evidence is presented.⁸⁴⁶ Each party to the dispute is given every opportunity to present their case.⁸⁴⁷ Hearings that involve self-represented applicants are conducted in smaller, more informal hearing rooms. Procedures are also modified to assist a self-represented applicant to present his or her case.

In order to enable it to achieve its objectives, the AAT Act provides that the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.⁸⁴⁸ This discretion is exercised subject to the requirements of procedural fairness. The AAT also uses multiple experts for evidence during a hearing. This is reported to improve the quality and objectivity of the evidence that is given; and to enhance the Tribunal decision-making process (it assists the AAT to reach the correct or preferable decision). It also reduces the length of time of the hearing.⁸⁴⁹

The AAT also has different modes of participation in hearings. The Tribunal conducts hearings in person, although it has the discretion to allow a person to participate by telephone, closed-circuit television, or any other means of communication.⁸⁵⁰

The Tribunal also utilises alternative dispute resolution processes to achieve its objectives.⁸⁵¹ Pre-hearing conferences reduce the length of a hearing or eliminate the need for a hearing, which reduces the costs incurred by the parties and the Tribunal. During a pre-trial conference, parties are able to define the issues in dispute; identify any further supporting material the parties may wish to obtain, including witness statements, expert reports or other documents; and explore whether the matter can be settled. The AAT pre-hearing conference process is flexible and informal. The pre-hearing conference contributes to the fairness and

⁸⁴⁶ Downes G “Practice, procedure and evidence in the Administrative Appeals Tribunal” Paper presented by the President of the Administrative Appeals Tribunal at the NSW Land and Environment Court Annual Conference, Sydney, 5 May 2011, 14.

⁸⁴⁷ Downes G “Australian Tribunal Reforms” Paper presented by the President of the Administrative Appeals Tribunal at the Commonwealth Law Conference 2009, 7.

⁸⁴⁸ Section 33(1)(c) of the AAT Act.

⁸⁴⁹ Downes G “Practice, procedure and evidence in the Administrative Appeals Tribunal” Paper presented by the President of the Administrative Appeals Tribunal at the NSW Land and Environment Court Annual Conference, Sydney, 5 May 2011, 15-17.

⁸⁵⁰ Section 35A of the AAT Act.

⁸⁵¹ In terms of section 3(1) of the AAT Act, alternative dispute resolution processes means procedures and services for the resolution of disputes, and includes conferencing; mediation; neutral evaluation; case appraisal; conciliation; and procedures or services specified in the regulations but does not include arbitration or court procedures or services.

justice of the review process, as it provides self-represented applicants with assistance that helps them to understand and present their case.⁸⁵²

Where possible, the Tribunal assists parties in reaching agreement. It hears and determines a relatively small proportion of cases that cannot be resolved during the pre-hearing conference.⁸⁵³ Pre-hearing conferences are thus a key way in which the Tribunal seeks to make the review process economical, quick and informal.

Where both parties are represented, pre-hearing conferences are generally held by telephone. Where an applicant is not legally represented, conferences are held in person at the AAT's premises. However, this would not be the case if it would not be convenient for one of the parties because of geographic or other reasons.⁸⁵⁴

3.3.4 Expertise, independence, and impartiality of the AAT

The wide scope of jurisdiction of the tribunal requires it to be flexible. The Tribunal's flexibility is facilitated by the diversity of its membership. The Tribunal is composed of the President, other presidential members (deputy presidents), senior members and members who are appointed either on a full-time or part-time basis.⁸⁵⁵ The President of the Tribunal is a judge of the Federal Court, who is appointed for seven years. Judges of the Federal Court and the Family Court may be appointed as presidential members of the Tribunal. In order for a person to be appointed as a presidential member, he or she must have been enrolled as legal practitioners for at least five years. Senior members must have been enrolled as legal practitioners for at least five years or have special knowledge or skills relevant to the duties of a senior member. Members are required to have knowledge or skills relevant to the duties of a member, such as accountancy, aviation, engineering, law, medicine, pharmacology, military affairs, public administration and taxation.

⁸⁵² Downes G "Practice, procedure and evidence in the Administrative Appeals Tribunal" Paper presented by the President of the Administrative Appeals Tribunal at the NSW Land and Environment Court Annual Conference, Sydney, 5 May 2011, 9-10.

⁸⁵³ *Ibid*, 12. See also Downes G "Australian Tribunal Reforms" Paper presented by the President of the Administrative Appeals Tribunal at the Commonwealth Law Conference 2009, 6.

⁸⁵⁴ *Ibid*, 8.

⁸⁵⁵ Administrative Appeals Tribunal *Annual Report 2009-2010*, 11.

Some AAT members have expertise in more than one discipline. Since the Tribunal conducts hearings in panels of one, two or three members, a range of expertise is available in an AAT hearing.⁸⁵⁶ The range of expertise of the Tribunal enables it to tackle most issues brought before it from an informed background. It is thus remarked that:

“The ability to draw on this range of expertise when reviewing decisions contributes significantly to the quality of its decisions. It is also valuable for ADR processes where the issues in dispute are specialised in nature.”⁸⁵⁷

In addition to the members, there are also Conference Registrars for the conduct of pre-hearing conferences. They are not members of the Tribunal, but are appointed personally by the President of the AAT. Conference Registrars are legally-qualified and are specialists in alternative dispute resolution processes.⁸⁵⁸

The effectiveness of the AAT is promoted by its independence. The Tribunal falls within the portfolio of the Attorney-General (Ministry of Justice).⁸⁵⁹ As a result, it is independent of the Ministries and institutions whose decisions it reviews and impartial. Its institutional framework also ensures that the Tribunal is independent and impartial and is able to attain its objectives. The Tribunal’s institutional framework relates to the appointment of its members;⁸⁶⁰ discipline and termination of service of its members;⁸⁶¹ funding of the Tribunal;⁸⁶² human resource and administrative support;⁸⁶³ managerial framework of the

⁸⁵⁶ Downes G “Australian Tribunal Reforms” Paper presented by the President of the Administrative Appeals Tribunal at the Commonwealth Law Conference 2009, 6.

⁸⁵⁷ Downes G “Practice, procedure and evidence in the Administrative Appeals Tribunal” Paper presented by the President of the Administrative Appeals Tribunal at the NSW Land and Environment Court Annual Conference, Sydney, 5 May 2011, 14.

⁸⁵⁸ *Ibid.*, 12.

⁸⁵⁹ Administrative Appeals Tribunal *Annual Report 2009-2010*, 10.

⁸⁶⁰ Members of the Tribunal are appointed by the Governor-General. The Governor-General also appoints the Registrar of the Tribunal (see Administrative Appeals Tribunal *Annual Report 2009-2010*, 11-12).

⁸⁶¹ A member of the Administrative Appeals Tribunal cannot be removed or suspended from office except in terms of the AAT Act (section 13(11) of the AAT Act 1975). The Governor-General may remove a member of the Tribunal (who is not a judge) from office if he or she receives a request for the member’s removal from both Houses of the Parliament in the same session (section 13(1) of the AAT Act). The Governor-General may suspend a non-presidential member from office on the ground of misbehaviour or incapacity (section 13(2) of the AAT Act) The Governor-General may, with the consent of a member, retire the member from office on the ground of incapacity (section 13(9) of the AAT Act).

⁸⁶² The Administrative Appeals Tribunal is funded through a variety of sources. These include through money appropriated by Parliament for the Tribunal and dispute application filing fees (see Administrative Appeals Tribunal *Annual Report 2009-10*, 58. See also sections 24E and 29A of the AAT Act). Members of the Tribunal, other than a member who is a Judge, are paid remuneration determined by the Remuneration Tribunal or as prescribed (section 9(1) of the AAT Act). In addition, the Registrar is paid remuneration and allowances determined by the Remuneration Tribunal or as prescribed (Section 24E(1) and (2) of the AAT Act).

Tribunal;⁸⁶⁴ governance, oversight and supervision arrangements;⁸⁶⁵ and the accountability and reporting of the Tribunal.⁸⁶⁶ These mechanisms ensure that the Tribunal is able to ensure

⁸⁶³ The Tribunal has a Principal Registry and District Registries. Principal Registry managers and District Registrars provide policy advice and operational assistance. Staff of the Tribunal is employed under the Public Service Act of 1999 to assist the Tribunal to carry out its functions (Administrative Appeals Tribunal *Annual Report 2009–10*, 10-11).

⁸⁶⁴ The President of the Tribunal is responsible for managing the Tribunal and its resources (Administrative Appeals Tribunal *Annual Report 2009–10*, 10). The Registrar assists the President in managing the Tribunal and advises on its operations and performance. The Registrar acts on behalf of the President in the administration of the Tribunal (Administrative Appeals Tribunal *Annual Report 2009–10*, 12). The Registrar is the head of the Tribunal for the purposes of the Public Service Act, responsible for the employment of the Tribunal's staff on behalf of the Commonwealth. The Registrar is assisted by the Assistant Registrar who holds office as a senior executive in the Australian Public Service.

⁸⁶⁵ Governance, oversight and supervision of the Administrative Appeals Tribunal are undertaken by the Administrative Review Council, established in terms of the AAT Act. The members of the Administrative Review Council are appointed by the Governor-General. They perform a variety of functions and have wide powers (section 49(2) of the AAT Act). The functions of the Administrative Review Council are:

- (aa) to keep the Commonwealth administrative law system under review, monitor developments in administrative law and recommend to the Minister improvements that might be made to the system; and
- (ab) to inquire into the adequacy of the procedures used by authorities of the Commonwealth and other persons who exercise administrative discretions or make administrative decisions, and consult with and advise them about those procedures, for the purpose of ensuring that the discretions are exercised, or the decisions are made, in a just and equitable manner; and
- (a) to ascertain, and keep under review, the classes of administrative decisions that are not the subject of review by a court, tribunal or other body; and
- (b) to make recommendations to the Minister as to whether any of those classes of decisions should be the subject of review by a court, tribunal or other body and, if so, as to the appropriate court, tribunal or other body to make that review; and
- (c) to inquire into the adequacy of the law and practice relating to the review by courts of administrative decisions and to make recommendations to the Minister as to any improvements that might be made in that law or practice; and
- (d) to inquire into:
 - (i) the qualification required for membership of authorities of the Commonwealth, and the qualifications required by other persons, engaged in the review of administrative decisions; and
 - (ii) the extent of the jurisdiction to review administrative decisions that is conferred on those authorities and other persons; and
 - (iii) the adequacy of the procedures used by those authorities and other persons in the exercise of that jurisdiction; and to consult with and advise those authorities and other persons about the procedures used by them as mentioned in subparagraph (iii) and recommend to the Minister any improvements that might be made in respect of any of the matters referred to in subparagraphs (i), (ii) and (iii); and
- (e) to make recommendations to the Minister as to the manner in which tribunals engaged in the review of administrative decisions should be constituted; and
- (f) to make recommendations to the Minister as to the desirability of administrative decisions that are the subject of review by tribunals other than the Administrative Appeals Tribunal being made the subject of review by the Administrative Appeals Tribunal; and
- (g) to facilitate the training of members of authorities of the Commonwealth and other persons in exercising administrative discretions or making administrative decisions; and
- (h) to promote knowledge about the Commonwealth administrative law system; and
- (i) to consider, and report to the Minister on, matters referred to the Council by the Minister.

⁸⁶⁶ The Registrar of the Tribunal is the Chief Executive for the purposes of the Financial Management and Accountability Act of 1997 (see Administrative Appeals Tribunal *Annual Report 2009–2010*, 12). A Chief Executive is responsible for the financial management and accountability of an agency. The Financial Management and Accountability Act stipulates various responsibilities for Chief Executives (see Part 7 of the Financial Management and Accountability Act of 1997 for the special responsibilities of Chief Executives.). The Act states that the Chief Executive must (*inter alia*) keep the responsible Minister and Finance Minister informed (through reports, documents and information in relation to the operations and financial affairs of the Agency). The Chief Executive must also give to the Auditor-General the annual financial statements required by

access to justice for review applicants, by providing a review process that is fair, just, economical, informal and quick.

4. UNITED KINGDOM

The preceding paragraphs reveal that the United Kingdom's social security system includes a multi-level dispute resolution framework that consists of internal and external review of decisions. The system is structured to create incentives to encourage people to resolve disputes at the most appropriate level. Social security institutions that take decisions are empowered to reconsider or revise the decisions. In addition, independent adjudication institutions have also been established to review the decisions of the departments or institutions. External review of social security decisions is undertaken by specialist multi-tiered tribunals, specifically established to review administrative decisions and to provide effective redress.

The current tribunal review framework is the result of the process of review of the tribunal system, which started with the publication of reform proposals in the Report of the Review of Tribunals in 2001.⁸⁶⁷ The adjudication framework at the time failed to provide access to justice for its users. Commenting on the weaknesses of the adjudication system, the Report of the Review of Tribunals stated that:

“In the 44 years since tribunals were last reviewed, their numbers have increased considerably and their work has become more complex. Together they constitute a substantial part of the system of justice in England and Wales. But too often their methods are old-fashioned and they are daunting to users. Their training and IT are under-resourced. Because they are many and disparate, there is a considerable waste of resources in managing them, and they achieve no economies of scale. Most importantly, they are not independent of the departments that sponsor them. The object of this review is to recommend a system that is independent, coherent, professional, cost-effective and user-friendly. Together tribunals must form a system and provide a service fit for the users for whom they were intended.”⁸⁶⁸

the Finance Minister's Orders. The AAT Act further requires the President of the Tribunal to give to the responsible Minister a report of the management of the administrative affairs of the Tribunal during the year (section 24R(1) of the AAT Act). The Minister must present a copy of the report in each House of the Parliament as soon as practicable (section 24R(3) of the AAT Act).

⁸⁶⁷ Leggatt *A Tribunals for Users, One System, One Service* (Report of the Review of Tribunals) HMSO, 2001.

⁸⁶⁸ Leggatt *A Tribunals for Users, One System, One Service* para 1.

It was thus proposed that a new independent tribunal service should be created to take over the management of the tribunals from their sponsoring departments. In addition, the new tribunal service was to have a composite, two-tier tribunal structure, under the leadership of a senior judge.⁸⁶⁹

The reformed adjudication system was established by the Tribunals, Courts and Enforcement Act (TCEA).⁸⁷⁰ In line with proposals for the creation of a composite, two-tier tribunal structure, the TCEA created the First-tier Tribunal and the Upper Tribunal, transferring to these the jurisdiction of various existing tribunals.⁸⁷¹ The Act thus creates a new, simplified and more consistent legal framework in a bid to make administrative justice in the UK more accessible and efficient.⁸⁷²

Upon their creation, the First-tier Tribunal and the Upper Tribunal became part of the Tribunals Service that had been created in April 2006, as an Executive Agency of the Ministry of Justice. The aim of the Tribunals Service was to establish, for the first time, a unified administration for the tribunals system that ensures the public will have the opportunity to exercise their rights and to seek effective redress against Government decisions.⁸⁷³ The Tribunals Service was merged with the Courts Service on 1 April 2011 to form one integrated agency for the administration of courts and tribunals – the Courts and Tribunals Service.

The TCEA entrenches the independence of the Tribunal service by extending the guarantee of continued judicial independence of courts – in the Constitutional Reform Act⁸⁷⁴ – to tribunals.⁸⁷⁵ The Tribunals Service is headed by the Senior President of Tribunals, who presides over both of the First-tier Tribunal and the Upper Tribunal.⁸⁷⁶ Both Tribunals are divided into Chambers, with each Chamber having its own President.⁸⁷⁷ The independence of the Tribunals is further facilitated by issues such as the conditions of appointment and

⁸⁶⁹ Carnwath R “Tribunal Justice - a New Start” *Public Law* Issue 1 (2009) 49.

⁸⁷⁰ Tribunals, Courts and Enforcement Act (Chapter 15) of 2007.

⁸⁷¹ Section 3(1) and (2) of the Tribunals, Courts and Enforcement Act.

⁸⁷² Cooper J *The Tribunals, Courts and Enforcement Act* Wragge & Co (November 2008) accessed at www.wragge.com/analysis.asp on 22 March 2012.

⁸⁷³ Tribunal Service *About Us* accessed at <http://www.tribunals.gov.uk/Tribunals/About/about.htm>.

⁸⁷⁴ Section 3 of the Constitutional Reform Act (chapter 4) of 2005 imposes a duty on the Lord Chancellor and other Ministers to “uphold the continued independence of” the court judiciary.

⁸⁷⁵ See section 1 of the Tribunals, Courts and Enforcement Act.

⁸⁷⁶ Section 3(4) of the Tribunals, Courts and Enforcement Act of 2007.

⁸⁷⁷ Section 7 of the Tribunals, Courts and Enforcement Act.

removal of the Senior President;⁸⁷⁸ the conditions of appointment of Tribunal members;⁸⁷⁹ the conditions of removal of Tribunal members,⁸⁸⁰ funding;⁸⁸¹ human resource and

⁸⁷⁸ The Queen appoints the Senior President of Tribunals on the recommendation of the Lord Chancellor - section 2(1) of the TCEA. The Lord Chancellor pays the remuneration; allowances; and expenses of the Senior President of Tribunals as the Lord Chancellor determines - Para 10 of Schedule 1 of the TCEA. Senior President of Tribunals remains in office if he or she is of good behaviour, although the Queen has the power to remove him or her through a request by both Houses of Parliament. The Queen exercises her power to remove the Senior President on the recommendation of the Lord Chancellor - Para 6(2) and (3) of Schedule 1 of the TCEA. The Senior President of Tribunals also ceases to be Senior President of Tribunals if he is no longer an ordinary judge of the Court of Appeal of England and Wales, or a judge of the First or Second Division of the Inner House of the Court of Session (of Scotland), or a Lord Justice of Appeal in Northern Ireland - Para 7(2) read with Para 2(2)(b) of Schedule 1 of the TCEA. The Senior President of Tribunals retires from office at the end of a fixed term contract as Senior President (Para 6(1) of Schedule 1 of the TCEA). The Senior President of Tribunals can also resign at any time resign by giving notice in writing of his or her resignation to the Lord Chancellor - Para 8 of Schedule 1 of the TCEA. The Lord Chancellor may also declare that the Senior President has resigned if a medical certificate confirms that the Senior President is disabled to perform his or her duties by permanent infirmity and is unable to resign due to the infirmity. However, such a declaration must be made with the concurrence of Lord Chief Justice of England and Wales, the Lord President of the Court of Session (of Scotland) and the Lord Chief Justice of Northern Ireland - Paras 9(1) and (2) of Schedule 1 of the TCEA.

⁸⁷⁹ The Queen appoints a person to be one of the judges of the Upper Tribunal on the recommendation of the Lord Chancellor - Para 1(1) of Schedule 3 of the TCEA. A person can become a judge of the Upper Tribunal if he or she satisfies one of the following criteria: is the Senior President of Tribunals; is a judge of the Upper Tribunal by virtue of appointment; is transferred to the Upper Tribunal; is a member of the Asylum and Immigration Tribunal (legally-qualified member) appointed in terms of the Nationality, Immigration and Asylum Act of 2002 who is the President or a Deputy President of that tribunal, or has the title Senior Immigration Judge but is neither the President nor a Deputy President of that tribunal; is the Chief Social Security Commissioner, or another Social Security Commissioner, appointed under section 50(1) of the Social Security Administration (Northern Ireland) Act of 1992; is a Social Security Commissioner appointed under section 50(2) of the Social Security Administration (Northern Ireland) Act (Deputy Commissioners); is either an ordinary judge of the Court of Appeal in England and Wales (including the vice-president, if any, of either division of that Court), is a Lord Justice of Appeal in Northern Ireland, is a judge of the Court of Session, is a puisne judge of the High Court in England and Wales or Northern Ireland, is a circuit judge, is a sheriff in Scotland, is a county court judge in Northern Ireland, is a district judge in England and Wales or Northern Ireland, or is a District Judge (Magistrates' Courts); is a deputy judge of the Upper Tribunal; or is a Chamber President or a Deputy Chamber President, whether of a chamber of the Upper Tribunal or of the First-tier Tribunal, and does not fall within any of the other categories - section 5(1) of the TCEA. The Lord Chancellor may appoint a person to be one of the members of the Upper Tribunal who are not judges of the tribunal - Para 2 of Schedule 3 of the TCEA. A person can also be appointed as a (non-judicial) member of the Upper Tribunal if he or she is one of the other members appointed to the Upper Tribunal; is transferred to the Upper Tribunal; is a member of the Employment Appeal Tribunal appointed in terms of the Employment Tribunals Act 1996; or is a member of the Asylum and Immigration Tribunal appointed in terms of the Nationality, Immigration and Asylum Act 2002 (members other than "legally-qualified members") - section 5(2) of the TCEA.

The Lord Chancellor appoints a person to be one of the judges of the First-tier (Para 1 of Schedule 2 of the TCEA). A person can also be a judge of the First-tier Tribunal if he or she is transferred to the First-tier Tribunal; is a judge of the Upper Tribunal; is a legally-qualified member of the Asylum and Immigration Tribunal appointed in terms of the Nationality, Immigration and Asylum Act of 2002 who is not a judge of the Upper Tribunal; or is a member of a panel of chairmen of employment tribunals - section 4 of the TCEA.

⁸⁸⁰ A member of the First-tier Tribunal holds and vacates office in accordance with the terms of his/her appointment, except where he or she is removed - Para 4(3) of Schedule 2 of the TCEA. A First-tier Tribunal member appointed on a salary (as opposed to fee-paid) basis can be removed from office only by the Lord Chancellor and only on the ground of inability or misbehaviour - Para 4(1) and (2) of Schedule 2 of the TCEA. A First-tier Tribunal member who exercises his or her functions wholly or mainly in Scotland or Northern Ireland may be removed from office only with the concurrence of the Lord President of the Court of Session or Lord Chief Justice of Northern Ireland, respectively - Paras 3(2) and (3) of Schedule 2 of the TCEA. A First-tier Tribunal member who does not exercise functions wholly or mainly in Northern Ireland or Scotland may be removed from office only with the concurrence of the Lord Chief Justice of England and Wales - Paras 3(4) of

administrative support;⁸⁸² management;⁸⁸³ governance, oversight and supervision;⁸⁸⁴ and accountability of the Tribunals.⁸⁸⁵ These enable the Tribunals to be independent of, and impartial to, the departments and institutions whose decisions they review.

The TCEA also sets out the overall objectives of the Tribunal service. Section 2 of the Act, in creating the new post of Senior President of Tribunals and delineating his responsibilities and functions, states that in carrying out his/her functions, the Senior President must have regard

Schedule 2 of the TCEA. See also Schedule 3 of the TCEA for conditions of removal of Upper Tribunal members.

⁸⁸¹ The Lord Chancellor is required to ensure that there is an efficient and effective system to support the business of the First-tier and Upper Tribunals (amongst others) and that appropriate services are provided for these Tribunals - section 39 of the TCEA. The Lord Chancellor pays the remuneration, allowances and expenses of the judges of First-tier Tribunal - Para 5 of Schedule 2 of the TCEA). The Lord Chancellor may provide, equip, maintain and manage such tribunal buildings, offices and other accommodation as appear to him appropriate for the purpose of discharging his general duty in relation to the tribunals. The Lord Chancellor may enter into arrangements for the provision, equipment, maintenance or management of tribunal buildings, offices or other accommodation as he or she considers appropriate for the purpose of discharging his general duty in relation to the tribunals - section 41 of the TCEA.

⁸⁸² Support for the administration of justice in tribunals and courts (including in the First-tier and Upper Tribunals) is provided by the Courts and Tribunals Service. The Courts and Tribunals Service was created on 1 April 2011, bringing together the Courts Service and the Tribunals Service into one integrated administrative agency. The Lord Chancellor may appoint staff as he or she deems appropriate for the purpose of discharging his general duty in relation to the tribunals. The Lord Chancellor may also enter into such contracts with other persons for the provision, by them or their subcontractors, of staff or services as appear to him appropriate for the purpose of discharging his general duty in relation to the tribunals. However, the Lord Chancellor may not enter into contracts for the provision of staff to discharge functions which involve making judicial decisions or exercising any judicial discretion - section 40 of the TCEA.

⁸⁸³ The Senior President of Tribunals presides over the First-tier and Upper Tribunals - section 3(4) of the TCEA. Each Chamber of both the First-tier and Upper Tribunals is headed by a Chamber President -section 7 of the TCEA.

⁸⁸⁴ The work of the Courts and Tribunals Service is overseen by the Tribunals Service Management Board (TSMB). The TSMB is headed by an independent Chair working with non-executive, executive and judicial members. The Board ensures that the agency delivers the aims and objectives set by the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals. The Board is responsible for overseeing the leadership and direction of the Courts and Tribunals Service in delivering its aim and objectives. It provides strategic oversight and direction to the agency, by undertaking the following activities to support the Chief Executive of the Courts and Tribunals Service: leads and oversees the process of change and innovation to ensure delivery of strategic business objectives; agrees and reviews achievement against strategic and business plans to achieve the Tribunals Service's (and wider Ministry of Justice) strategic aims and objectives; advises on allocation of the Tribunals Service's financial and human resources to achieve those aims, and review and scrutinise their management; ensures delivery of excellent services to tribunal users; ensures compliance with the Freedom of Information Act (FOI) and other guidance on information handling, including prompt response to public requests for information; champions the promotion of diversity throughout the organisation; ensures that the agency operates sound environmental policies and practices in accordance with government guidance; assesses and manages risk; and complies with corporate governance principles - *Tribunals Service Annual Report & Accounts 2009-10*, 53.

⁸⁸⁵ The Accounting Officer for the Ministry of Justice has designated the Tribunals Service Chief Executive as the agency's Accounting Officer. He/she is responsible to the minister and accountable to Parliament for the agency's use of resources in carrying out its functions – see *Tribunals Service Annual Report & Accounts 2009-10*, 69. The Senior President of Tribunals is required to each year give the Lord Chancellor a report covering, in relation to relevant tribunal cases matters that the Senior President of Tribunals wishes to bring to the attention of the Lord Chancellor, and matters that the Lord Chancellor has asked the Senior President of Tribunals to cover in the report. The Lord Chancellor must publish each report given to him - section 43 of the TCEA.

to the need for tribunals to be accessible; for proceedings before tribunals to be fair and to be handled quickly and efficiently; for members of tribunals to be experts in the subject-matter of, or the law to be applied in, cases in which they decide matters; and to develop innovative methods of resolving disputes that are of a type that may be brought before tribunals.⁸⁸⁶

The establishment of the Tribunals and their procedures aim to realise their overall objective of achieving access to users (through accessibility, fair procedures, quick and efficient resolution of disputes, the appointment of experts and the development of innovative methods to resolve disputes).

4.1 Internal review of social security decisions

A person who is unhappy with a decision of a government department or institution can request a written explanation or apply for a revision of the decision.⁸⁸⁷ For example, the Secretary of State of the Department of Work and Pensions (DWP) or an employee of the Department (the original decision-maker) may review any decision that has been taken. Where a person applied for reconsideration of a decision, the original decision-maker can revise it or refuse to revise it. A decision can be reviewed if new facts have been brought to his or her notice; or he or she is satisfied that the decision was given in ignorance of some material fact; or it was based on a mistake as to some material fact; or was erroneous in point of law.⁸⁸⁸ If the decision is not revised or the person is still not satisfied with the revised, he or she can appeal for review of the decision by an external body.

Reconsideration of decisions by the original decision-maker reduces the number of appeal applications as this enables the Department to explain decisions better and provides an additional opportunity for it to correct decisions. It also increases the number of appeal applicants whose disputes are quickly resolved, without the need to go to appeal.⁸⁸⁹

⁸⁸⁶ Section 2(3) of the Tribunals, Courts and Enforcement Act.

⁸⁸⁷ See Section 19 of the Social Security Administration Act (Chapter 5) of 1992; Regulation 3 and 3A of the Social Security and Child Support (Decisions and Appeals) Regulations 1999; Regulation 11 of the Vaccine Damage Payments Regulations 1979; Regulation 17 of the Child Support (Maintenance Assessment Procedure) Regulations 1992; and Regulation 4 of the Mesothelioma Lump Sum Payments (Claims and Reconsiderations) Regulations 2008.

⁸⁸⁸ Section 19(1)(a) & (b) of the Social Security Administration Act.

⁸⁸⁹ This was revealed in a project launched by Jobcentre Plus (Jobcentre Plus is part of the Department for Work and Pensions and provides services that support people of working age from welfare into work, and helps employers to fill their vacancies). During the project, Jobcentre Plus telephoned claimants who had made an

However, social security claimants are not compelled to seek an explanation or apply for a revision. This implies that a claimant can simply appeal the decision within a month, without requesting a revision. Proposals are underway to make it compulsory for a person to request an explanation or to apply for a revision.⁸⁹⁰ The DWP has remarked that:

“the change will enable the Department to ensure that decisions are changed at the earliest stage in the process, and to provide a clear explanation. Claimants will then be able to make an informed decision on formally appealing to Her Majesty’s Courts and Tribunal Service taking the outcome of the reconsideration process into account. These changes are necessary to deliver timely, proportionate and effective justice for claimants, make the process for disputing a decision fairer and more efficient.”⁸⁹¹

4.2 Review of decisions by First-tier Tribunal

4.2.1 Accessibility of the First-tier Tribunal

Efforts have been made to facilitate access to the First-tier Tribunal. This relates to the location of tribunal venues and appeal lodgement procedures and time periods. The objective of the Tribunal is to provide a local service to applicants. As a result, hearing procedures in the Social Security and Child Support Tribunal are conducted in 152 venues for hearings across England, Scotland and Wales.⁸⁹² In addition, the Tribunal facilitates participation at a hearing by making a contribution towards an applicant’s out-of-pocket expenses in attending a hearing, such as travel costs, loss of wages and child minding expenses.⁸⁹³

A review application can be sent to the Tribunal by pre-paid post, or delivered by hand to a specified address or delivered by any other method permitted by the Tribunal.⁸⁹⁴ In social security and child support cases, an appellant must send notice of appeal to the decision-

appeal application against its Employment and Support Allowance (ESA) decision. The original decision was explained to applicants and, if they still disagreed with the decision they were provided with additional information or evidence and the decision was reconsidered. This led to 15 per cent of appeal applicants either withdrawing their application or having the original decision revised by the Decision Maker – see DWP *Impact Assessment (IA): To require consideration of revision before appeal* (October 2011) 6.

⁸⁹⁰ See Department of Work and Pensions *Mandatory consideration of revision before appeal* (Public consultation) February 2012; and The Social Security, Child Support, Vaccine Damage and Other Payments (Consideration of Revision before Appeal) Regulations 2012 (Draft).

⁸⁹¹ Department of Work and Pensions *Mandatory consideration of revision before appeal* (Public consultation) February 2012, 7.

⁸⁹² Social security and Child Support Tribunal is within the Social Entitlement Chamber, one of six Chambers of the First-tier Tribunal.

⁸⁹³ See Department of Justice Social security and Child Support Tribunal – Venues accessed at www.justice.gov.uk/tribunals/sscs/venues on 22 March 2012.

⁸⁹⁴ Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.

maker within a month of receiving notice of the decision that is challenged. If an applicant had requested a written statement of reasons for the decision within that month, the notice of appeal must be sent within 14 days of the request or the date on which the written statement of reasons was provided.⁸⁹⁵ If the appellant provides the notice of appeal to the decision-maker later than the specified time, the notice of appeal must include the reason why the notice of appeal was not provided in time. Where an appeal is not made within the specified time, it will be treated as having been made in time if the decision-maker does not object. No appeal may be made more than 12 months after the specified time. The notice of appeal must be in English or Welsh and signed by the appellant. It must also state the name and address of the appellant; the name and address of the appellant's representative (if any); an address where documents for the appellant may be sent or delivered; details of the decision being appealed; and the grounds on which the appellant relies.⁸⁹⁶

The decision-maker is required to refer the case to the Tribunal immediately if the appeal is made after the specified time and the decision-maker objects to it being treated as having been made in time; or the decision-maker considers that the appeal has been made more than 12 months after the specified time.⁸⁹⁷

4.2.2 Scope of jurisdiction and powers of the First-tier Tribunal

The First-tier Tribunal has a wide range of subject-matter, mainly involving appeals from government departments or other public bodies. The Tribunal was created to absorb the work of most central government tribunals in time. It hears appeals against decisions on the payment of a variety of benefits and other decisions made by the Government delivery institutions.⁸⁹⁸ The First-tier Tribunal currently consists of six Chambers: War Pensions and Armed Forces Compensation Chamber, Social Entitlement Chamber, Health Education and Social Care Chamber, General Regulatory Chamber, Tax Chamber, and Immigration and Asylum Chamber.⁸⁹⁹ The Social Entitlement Chamber (SEC) hears appeals for Social Security and Child Support; Criminal Injuries Compensation; and Asylum Support.

⁸⁹⁵ Rule 23 and Schedule 1(a) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.

⁸⁹⁶ Rule 23 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.

⁸⁹⁷ *Ibid.*

⁸⁹⁸ Section 3(1) of the Tribunals, Courts and Enforcement Act.

⁸⁹⁹ Tribunals Service *Annual Report & Accounts 2009-10*, 128.

In terms of Social Security and Child Support, the Tribunal deals with disputes about Income Support, Jobseeker's Allowance; Incapacity Benefit, Employment Support Allowance; Attendance Allowance, Disability Living Allowance; and Pension Credit and State Pension. It also deals with disputes about Child Benefit, Child Support and Child Tax Credit; Statutory Sick Pay / Statutory Maternity Pay; Compensation Recovery Scheme/ Road Traffic (NHS) charges; Decisions on Housing Benefit and Council Tax Benefit; and Industrial Injuries Disablement Benefit and others.⁹⁰⁰

The First-tier Tribunal can review a decision made by it on application by a person who has a right to appeal the decision or on the Tribunal's own initiative when it considers that the decision contains an error of law.⁹⁰¹ The Tribunal can correct any clerical mistake, other accidental slip or omission in a decision, direction or document it produced at any time.⁹⁰² It can do this by sending notification of the amended decision or direction, or a copy of the amended document, to all parties; and making any necessary amendment to any information published in relation to the decision, direction or document.

The Tribunal is required to notify the parties in writing of the outcome of any review, and of any right of appeal in relation to the outcome. The Tribunal must give every party an opportunity to make representations when reviewing a decision. If the Tribunal takes action after the review of a decision without first giving every party an opportunity to make representations, the notice of the outcome of the review must state that any party that did not have an opportunity to make representations may apply for the action to be set aside and for the decision to be reviewed again.⁹⁰³

Where the Tribunal has reviewed a decision, it may, in the light of the review, correct accidental errors in the decision or in a record of the decision; amend reasons given for the decision; or set the decision aside.⁹⁰⁴ Where the First-tier Tribunal sets a decision aside, it can re-decide the matter or refer the matter to the Upper Tribunal.⁹⁰⁵ Where a matter is referred to the Upper Tribunal, the Upper Tribunal re-decides the matter. It may make any decision

⁹⁰⁰ Tribunals Service *Annual Report & Accounts 2009-10*, 129.

⁹⁰¹ Rule 40 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 and section 9(1) & (2) of the Tribunals, Courts and Enforcement Act of 2007.

⁹⁰² Rule 36 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.

⁹⁰³ Rule 40(3) and (4) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.

⁹⁰⁴ Section 9(4) of the Tribunals, Courts and Enforcement Act of 2007.

⁹⁰⁵ Section 9(5) of the Tribunals, Courts and Enforcement Act of 2007.

which the First-tier Tribunal could make if the First-tier Tribunal were re-deciding the matter; and make such findings of fact as it considers appropriate.⁹⁰⁶

The Tribunal can bring to the attention of the parties the availability of any appropriate alternative procedure for the resolution of the dispute, where appropriate.⁹⁰⁷ The Tribunal can facilitate the use of an appropriate alternative procedure if it is the wish of the parties and the procedure is compatible with the Tribunal's overriding objective.

4.2.3 Fairness of the First-tier Tribunal procedures

The procedures of the First-tier Tribunal allow effective access and participation. The Tribunals, Courts and Enforcement Act empowers the Tribunal to set their own rules of procedure.⁹⁰⁸ Hearing procedures of the Tribunal are flexible and adaptable in meeting the difficulties that parties face, especially if they are unrepresented. The features and principles of the Tribunal enable the development of an approach that meets the needs of users. The procedures of the Tribunals are governed by the guiding objectives and principles of enabling the Tribunal to deal with cases fairly and justly. Dealing with a case fairly and justly includes dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues.⁹⁰⁹ Therefore, the procedures of the Tribunal seek to ensure the benefit of users of the system, by providing for accessibility, participation, flexibility, specialisation and efficiency.⁹¹⁰ Parties to a dispute are also required to help the Tribunal to further its overriding objective and to cooperate with the Tribunal.⁹¹¹

⁹⁰⁶ Section 9(6), (7) & (8) of the Tribunals, Courts and Enforcement Act of 2007.

⁹⁰⁷ Rule 3 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.

⁹⁰⁸ Section 22(2) of the TCEA. The Social Entitlement Chamber of the First-tier Tribunal is guided by the Tribunal Procedure (First-tier Tribunal)(Social Entitlement Chamber) Rules 2008 (SI No. 2685).

⁹⁰⁹ Rule 2(1), (2) and (3) of the Tribunal Procedure (First-tier Tribunal)(Social Entitlement Chamber) Rules 2008 (SI No. 2685).

⁹¹⁰ See Jacobs E "Something Old, Something New: The New Tribunal System" 2009 *ILJ* (UK) Vol. 38, No. 4, 417-423 at 420.

⁹¹¹ Rule 2(4) and (5) of the Tribunal Procedure (First-tier Tribunal)(Social Entitlement Chamber) Rules 2008 (SI No. 2685)The parties to the dispute are required to cooperate with the tribunal both in general (also with each other), and in furthering the overall objective. The Tribunal and the parties to the dispute are therefore joint actors in proceedings that are conducted fairly and justly.

The Tribunal's rules of procedure provide wide case management powers.⁹¹² In addition to a general power to regulate its own procedure, case management also enables the Tribunal to be proactive throughout the proceedings, and not merely reactive to the application of the parties. The guiding objectives of the Tribunal also permit it to override the individual or even collective wishes of the parties in order to take account of the efficient operation of the system as a whole.⁹¹³ In terms of the Rules, the Tribunal's case management powers are exercised through directions.⁹¹⁴ Directions are given either on application of a party or at the Tribunal's own initiative; and on application of a party or at the Tribunal's own initiative if it considers it appropriate, they may be amended, suspended or set aside. The power to give directives is not only a means for the Tribunal to control the progress of the proceedings, but can be used constructively to further the objectives of making the Tribunal accessible and permitting effective participation.⁹¹⁵

The Tribunal may give a direction substituting a party if the wrong person has been named as a party; or the substitution has become necessary because of a change in circumstances since the start of proceedings. The Tribunal may give a direction by adding a person to the proceedings as a respondent. If the Tribunal gives a direction, it may give consequential directions that it considers appropriate.⁹¹⁶

⁹¹² See Rule 5 of the Tribunal Procedure (First-tier Tribunal)(Social Entitlement Chamber) Rules 2008 (SI No. 2685). The Tribunal's case management powers enable it to give a direction in relation to the conduct or disposal of a review at any time, including a direction amending, suspending or setting aside an earlier direction. The Tribunal can also extend or shorten the time for complying with a rule, practice direction or direction; consolidate or hear together two or more review applications or parts of reviews raising common issues, or treat a case as a lead case; permit or require a party to amend a document; permit or require a party or another person to provide documents, information, evidence or submissions to the Tribunal or a party; deal with an issue in the hearings as a preliminary issue; hold a hearing to consider any matter, including a case management issue; decide the form of any hearing; adjourn or postpone a hearing; require a party to produce a bundle for a hearing; halt proceedings; transfer proceedings to another court or tribunal if that other court or tribunal has jurisdiction and the Tribunal no longer has jurisdiction to review the decision because of a change of circumstances since the hearings started, or the other court or tribunal is considered a more appropriate forum for the determination of the case. The Tribunal can also suspend the effect of its own decision pending the determination by it or the Upper Tribunal of an application for permission to appeal against, and any appeal or review of, that decision.

⁹¹³ Jacobs E "Something Old, Something New: The New Tribunal System" 2009 *ILJ* (UK) Vol. 38, No. 4, 417-423 at 421.

⁹¹⁴ See Rule 6 of the First-tier Rules.

⁹¹⁵ See Jacobs E "Something Old, Something New: The New Tribunal System" 2009 *ILJ* (UK) Vol. 38, No. 4, 417-423 at 421. Directions can be used to help parties understand and thereby to cooperate with the tribunal and the other parties. They can also be used to give guidance on what is required of the parties, and to help them understand the evidence that is required and the significance of failing to provide it.

⁹¹⁶ Rule 9 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.

The Tribunal may make an order prohibiting the disclosure or publication of specified documents or information relating to the proceedings; or any matter likely to lead members of the public to identify any person whom the Tribunal considers should not be identified.⁹¹⁷

The Tribunal is required to hold a hearing before making a decision.⁹¹⁸ It can only decide an appeal without a hearing if all parties consent to it or a party does not object to the appeal being decided without a hearing; and if the Tribunal considers that it is able to decide the matter without a hearing. In this case, the Tribunal is expected to give reasons for exercising its discretion in a particular way.⁹¹⁹ The Tribunal can also finalise a review without a hearing where it strikes out a party's case.

A party to a Tribunal proceeding is entitled to attend a hearing, except where the party has been excluded from a hearing.⁹²⁰ The Tribunal gives each party entitled to attend a hearing reasonable notice of the time and place of the hearing (including any adjourned or postponed hearing) and any changes to the time and place of the hearing. The period of notice is at least 14 days, although the Tribunal may give shorter notice with the consent of the parties or in urgent or exceptional circumstances.⁹²¹ A party may appoint a representative (whether a legal representative or not) to represent them in the proceedings.⁹²²

Generally, hearings are held in public. However, a hearing in a criminal injuries compensation case must be held in private, unless the appellant has consented to the hearing being held in public; and the Tribunal considers that it is in the interests of justice for the hearing to be held in public. The Tribunal may also give a direction that a hearing, or part of it, is to be held in private. Where a hearing or part of it is to be held in private, the Tribunal may determine who is permitted to attend the hearing or part of it. The Tribunal may give a

⁹¹⁷ Rule 14 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.

⁹¹⁸ Rule 27 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008. In a criminal injuries compensation case, the Tribunal decide a review without a hearing. If the Tribunal decides a review without a hearing, a party can make a written application to the Tribunal to reconsider the decision at a hearing. However, an application may not be made in relation to a decision not to extend a time limit; not to set aside a previous decision; not to allow an appeal against a decision not to extend a time limit; or not to allow an appeal against a decision not to reopen a case.

⁹¹⁹ In *MM v Secretary of State for Work and Pensions (ESA)* [2011] UKUT 334 (AAC), the Upper Tribunal held that a failure to explain expressly (or impliedly) why a discretion was exercised in a particular way may involve an error of law. This would leave the tribunal's reasons open to attack for inadequacy.

⁹²⁰ Rule 28 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.

⁹²¹ Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.

⁹²² Rule 11 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.

direction excluding any person whose conduct it considers is disrupting or is likely to disrupt a hearing from the hearing or a part of it.⁹²³ It can also exclude a person whose presence it considers is likely to prevent another person from giving evidence or making submissions freely; a person who it considers should be excluded in order to give effect to a direction to withhold information that is likely to cause harm; or a person whose presence would defeat the purpose of the hearing. The Tribunal may also give a direction excluding a witness from a hearing until that witness gives evidence.

If a party fails to attend a hearing, the Tribunal can proceed with the hearing if it is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing and considers that it is in the interests of justice to proceed with the hearing.⁹²⁴

The Tribunal may give a decision orally at a hearing. Except where the Tribunal withholds information that is likely to cause harm, the Tribunal must provide to each party a decision notice stating the Tribunal's decision; notification of the right to apply for a written statement of reasons (where appropriate); and notification of any right of appeal against the decision and the time within which, and the manner in which, such right of appeal may be exercised.⁹²⁵ This must be done as soon as reasonably practicable after making a decision which finally disposes of all issues in the proceedings.

The Tribunal has a duty to give adequate reasons for its review decisions. The Tribunal gives reasons for a review decision orally at a hearing or in a written statement of reasons to each party.⁹²⁶ The Tribunal's reasons must be adequate. If its reasons are not adequate, its decision may be considered to have been made in error of law and set aside on appeal to the Upper Tribunal.⁹²⁷ If the Tribunal fails to give reasons, a party can apply in writing for the reasons.

A party that is not happy with a decision of the first-tier Tribunal can apply for permission to appeal against the decision of the Tribunal to the Upper Tribunal. An appeal may only be

⁹²³ Rule 30 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.

⁹²⁴ Rule 31 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.

⁹²⁵ Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.

⁹²⁶ Rule 34 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.

⁹²⁷ See *HL v Secretary of State for Work and Pensions (DLA)* [2011] UKUT 183 (AAC); *RC v Secretary of State for Work and Pensions (IB)* and *RC v Secretary of State for Work and Pensions (ESA)* [2011] UKUT 389 (AAC); and *AS v Secretary of State for Work and Pensions (ESA)* [2011] UKUT 159 (AAC).

made on the ground that there is an ‘error of law’. Examples of what can be considered as error of law is where the Tribunal applied the law incorrectly, conducted the hearing in breach of the proper procedures, or failed to make adequate findings of fact or to give adequate reasons for its decision.⁹²⁸

4.2.4 Expertise and specialisation of the First-tier Tribunal

The criteria for appointment to the First-tier Tribunal ensure specialisation of the Tribunal. A person is eligible for appointment as a judge of the Tribunal only if he or she satisfies the eligibility condition for judicial appointment on a five-year basis; if he or she has been an advocate or solicitor in Scotland for at least five years; if he or she has been a barrister or solicitor in Northern Ireland for at least five years; or if in the opinion of the Lord Chancellor he or she has gained experience in law which makes him or her as suitable for appointment as if the conditions of appointment have been satisfied.⁹²⁹

The Lord Chancellor may appoint a person to be one of the members of the First-tier Tribunal who are not judges of the Tribunal. A person is eligible for such appointment only if he or she has qualifications prescribed by order made by the Lord Chancellor with the concurrence of the Senior President of Tribunals.⁹³⁰

In social security and child support hearings, the panel consists of three members.⁹³¹ Where the hearing is on an attendance allowance or a disability living allowance, the Tribunal panel is made up of a Tribunal Judge, a registered medical practitioner, and a Member with a disability qualification.⁹³² The Tribunal consists of a Tribunal Judge and a registered medical practitioner where the appeal involves other health- and disability-related issues.⁹³³ In any other case the Tribunal must consist of a Tribunal Judge.⁹³⁴

⁹²⁸ Tribunal Service/Social Security and Child Support *How to Appeal: A Step-by-Step Guide* 30.

⁹²⁹ Para 1 of Schedule 2 of the Tribunals, Courts and Enforcement Act.

⁹³⁰ Para 2 of Schedule 2 of the Tribunals, Courts and Enforcement Act.

⁹³¹ Para 3 of the Practice statement on the Composition of Tribunals in social security and child support cases in the Social Entitlement Chamber on or after 3 November 2008)

⁹³² Para 4 of the Practice statement on the Composition of Tribunals in social security and child support cases in the Social Entitlement Chamber on or after 3 November 2008.

⁹³³ Such as the personal capability assessment within the meaning of regulations 34 and 35 of the Employment and Support Allowance Regulations of 2008; or the appeal involves the limited capability for work assessment; or the determination of limited capability for work- related activity; or the appeal is made under section 11(1)(b) of the Social Security (Recovery of Benefits) Act 1997; or the appeal raises issues relating to severe disablement allowance under section 68 of the Social Security Contributions and Benefits Act of 1992 or industrial injuries

Where an appeal may require the examination of financial accounts, the Chamber President may determine that a Tribunal panel be constituted to include an accountant. In addition, where the complexity of the medical issues in the appeal so demands, the Chamber President can include an additional panel Member who is a registered medical practitioner. The Chamber President can also add additional Tribunal Judges or Members as he or she considers appropriate to provide further experience of the additional Judge or Member or for assisting the Chamber President in the monitoring of decision-making standards.⁹³⁵

Where the Chamber President considers that a matter relating to the attendance allowance, or a disability living allowance or issues of capability assessment only raises questions of law and the expertise of any of the other members is not necessary to decide the matter, the Chamber President may direct that the Tribunal must consist only of a Tribunal Judge, or of a Tribunal Judge and a Member whose experience and qualifications are necessary to decide the matter.⁹³⁶

The availability of a variety of skilled members and the ability of the First-tier Tribunal to constitute hearing panels ensures that the Tribunal has the necessary specialist skills to determine appeals. It also affords the Tribunal the necessary flexibility and adaptability in providing redress to its users. This justifies the conclusion that:

“Through the chamber structure, the specialism and expertise of existing independent tribunals will be preserved, but the ability of members, where expertise allows, to be transferred between chambers will allow for a more efficient service.”⁹³⁷

benefit under Part V of that Act (except for an appeal where the only issue is whether there should be a declaration of an industrial accident under section 29(2) of the Social Security Act of 1998); or the appeal is made under section 4 of the Vaccine Damage Payments Act of 1979; or the appeal is against a certificate of National Health Service charges under section 157(1) of the Health and Social Care (Community Health and Standards) Act of 2003; or the appeal arises under Part IV of the Child Maintenance and Other Payments Act of 2008 – see Para 5 of the Practice statement on the Composition of Tribunals in social security and child support cases in the Social Entitlement Chamber on or after 3 November 2008.

⁹³⁴ Para 6 of the Practice statement on the Composition of Tribunals in social security and child support cases in the Social Entitlement Chamber on or after 3 November 2008.

⁹³⁵ Para 7 of the Practice statement on the Composition of Tribunals in social security and child support cases in the Social Entitlement Chamber on or after 3 November 2008.

⁹³⁶ Para 8 of the Practice statement on the Composition of Tribunals in social security and child support cases in the Social Entitlement Chamber on or after 3 November 2008.

⁹³⁷ Cooper J *The Tribunals, Courts and Enforcement Act* Wragge & Co (November 2008) accessed at www.wragge.com/analysis.asp on 22 March 2012.

4.3 Review of decisions by the Upper Tribunal

The Upper Tribunal mainly reviews and decides appeals from the First-tier Tribunal. It also has the power to deal with judicial review work delegated from the High Courts of England and Wales and Northern Ireland and from the Court of Session.⁹³⁸ In addition to the protection of its independence, the effectiveness of the Upper Tribunal is promoted (in the same manner as the First-Tier Tribunal) through its accessibility, procedural fairness, scope of jurisdiction and powers and the expertise and specialisation of its members.

4.3.1 Accessibility of the Upper Tribunal

The Upper Tribunal's location, appeal lodgement procedures and time periods are designed to ensure easy access to the Tribunal. The Administrative Appeals Chamber of the Tribunal has a contact for the lodgement of applications in each of the countries of the UK – in London, Cardiff, Edinburgh and Belfast for England, Wales, Scotland and Northern Ireland, respectively.

A document to be provided to the Upper Tribunal in terms of the Rules, a practice direction or a direction of the Tribunal must be sent by pre-paid post or by document exchange, or delivered by hand to a specified address; sent by fax to a specified number; or can be delivered another method permitted or directed the Upper Tribunal may.⁹³⁹

A person can only apply to the Upper Tribunal if they have been given leave to apply by the Tribunal whose decision they are challenging; or an application for leave to apply has been refused. Where an application for leave to apply to the Upper Tribunal is refused, a person may apply to the Upper Tribunal for permission to appeal.⁹⁴⁰ An application for permission to appeal must be made in writing and should be received by the Upper Tribunal at least a month after receiving notice from a Tribunal refusing permission to appeal, or refusal to admit the application for permission to appeal.⁹⁴¹ If a person applies to the Upper Tribunal later than the one month period or after any other extension period given, the application

⁹³⁸ Ministry of justice *Implementation of the Tribunals Courts and Enforcement Act 2007* (Written Ministerial Statement to the House of Commons)(undated).

⁹³⁹ Rule 13 of the Tribunal Procedure (Upper Tribunal) Rules of 2008.

⁹⁴⁰ Rule 21(2) of the Tribunal Procedure (Upper Tribunal) Rules (SI No. 2698) of 2008.

⁹⁴¹ Rule 21(3) of the Tribunal Procedure (Upper Tribunal) Rules of 2008.

must include a request for an extension of time and the reason why the application was not provided in time. Except if the Upper Tribunal extends the time limit for the application, it will not accept the application.⁹⁴²

If an application to the Upper Tribunal is for leave to appeal against the decision of another tribunal and the application for leave to appeal at the lower tribunal was refused because the application for leave or for a written statement of reasons was not made in time, the application to the Upper Tribunal must include the reason why the application to the lower tribunal was not made in time. The Upper Tribunal will only accept such an application if it considers that it is in the interests of justice for it to do so.⁹⁴³

The application must contain the name and address of the appellant; the name and address of any representative; an address where documents may be sent or delivered to the appellant; details of the decision challenged (including the full reference); the grounds relied on by the appellant; and whether the appellant wants the application to be dealt with at an oral hearing.⁹⁴⁴

In order to enable the applicant to prepare for the appeal, he or she is given a copy of any written record of the decision being challenged; any separate written statement of reasons for the decision.⁹⁴⁵ If the application is for permission to appeal against a decision of another tribunal, the notice of refusal of permission to appeal, or notice of refusal to admit the application for permission to appeal from that other tribunal is also provided.

4.3.2 Scope of jurisdiction and powers of the Upper Tribunal

The Upper Tribunal has jurisdiction throughout the United Kingdom. It was established to take over hearing appeals to the courts, the Social Security and Child Support Commissioners, and similar bodies from the decisions of local tribunals. It is also intended to take over some of the supervisory powers of the Courts to deal with the actions of tribunals and of the government departments and other public authorities whose decisions may be appealed to tribunals; and to deal with enforcement of decisions, directions and orders made

⁹⁴² Rule 21(6) of the Tribunal Procedure (Upper Tribunal) Rules of 2008.

⁹⁴³ Rule 21(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

⁹⁴⁴ Rule 21(4) of the Tribunal Procedure (Upper Tribunal) Rules of 2008.

⁹⁴⁵ Rule 21(5) of the Tribunal Procedure (Upper Tribunal) Rules of 2008.

by tribunals.⁹⁴⁶ The main functions of the Upper Tribunal are to hear appeals from the First-tier Tribunal; to decide certain cases that do not go to the First-tier Tribunal; to exercise powers of judicial review in certain circumstances; and to deal with enforcement of decisions, directions and orders made by tribunals.⁹⁴⁷

The Administrative Appeals Chamber thus has appellate, judicial review and referral jurisdiction. It hears appeals against decisions made by the First-tier Tribunal (except an appeal assigned to the Tax and Chancery Chamber or the Immigration and Asylum Chamber of the Upper Tribunal); assessment decisions of the Pensions Appeal Tribunal in Northern Ireland; and decisions of the Pensions Appeal Tribunal in Scotland; a decision of the Mental Health Review Tribunal for Wales; against a decision of the Special Educational Needs Tribunal for Wales; appeals in terms of section 4 of the Safeguarding Vulnerable Groups Act 2006; cases transferred to the Upper Tribunal from the First-tier Tribunal under Tribunal Procedure Rules (except an appeal allocated to the Tax and Chancery Chamber); and decisions of a Traffic Commissioner.⁹⁴⁸

The Administrative Appeals Chamber of the Upper Tribunal has jurisdiction to judicially review procedural decisions of First-tier Tribunals where there is no right of appeal; criminal injuries compensation appeals decided by the First-tier Tribunal; and judicial review applications in Scotland.⁹⁴⁹ In cases decided in England, Wales or Northern Ireland, the Upper Tribunal can grant a mandatory order; a prohibiting order; a quashing order; a declaration; and an injunction.⁹⁵⁰ Relief by the Upper Tribunal has the same effect as the corresponding relief granted by the High Court on an application for judicial review, and is enforceable as if it were relief granted by the High Court on an application for judicial review.⁹⁵¹ In deciding whether to grant relief, the Upper Tribunal must apply the principles that the High Court would apply in deciding whether to grant that relief on an application for judicial review.⁹⁵²

⁹⁴⁶ See *Tribunals Service Annual Report & Accounts 2009-10*, 136.

⁹⁴⁷ *Tribunals Service Annual Report & Accounts 2009-10*, 126.

⁹⁴⁸ Article 10(a) of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010.

⁹⁴⁹ Sections 15 and 21 of the TCEA. See also Article 10(b) of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010.

⁹⁵⁰ Section 15(1) of the Tribunals, Courts and Enforcement Act of 2007.

⁹⁵¹ Section 15(3) of the Tribunals, Courts and Enforcement Act of 2007

⁹⁵² Section 15(4) of the Tribunals, Courts and Enforcement Act of 2007.

The Upper Tribunal also decides cases referred to it by the First-tier Tribunal; a determination or decision under section 4 of the Forfeiture Act 1982; proceedings or a preliminary issue transferred under Tribunal Procedure Rules to the Upper Tribunal from the First-tier Tribunal (except those allocated to the Tax and Chancery Chamber); and cases transferred to it from the High Court and the Court of Session.⁹⁵³

The Upper Tribunal is a superior court of record.⁹⁵⁴ The Tribunal is conferred the same powers, rights, privileges and authority as the High Court in relation to the attendance and examination of witnesses, the production and inspection of documents, and all other matters incidental to the Upper Tribunal's functions.⁹⁵⁵ The test for appealing from the Upper tribunal to the Court of Appeal is the same test applying to appeals from the county court and High Court to the Court of Appeal. An appeal against a decision of the Tribunal is only possible if it would raise an important point of principle or practice or there is some other compelling reason.⁹⁵⁶

Where a matter is referred to the Upper Tribunal, it must re-decide the matter. It may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-deciding the matter, and make such findings of fact as it considers appropriate.⁹⁵⁷ If in deciding an appeal the Upper Tribunal finds that the making of the decision concerned involved the making of an error on a point of law, the Upper Tribunal may set aside the decision of the First-tier Tribunal.⁹⁵⁸ If it sets aside the decision of the First-tier Tribunal, the Upper Tribunal re-makes the decision or remits the case to the First-tier Tribunal with directions for its reconsideration, including procedural directions.⁹⁵⁹ In remitting the case to the First-tier Tribunal with directions for its reconsideration, the Upper Tribunal may also direct that the members of the First-tier Tribunal who are chosen to reconsider the case are

⁹⁵³ Sections 19 and 21 of the TCEA. See also Article 10(c), (d) and (e) of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010.

⁹⁵⁴ Section 3(5) of the TCEA.

⁹⁵⁵ Section 25 of the TCEA.

⁹⁵⁶ Jacobs E Tribunal Practice and Procedure: *Tribunals under the Tribunals, Courts and Enforcement Act 2007* Legal Action Group (June 2011) 35.

⁹⁵⁷ Section 9(6), (7) & (8) of the Tribunals, Courts and Enforcement Act of 2007.

⁹⁵⁸ See *AS v Secretary of State for Work and Pensions (ESA)* [2011] UKUT 159 (AAC).

⁹⁵⁹ See *RC v Secretary of State for Work and Pensions (IB) / RC v Secretary of State for Work and Pensions (ESA)* [2011] UKUT 389 (AAC); *MM v Secretary of State for Work and Pensions (ESA)* [2011] UKUT 334 (AAC) and section 12 of the TCEA.

not to be the same as those who made the decision that has been set aside.⁹⁶⁰ It may also give a decision in connection with the reconsideration of the case by the First-tier Tribunal. In re-making the decision, the Upper Tribunal may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and may make such findings of fact as it considers appropriate.⁹⁶¹

The Upper Tribunal can also review a decision made by it of its own initiative, or on application by a person who has a right of appeal the decision.⁹⁶² Where the Upper Tribunal reviews a decision, it can correct accidental errors in the decision or in a record of the decision; amend reasons given for the decision; or set the decision aside. Where the Upper Tribunal sets a decision aside, it must re-decide the matter; and make any findings of fact it considers appropriate.

The Upper Tribunal may not make an order in respect of costs or expenses in proceedings transferred or referred by or on appeal from another tribunal (except to the extent permitted in a national security certificate appeal); in proceedings transferred by or on appeal from the Tax Chamber of the First-tier Tribunal; or to the extent and in the circumstances that the other tribunal had the power to make an order in respect of costs or expenses.⁹⁶³

The Upper Tribunal may at any time correct any clerical mistake or other accidental slip or omission in its decision or record of a decision. It can do so by sending notification of the amended decision or a copy of the amended record to all parties. It must also make all necessary amendments to information published in relation to the decision or record.⁹⁶⁴

The Upper Tribunal can set aside its decision or part of a decision and re-make the decision or the relevant part of it, if the Tribunal considers that it is in the interests of justice to do so. It can only do so if a document relating to the proceedings was not sent to or was not received at an appropriate time by a party or the party's representative; a document relating to the proceedings was not sent to the Upper Tribunal at an appropriate time; a party or the party's

⁹⁶⁰ See *HL v Secretary of State for Work and Pensions (DLA)* [2011] UKUT 183 (AAC); *EM v Secretary of State for Work and Pensions (DLA)* [2011] UKUT 320 (AAC) and *PJ v Secretary of State for Work and Pensions (ESA)* [2011] UKUT 224 (AAC).

⁹⁶¹ Section 12(4) of the Tribunals, Courts and Enforcement Act of 2007.

⁹⁶² Section 10 of the Tribunals, Courts and Enforcement Act of 2007.

⁹⁶³ Rule 10 of the Tribunal Procedure (Upper Tribunal) Rules of 2008.

⁹⁶⁴ Rule 42 of the Tribunal Procedure (Upper Tribunal) Rules of 2008.

representative was not present at a hearing related to the proceedings; or there was some other procedural irregularity in the proceedings.⁹⁶⁵

4.3.3 Procedural fairness of the Upper Tribunal

The Upper Tribunal is also empowered to set its own rules of procedure.⁹⁶⁶ The Tribunal's procedures are also guided by the need to enable the Tribunal to deal with cases fairly and justly; and the duty for the parties to the dispute to cooperate with the Tribunal.⁹⁶⁷ In order for a case to be dealt with fairly and justly, the Tribunal is required to deal with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties; to avoid unnecessary formality and seeking flexibility in the proceedings; to ensure that the parties are able to participate fully in the proceedings as far as practicable; to use any special expertise of the Upper Tribunal effectively; and to avoid delay, as far as it is compatible with proper consideration of the issues.⁹⁶⁸ In addition, the guiding objectives of the Tribunals permit it to override the individual or even collective wishes of the parties in order to take account of the efficient operation of the whole tribunal system.⁹⁶⁹

The Upper Tribunals' rules of procedure provide wide case management powers, which include a general power to regulate their own procedure.⁹⁷⁰ Case management also enables the Tribunal to be proactive throughout the proceedings, and not merely reactive to the application of the parties. In terms of the Tribunal's Rules, its case management powers are exercised through directions. The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.⁹⁷¹ Directions are given either on the application of a party or at the

⁹⁶⁵ Rule 43 of the Tribunal Procedure (Upper Tribunal) Rules of 2008.

⁹⁶⁶ Section 22(2) of the TCEA.

⁹⁶⁷ Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules of 2008. The parties to the dispute are required to cooperate with the tribunal both in general (also with each other), and in furthering the overall objective. The Tribunal and the parties to the dispute are therefore joint actors in proceedings that are conducted fairly and justly.

⁹⁶⁸ Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No. 2698).

⁹⁶⁹ Jacobs E "Something Old, Something New: The New Tribunal System" 2009 *ILJ* (UK) Vol. 38, No. 4, 417-423 at 421.

⁹⁷⁰ See Rule 5 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No. 2698).

⁹⁷¹ Rule 5(2) of the Tribunal Procedure (Upper Tribunal) Rules of 2008. In addition, the Upper Tribunal may also extend or shorten the time for complying with any rule, practice direction or direction; consolidate or hear together two or more sets of proceedings or parts of proceedings raising common issues, or treat a case as a lead case; permit or require a party to amend a document; permit or require a party or another person to provide

tribunal's own initiative. Furthermore, on the application of a party or at the Tribunal's own initiative, directions can be amended, suspended or set aside if it considers it appropriate. The power to give directives is not only a means for the Tribunal to control the progress of proceedings, but can be used constructively to further the objectives of making the Tribunal accessible and of permitting effective participation.⁹⁷²

In proceedings before the Upper Tribunal, a party may appoint a representative (whether a legal representative or not) to represent them, except where a person is prohibited from representing someone.⁹⁷³

Each party and any other person permitted by the Upper Tribunal can submit evidence, except at the hearing of an application for permission. They can also make representations at a hearing which they are entitled to attend, and make written representations where a decision is to be made without a hearing.⁹⁷⁴

The Upper Tribunal can decide an appeal without a hearing. However, the Tribunal must consider the views expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of such a hearing.⁹⁷⁵ Where a hearing is held, each party is entitled to attend the hearing.⁹⁷⁶

documents, information, evidence or submissions to the Upper Tribunal or a party; deal with an issue in the proceedings as a preliminary issue; hold a hearing to consider any matter, including a case management issue; decide the form of any hearing; adjourn or postpone a hearing; require a party to produce a bundle for a hearing; halt proceedings; transfer proceedings to another court or tribunal if that other court or tribunal has jurisdiction in relation to the proceedings and because of a change of circumstances since the proceedings were started, the Upper Tribunal no longer has jurisdiction in relation to the proceedings; or the Upper Tribunal considers that the other court or tribunal is a more appropriate forum for the determination of the case; suspend the effect of its own decision pending an appeal or review of that decision; in an appeal, or an application for permission to appeal, against the decision of another tribunal, suspend the effect of that decision pending the determination of the application for permission to appeal, and any appeal; require any person, body or other tribunal whose decision is the subject of proceedings before the Upper Tribunal to provide reasons for the decision, or other information or documents in relation to the decision or any proceedings before that person, body or tribunal - Rule 5(3) of the Tribunal Procedure (Upper Tribunal) Rules of 2008.

⁹⁷² See Jacobs E "Something Old, Something New: The New Tribunal System" 2009 *ILJ* (UK) Vol. 38, No. 4, 417-423 at 421. Directions can be used to help parties understand and thereby to cooperate with the tribunal and the other parties. They can also be used to give guidance on what is required of the parties, and to help them understand the evidence that is required and the significance of failing to provide it.

⁹⁷³ Immigration and Asylum Act of 1999. See Rule 11 of the Tribunal Procedure (Upper Tribunal) Rules of 2008.

⁹⁷⁴ Rule 33 of the Tribunal Procedure (Upper Tribunal) Rules of 2008.

⁹⁷⁵ Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules of 2008.

⁹⁷⁶ Rule 35 of the Tribunal Procedure (Upper Tribunal) Rules of 2008.

The Upper Tribunal gives each party entitled to attend a hearing reasonable notice of the time and place of the hearing (including any adjourned or postponed hearing) and any change to the time and place of the hearing. The period of notice is at least 14 days except in applications for permission to bring judicial review proceedings where the period of notice must be at least two working days. In a fast-track case, the period of notice is at least one working day. However, in a case that is not fast-tracked, the Tribunal can give shorter notice with the consent of the parties or in urgent or exceptional cases.⁹⁷⁷

All hearings of the Upper Tribunal are held in public.⁹⁷⁸ However, the Tribunal can give a direction that a hearing or part of a hearing is held in private. Where a hearing or part of it is held in private, the Upper Tribunal may determine persons entitled to attend. The Tribunal may give a direction excluding from a hearing or part of it a person whose conduct it considers will disrupt or is likely to disrupt the hearing. It can also exclude a person whose presence it considers is likely to prevent another person from giving evidence or making submissions freely. A person can also be excluded if the Tribunal considers that he or she should be excluded in order to give effect to the requirement to prevent disclosure or publication of documents and information. Other persons that can be excluded include a person whose attendance will defeat the purpose of the hearing; and a person under the age of eighteen years. The Upper Tribunal may give a direction excluding a witness from a hearing until that witness gives evidence.

If a party fails to attend a hearing, the Upper Tribunal may proceed with the hearing.⁹⁷⁹ This would be the case where the Upper Tribunal is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing, and the Tribunal considers that it is in the interests of justice to proceed with the hearing.

Where appropriate, the Upper Tribunal brings to the attention of the parties the availability of any appropriate alternative procedure for the resolution of the dispute; and if the parties wish and provided that it is compatible with the overriding objective, to facilitate the use of the procedure.⁹⁸⁰

⁹⁷⁷ Rule 36 of the Tribunal Procedure (Upper Tribunal) Rules of 2008.

⁹⁷⁸ Rule 37 of the Tribunal Procedure (Upper Tribunal) Rules of 2008.

⁹⁷⁹ Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules of 2008.

⁹⁸⁰ Rule 3 of the Tribunal Procedure (Upper Tribunal) Rules of 2008.

The Upper Tribunal can give a decision orally at a hearing. However, as soon as reasonably practicable after making a decision, the Tribunal must provide to each party a decision notice stating the Tribunal's decision, notification of any rights of review or appeal against the decision and the time and manner of exercising such rights.⁹⁸¹ The decision notice must include written reasons for the Tribunal's decision, except where the decision is made with the consent of the parties; or the parties have consented to the Tribunal not giving written reasons.

4.3.4 Expertise and specialisation of the Upper Tribunal

In order for the Upper Tribunals to perform its duty to users, it must have the necessary expertise and specialisation. This is recognised in the Tribunals, Courts and Enforcement Act, as it requires the Senior President to have regard to the need for members to be expert in the subject matter of, or the law to be applied in, their tribunal.⁹⁸²

Upper Tribunal members are appointed on the basis of their knowledge, experience or expertise relevant to the Tribunal's jurisdiction.⁹⁸³ The expertise and specialisation of Tribunal members is also further promoted through experience in the Tribunal's jurisdiction and the assigning and ticketing⁹⁸⁴ within its various chambers.⁹⁸⁵

⁹⁸¹ Rule 40 of the Tribunal Procedure (Upper Tribunal) Rules of 2008.

⁹⁸² Section 2(3)(c) of the TCEA 2007.

⁹⁸³ A person is eligible for appointment as a judicial member of the Upper Tribunal only if he or she satisfies the eligibility condition for judicial appointment on a 7-year basis; or has been an advocate or solicitor in Scotland of at least seven years; or has been a barrister or solicitor in Northern Ireland of at least seven years; or if in the opinion of the Lord Chancellor he or she has gained experience in law to make him or her suitable for appointment as if he or she satisfies one of the other conditions - Para 1(1) of Schedule 3 of the TCEA. The Lord Chancellor can also appoint a person to be one of the non-judicial members of the Upper Tribunal if the person has qualifications prescribed in an order made by the Lord Chancellor with the concurrence of the Senior President of Tribunals - Para 2 of Schedule 3 of the TCEA.

⁹⁸⁴ Assigning and "cross ticketing" refer to a procedure introduced by the TCEA where judges are deployed within and across the new chambers of the Tribunals. In terms of this procedure, suitably qualified judiciary can hear cases in jurisdictions other than the one to which they were first appointed without the need for a further Judicial Appointments Commission competition. This reduces the costs of training and support; and enables the flexible deployment of judiciary to meet fluctuations in workloads between jurisdictions. It also encourages greater consistency of standards and approach across previously disparate jurisdictions. It assists where there are difficulties in finding judges for particular locations and where there are recruitment difficulties in smaller jurisdictions – see Prentice B "Tribunals Courts and Enforcement Act 2007" (16 July 2009)(written statement by the Parliamentary Under-Secretary of the Ministry of Justice to the House of Commons (Hansard source citation: HC Deb, 16 July 2009, c61WS).

⁹⁸⁵ Jacobs E Tribunal Practice and Procedure: *Tribunals under the Tribunals, Courts and Enforcement Act 2007* Legal Action Group (June 2011) 31.

The expertise and specialisation of the members of the Upper Tribunal enhances its status as it limits the scope for appealing its decision. The courts have emphasised the significance of the expertise and specialisation of a tribunal such as the Upper Tribunal in assessing whether an appeal of its decision has a real prospect of success. In *Cooke v Secretary of State for Social Security* the Court of Appeal stated that:

“it is also important that such appeal structures have a link to the ordinary court system, to maintain both their independence of government and the sponsoring department and their fidelity to the relevant general principles of law. But the ordinary courts should approach such cases with an appropriate degree of caution. It is quite probable that on a technical issue of understanding and applying the complex legislation the social security Commissioner will have got it right. The Commissioners will know how that particular issue fits into the broader picture of social security principles as a whole. They will be less likely to introduce distortion into those principles. They may be better placed, where it is appropriate, to apply those principles in a purposive construction of the legislation in question. They will also know the realities of tribunal life. All this should be taken into account by an appellate court when considering whether an appeal will have a real prospect of success.”⁹⁸⁶

5. NEW ZEALAND

New Zealand also implements a multi-tier social security review and appeals process. This involves reconsideration (review) by the relevant Ministry (such as the Ministry of Social Development and the Ministry of Work and Income). A person who is unhappy with the reconsidered decision of a ministry can appeal to the Benefit Review Committee of the Ministry. Appeals from the Benefit Review Committee are forwarded to the Social Security Appeal Authority (SSAA). A further right of appeal is to the High Court, the Court of Appeal and finally to the Supreme Court. The (social Security) dispute resolution system is guided by the principles that it should be proportionate, in relation to the complexity of procedures, the availability of representation and the provision of appeal mechanisms.⁹⁸⁷

5.1 Reconsideration of social security decisions by relevant ministry

An applicant or beneficiary who does not understand or disagrees with a decision of a ministry can seek a reconsideration of the decision through a case manager. The case

⁹⁸⁶ *Cooke v Secretary of State for Social Security* [2002] 3 All ER 279 at [16].

⁹⁸⁷ Ministry of Justice *Tribunal Reform Programme* (October 2007) accessed at www.justice.gov.nz.

manager explains the decision and corrects any mistakes that may have been made.⁹⁸⁸ A person who still disagrees with the decision of the Ministry can apply for a formal review of the decision. This can be done by completing a *Review of Decision* form or writing a letter to the local office of the Ministry. A formal review application must be done within three months of the original decision, unless the applicant shows good cause why they were unable to apply within three months.⁹⁸⁹ Upon receipt of the formal review application, the Ministry reviews the original decision. Where the Ministry agrees that the decision is incorrect, it varies the decision. Where the Ministry confirms its original decision or part of the decision, it sends the review application to a Benefits Review Committee of the Ministry together with a statement of the reasons for the decision.⁹⁹⁰ The Ministry endeavours to notify the applicant of the internal review outcome within two weeks of receipt of the review application.⁹⁹¹ The internal review of a social security decision by the Ministry thus enables a social security applicant or beneficiary who has a dispute with a ministry to have the dispute resolved expeditiously.

5.2 Review of decisions by Benefits Review Committees

In addition to the Ministry forwarding review applications to a Benefits Review Committee, a person who is dissatisfied with the review decision of the Ministry can challenge the decision with the Benefits Review Committee. The Committee ensures that the Ministry makes decisions that are correct and fair, with regard to procedure and law.⁹⁹² The committee consists of two senior ministry officials and a community representative appointed by the Minister. Although this may lead to questions about the objectivity and impartiality of the Committees, they are internal review bodies of the Ministry undertaking administrative duties and not a quasi-judicial function.⁹⁹³ In addition, decisions of the Committees are subject to review by an independent and impartial body (the Social Security Appeal Authority).

⁹⁸⁸ Ministry of Work and Income *Asking for a review of decision* accessed at www.workandincome.govt.nz (15 March 2012).

⁹⁸⁹ *Ibid.*

⁹⁹⁰ Snow M *Reviews can turn into an appealing process* Returned and Services Association (New Zealand) June 2011, accessed at www.rsa.org.nz (15 March 2012).

⁹⁹¹ Ministry of Work and Income *Asking for a review of decision* accessed at www.workandincome.govt.nz (15 March 2012).

⁹⁹² Ministry of Work and Income *Asking for a review of decision* accessed at www.workandincome.govt.nz (15 March 2012).

⁹⁹³ Welfare justice – The Alternative Welfare Working Group *Reflections and recommendations: A contribution to the welfare reform debate* (December 2010) 57. See also *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 14 paras 18-19.

An application to the Committee must be made within three months of the original decision. Where an application is made later than three months, the Committee organises a hearing to decide whether it should hear the review application. A review hearing is organised once the Committee decides that it can hear the review application. The Benefits Review Committee takes a fresh look at all available information and makes a decision about a review application, taking into account a review applicant's individual circumstances. Hearings by the Benefits Review Committee are informal and are held in a private venue. Applicants are encouraged to attend the review hearing to answer any questions or present information, although they can have a lawyer attend on their behalf. Where an applicant attends the hearing, they can be accompanied by a support person, client representative or lawyer. The Benefits Review Committee communicates the decision soon after a hearing. The Committee aims to advise applicants of the outcome of an internal review within two weeks of receiving an application. However, it takes about five weeks from the time a review application is received by the Benefits Review Committee to get a decision.⁹⁹⁴

Where the Benefits Review Committee affirms the decision of the Ministry or part of the decision, it is required to explain an applicant's right to appeal when it communicates the decision of the Committee. An applicant who disagrees with the decision the Benefits Review Committee can then appeal to the Social Security Appeal Authority.

5.3 Review of decisions by the Medical Appeals Board

Separate processes are provided for review of decisions relating to the Invalids Benefit, Child Disability Allowance or Sickness Benefit and (sometimes) the Veterans Pension.⁹⁹⁵ A person can apply to the Medical Appeals Board for a review of a decision by the Ministry to declining an application or cancelling a benefit.

Medical Appeals Board is made up of three experts such as doctors, rehabilitation professionals or vocation experts. The person who made the original medical assessment does not take part in a Medical Appeals Board hearing to ensure a fresh assessment of the issues.

⁹⁹⁴ Snow M *Reviews can turn into an appealing process* Returned and Services Association (New Zealand) June 2011, accessed at www.rsa.org.nz (15 March 2012).

⁹⁹⁵ Ministry of Work and Income *Asking for a review of decision* accessed at www.workandincome.govt.nz (15 March 2012).

Medical Appeals Board hearings are informal. Applicants are encouraged to attend and can have a support person or agent with them. An applicant's case manager guides them through the whole process. The Board reconsiders all the information on the applicant's medical condition or ability to work. It also considers if the right decision was made about the medical reasons for declining the application or cancelling the benefit. In order to help it in making its decision, the Board may require an applicant to be re-examined by a specialist or another medical practitioner. The Board pays for the medical examination and other related costs (such as travel costs). A decision of the Board is issued within two weeks of the hearing. The Board's decision is final, as there is no further right of appeal.

5.4 Review of decisions by the SSAA

The Social Security Appeal Authority (SSAA) is a statutory board established in terms of the Social Security Act.⁹⁹⁶ The SSAA is an independent judicial tribunal administered by the Ministry of Justice.⁹⁹⁷ The objective of the Social Security Appeal Authority is to hear appeals against decisions made by the social security administration; appeals against decisions of the social security administration that have been reviewed by the Benefits Review Committee; and appeals where the Benefits Review Committee has declined to hear a late application for review of a social security administration decision.⁹⁹⁸

In order to successfully undertake its appeal functions, the establishment and operation of the SSAA are guided by the principles that it should be accessible (in terms of geographic coverage, costs to users, simple entry and provision of information about the Tribunal to users); fair and credible (relating to its independence, the transparency of its proceedings and processes, the quality of its decision-making, its specialisation and its observance of the rule of law); and that it should be administered efficiently (through minimal delay, efficiency, best use of human resources and innovation).⁹⁹⁹ These aspects ensure that the SSAA is able to provide access to justice for its users.

⁹⁹⁶ Section 12F of the Social Security Act of 1964.

⁹⁹⁷ Social Security Appeal Authority *A Guide to Making an Appeal* available at www.justice.gov.nz/tribunals.

⁹⁹⁸ Section 12J of the Social Security Act.

⁹⁹⁹ Ministry of Justice Tribunal Reform Programme (October 2007) accessed at www.workandincome.govt.nz.

5.4.1 Accessibility of the SSAA

The SSAA conducts monthly hearings, alternating between New Zealand's major cities of Auckland and Wellington, with occasional hearings being held in Christchurch. In order to facilitate participation in its hearing, the SSAA pays the actual and reasonable travelling and accommodation expenses (if any) incurred by the appellant who is requested to appear before it.¹⁰⁰⁰

There are no fees required for the lodging of an appeal with the Authority. Where a decision is in a person's favour (either partly or wholly) the SSAA may order the Ministry of Social Development to reimburse an applicant the reasonable costs incurred in bringing the appeal. However, if the Authority's decision is not in a person's favour, it will not require the person to reimburse the other party for any costs. A cost order will only be made where the SSAA finds that the appeal was frivolous, vexatious, or should not to have been brought.¹⁰⁰¹

SSAA appeal lodgement procedures and time periods have been simplified to enable a person aggrieved by a decision to apply for a review of the decision. Appeals must be in writing and submitted by post to the Tribunals Unit of the Ministry of Justice (responsible for administrative support for the Authority).¹⁰⁰² An appeal may be lodged by an applicant filling out a *Notice of Appeal* form or by writing a letter to the Authority. The form or letter must state the applicant's name and address, his or her Benefit or Pension Number, the date of the decision he or she is dissatisfied with, why he or she disagrees with the decision of the Benefits Review Committee, the Chief Executive, or the Secretary for War Pensions, what he or she would like the Authority to do for him/her, and a copy of the decision he or she is appealing.¹⁰⁰³

If the appeal is against a decision or determination of the Ministry of Social Development confirmed or varied by a Benefits Review Committee, the notice of appeal must be lodged with the Secretary of the Appeal Authority within three months after the applicant is notified

¹⁰⁰⁰ Section 12L of Social Security Act.

¹⁰⁰¹ Social Security Appeal Authority *A Guide to Making an Appeal* available at www.justice.gov.nz/tribunals.

¹⁰⁰² Section 12K(1) of Social Security Act.

¹⁰⁰³ See Social Security Appeal Authority *A Guide to Making an Appeal* available www.justice.govt.nz/tribunals. See also section 12K(2) of Social Security Act.

of the confirmation or variation of the decision or determination.¹⁰⁰⁴ However, the Appeal Authority may allow an application to be made to it before or after the end of that period of 3 months where application is made and good cause is shown (such as an explanation of the reasons for the delay).¹⁰⁰⁵

Before the lodging of the notice of appeal or immediately after, a copy of it is sent to the Chief Executive.¹⁰⁰⁶ The Chief Executive is required to send documents relating to the decision under review to the Secretary of the SSAA.¹⁰⁰⁷ A copy of these documents or any further documents forward to the Authority is given to every party to the appeal, and to any other party that is entitled to be heard and to tender evidence on a matter referred to in the report.¹⁰⁰⁸ Equal access to the evidence ensures equality of arms between the parties to proceedings.

Except where the SSAA considers that the appeal can be properly determined without a hearing, it arranges for a time and place for the hearing of the appeal as soon as it can conveniently be held after the receipt of any application for a review. It also gives no less than 10 clear days' notice of the time and place for the hearing to each party to the dispute.¹⁰⁰⁹ Each party is thus given a reasonable opportunity to assert or defend its rights.

5.4.2 Scope of jurisdiction and powers of the SSAA

The Social Security Appeal Authority reviews decisions made under various social security laws.¹⁰¹⁰ However, it does not have the authority to hear and determine any appeal on medical grounds or on grounds relating to incapacity or capacity for work. It also does not

¹⁰⁰⁴ Section 12K(1A)(a) of Social Security Act.

¹⁰⁰⁵ Section 12K(1A)(b) of Social Security Act.

¹⁰⁰⁶ Section 12K(3) of Social Security Act.

¹⁰⁰⁷ This includes any application documents, written submissions, statements, reports, and other papers lodged with, received by, or prepared for, the chief executive and relating to the decision or determination appealed against; a copy of any notes made by or by direction of the chief executive of the evidence given at the hearing (if any) before the chief executive; any exhibits in the custody of the chief executive; a copy of the decision or determination appealed against; and a report setting out the considerations to which regard was had in making the decision or determination. See section 12K(4) of Social Security Act.

¹⁰⁰⁸ Section 12K(6) of Social Security Act.

¹⁰⁰⁹ Section 12K(7) of Social Security Act.

¹⁰¹⁰ The Authority hears appeals in terms of the Social Security Act of 1964; Part 1 of the Social Welfare (Transitional Provisions) Act of 1990 or Part 6 of the War Pensions Act of 1954; or Part 1 of the New Zealand Superannuation and Retirement Income Act of 2001; or the Family Benefits (Home Ownership) Act of 1964. See section 12J(1) and (1A) of the Social Security Act.

review a decision or determination relating to an invalid's benefit; a child disability allowance; a veteran's pension; and a sickness benefit.¹⁰¹¹

The parties to a Social Security Appeal Authority review hearing are the applicant or beneficiary affected by the decision or determination of the social security administration (on the one hand); and on the other hand the chief executive of the Department of Social Development or Secretary of the Department of Veterans Affairs.¹⁰¹²

The Authority is a judicial institution for the determination of appeals in accordance with the Social Security and War Pensions Acts. It therefore has wide powers in hearing and determining an appeal. During a hearing, the Authority has all the powers, duties, functions, and discretions that the original decision-maker had in respect of the same matter.¹⁰¹³ It may receive as evidence any statement, document, information, or matter which it believes may assist it to deal with the matters before it, whether or not the same evidence would be admissible in a court of law.¹⁰¹⁴ The Authority examines all of the evidence available and makes its own decision about an appeal.¹⁰¹⁵ It may confirm, modify, or reverse the decision or determination appealed against.¹⁰¹⁶

In addition, the Authority can refer a matter or part of a matter under review to the relevant Department that is the original decision-maker for further consideration. In this case the Authority informs the Department of its reasons for so doing and gives directions it thinks just in relation to the rehearing or reconsideration issues.¹⁰¹⁷

5.4.3 SSAA procedural fairness

The review of a decision by the Social Security Appeal Authority is through a rehearing. However, where there is a question of fact, information made available to the Department of Social Development of the Department of Veterans Affairs can be presented to the

¹⁰¹¹ See sections 12J(2) and 39A of the Social Security Act as well as section 70 of the War Pensions Act of 1954.

¹⁰¹² Section 12K(1C) of the Social Security Act.

¹⁰¹³ Section 12I of the Social Security Act.

¹⁰¹⁴ Section 12M(5) of Social Security Act.

¹⁰¹⁵ Section 12M of the Social Security Act. See also Social Security Appeal Authority *A Guide to Making an Appeal* available at www.justice.gov.nz/tribunals.

¹⁰¹⁶ Section 12M(7) of Social Security Act.

¹⁰¹⁷ Section 12M(8) of Social Security Act.

Authority.¹⁰¹⁸ The SSAA can rehear all or part of the evidence, including the evidence of a witness if the Authority believes that information on the witness provided by the Department is incomplete.¹⁰¹⁹

There is no standard procedure for a Social Security Appeal Authority hearing, which implies that a hearing before the Authority will not be considered defective due to the absence of a particular procedure. The Authority is empowered to determine its own procedure, except where a particular procedure is provided by the Social Security Act or by any regulations in force under the Act.¹⁰²⁰

A hearing of the SSAA is informal and is held in private. It is conducted in a place that the Authority considers convenient, having regard to the nature of the issues to be decided. However, the Authority can hear an appeal in public if it considers that the interests of the parties to the appeal and of all other persons concerned will not be adversely affected.¹⁰²¹

Parties to a dispute before the Authority may be present at the hearing. However, where a party prefers not to attend the hearing, the Authority considers the review application on the basis of the written submissions from all the parties. The Authority may still request a person to attend a hearing in some cases. At a review hearing, the Department of Social Development or Department of Veterans Affairs may be represented by counsel or by an officer of the Department. Any other party may appear and act personally or by counsel or any duly authorised representative.¹⁰²² If a person is represented by a lawyer, he or she can be granted legal aid to pay for their legal costs. An applicant can also request the Authority to arrange for an interpreter for free at least two weeks before the hearing to arrange one.¹⁰²³

The Authority issues a written decision approximately six weeks after the date of the hearing and forwards a copy of the decision to the applicant. When the Authority determines an appeal, the Secretary of the Authority sends a memorandum of the decision and the reasons

¹⁰¹⁸ Section 12M(1) of Social Security Act.

¹⁰¹⁹ Section 12M(2) of Social Security Act.

¹⁰²⁰ Section 12K(9) of Social Security Act.

¹⁰²¹ Section 12N(3) of the Social Security Act.

¹⁰²² See Ministry of Justice *Hearing Process* available at www.justice.gov.nz/tribunals/social-security-appeal-authority/hearing-process. See also section 12K(8) of Social Security Act.

¹⁰²³ Snow M *Reviews can turn into an appealing process* Returned and Services Association (New Zealand) June 2011, accessed at www.rsa.org.nz (15 March 2012).

thereof to the relevant Department and the appellant. The Department takes all necessary steps to effect the decision of the Authority.¹⁰²⁴ If any party is unhappy with the decision of the Authority, they can appeal the Authority's decision to the High Court on a question of law.

5.4.4 Independence and impartiality of the SSAA

The independence and impartiality of the Social Security Appeal Authority enhance its credibility in ensuring justice for its users. The Authority is a statutory board established in terms of the Social Security Act.¹⁰²⁵ It is an independent judicial tribunal administered by the Ministry of Justice.¹⁰²⁶ The Authority's independence is guaranteed through its membership;¹⁰²⁷ the discipline and termination of its members;¹⁰²⁸ its funding;¹⁰²⁹ the provision of human resource and administrative support to the Authority;¹⁰³⁰ its managerial framework;¹⁰³¹ and its governance, oversight, supervision and reporting arrangements.¹⁰³² Its

¹⁰²⁴ Section 12P of the Social Security Act.

¹⁰²⁵ Section 12F of the Social Security Act of 1964.

¹⁰²⁶ See Social Security Appeal Authority *A Guide to Making an Appeal* available at www.justice.gov.nz/tribunals.

¹⁰²⁷ The Social Security Appeal Authority consists of three persons appointed by the Governor-General on the recommendation of the Minister of Social Development given after consultation with the Minister of Justice. One of the members is appointed as Chairman of the Authority (section 12A of the Social Security Act). Except where provided otherwise, a member of the Social Security Appeal Authority holds office for a term of three years, but is eligible for reappointment. In addition, unless a member of the Appeal Authority dies, resigns or is removed he/she continues in office after the end of his/her term of appointment until his/her successor comes into office (section 12B of the Social Security Act).

¹⁰²⁸ A member of the Appeal Authority is removed from office at any time by the Prime Minister for inability to perform the functions of the office, bankruptcy, neglect of duty, or misconduct, proved to the satisfaction of the Prime Minister. The member may resign his or her office at any time by written notice to the Minister of Social Development (section 12C of the Social Security Act).

¹⁰²⁹ Since the Social Security Appeal Authority is a statutory Board within the meaning of the Fees and Travelling Allowances Act of 1951, its members are paid remuneration by way of fees, salary, or allowances, and travelling allowances and expenses out of money appropriated by Parliament (section 12F of Social Security Act). Where an appeal is allowed in whole or in part the Authority may require the relevant Department to pay a sum fixed by the Authority to cover all or part of the costs incurred by the Authority in hearing and determining the appeal, if it considers it appropriate (section 12OA of the Social Security Act).

¹⁰³⁰ The Tribunals Unit of the Ministry of Justice provides administrative support to the Authority and designates an officer to be secretary to the Authority. The Ministry also provides secretarial, recording, and clerical services necessary to enable the Authority to discharge its functions (section 12G of the Social Security Act).

¹⁰³¹ The head of the Authority is the Chairperson (appointed from one of its three members) as he or she directs the work of the Authority (section 12A of the Social Security Act). In the absence of the Chairperson, the deputy chairperson acts as the Chairperson (section 12E(1) of the Social Security Act).

¹⁰³² Governance, oversight, supervision arrangements are undertaken by and the Authority reports to the New Zealand Parliament. The Minister of Social Development (charged with the administration of Part One of the Social Security Act, which includes the Social Security Appeal Authority) is required to ensure that a report of the operations carried out under Part One during the financial year is prepared as soon as possible after the close of each financial year. The report of the operations must be presented to Parliament within 28 days after it has

credibility is also influenced by the quality of its decision-making, its specialisation and its observance of the rule of law.

6. GERMANY

The German Constitution (Basic Law or *Grundgesetz (GG)*) guarantees everyone the right to have access to courts. Article 19(4) provides that “a person whose rights are violated by public authority may have recourse to the courts. If a court with specific jurisdiction for the dispute has not been established, the aggrieved person will have recourse to the ordinary courts.”¹⁰³³ In addition, Article 92 states that “the judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law, and by the courts of the Länder”. This indicates that the Constitution excludes the establishment of the tribunal model used in some countries (especially the Commonwealth countries).

Jurisprudence of the Federal Constitutional Court indicates that “the Constitution warrants an effective and coherent system of remedies against all acts of state that affect the citizens”.¹⁰³⁴ Therefore, the right to have recourse to courts is more than a mere right to file a request, but the guarantee of effective judicial review. In order to ensure guarantee of effective judicial review, the Constitution vests the legal control of administrative authorities in ordinary and special courts that are independent and separate from these authorities.¹⁰³⁵

The German legal system is, besides the constitutional courts, divided into five independent jurisdictions and courts have been established for the different jurisdictions.¹⁰³⁶ These are the ordinary jurisdiction (civil and criminal), labour, administrative, financial and social

been received by the Minister if Parliament is in session. If Parliament is not in session, the report must be presented within 28 days after the commencement of the next session (section 133 of the Social Security Act).

¹⁰³³ Article 19(4) of the German Constitution (the Basic Law for the Federal Republic of Germany or *Grundgesetz (GG)*). However, the right of access to court is subject to the provision that in a situation where a person’s right to privacy of correspondence, posts and telecommunications is limited, recourse to the courts can be replaced by a review of the case by agencies and auxiliary agencies appointed by the legislature – Article 10(2).

¹⁰³⁴ Gärditz KF *Judicial review and remedies in a nutshell: Annual Report 2010 – Germany* Ius Publicum (May 2011) 2 and 5.

¹⁰³⁵ Gärditz KF *Judicial review and remedies in a nutshell: Annual Report 2010 – Germany* Ius Publicum (May 2011) 2. See also See Chapter IX of the German Constitution on the Judiciary.

¹⁰³⁶ Jaeger R and Broß S *The relations between the Constitutional Courts and the other national courts, including the interference in this area of the action of the European courts* (Report of the Constitutional Court of the Federal Republic of Germany) paper presented at the Conference of European Constitutional Courts XIIth Congress (Karlsruhe, August 28, 2001) 2.

jurisdictions.¹⁰³⁷ Each of these jurisdictions is divided between the German Federation (*Bund*) and the 16 federated states (*Länder*). Regional and/or higher regional courts operate at the *Länder* level for each of the five major court jurisdictions, with a supreme court operating at the federal (*Bund*) level. There is also a special military tribunal and a Federal Patent Court.¹⁰³⁸ The regional and higher regional courts resolve disputes on the basis of facts and law, while supreme courts decide on appeals only on points of law.¹⁰³⁹

This implies that in the social (security) jurisdiction, the courts are organised in three levels. Organisation and procedure are regulated by the Code of Social Court Procedure (*Sozialgerichtsgesetz*). In addition, the Civil Procedure Code is to be applied by analogy, if this is not forbidden by the differences between the nature of the types of procedure. In the first instance are social courts (*Sozialgerichte*). A party to a dispute before the Social Court can lodge an appeal on the merits of the case (*Berufung*) as well as an appeal on a point of law (*Revision*).¹⁰⁴⁰ In the second instance is the state (*Länder*) or Higher Social Court (*Landessozialgerichte*) for most of the sixteen German states. In two cases there is a joint court for two *Länder*. The Higher Social Courts hear appeals against decisions of the Social Courts. An appeal on the merits can in principle be lodged against any decision of a first-instance social court. However, where the amount in dispute is less than €750, an appeal on the merits can only be lodged if the Social Court expressly grants leave to appeal.¹⁰⁴¹ The competent Higher Social Court reviews all factual and legal aspects of the case in an appeal on the merits of a case.¹⁰⁴²

The final instance of social security adjudication is by the Federal Social Court (*Bundessozialgericht*).¹⁰⁴³ The Federal Social Court only decides appeals on points of law and not on the facts of a case. Access to the Court is restricted, as an appeal is only accepted if leave to appeal is expressly granted by the Higher Social Court (or by a leap-frog appeal in

¹⁰³⁷ See Articles 93 and 95 of the German Constitution.

¹⁰³⁸ Article 96 of the German Constitution. See also *Bundessozialgericht Bundessozialgericht und Sozialgerichtsbarkeit - eine Information* (English Summary) Kassel, September 2008, 34.

¹⁰³⁹ European Union Agency for Fundamental Rights (FRA) *Access to justice in Europe: an overview of challenges and opportunities* (National Thematic Study - Germany)(2010) 1.

¹⁰⁴⁰ Federal Ministry of Labour and Social Affairs *Social security at a glance - total summary* Bonn (January 2011) 164.

¹⁰⁴¹ The amount in dispute is the difference between what the appellant received in the proceedings before the first-instance social court and what he or she seeks on appeal.

¹⁰⁴² Federal Ministry of Labour and Social Affairs *Social security at a glance - total summary* Bonn (January 2011) 163-164.

¹⁰⁴³ Federal Ministry of Labour and Social Affairs *Social security at a glance - total summary* Bonn (January 2011) 162.

the verdict of the Social Court), or if it has been accepted by the Federal Social Court in response to an appeal against refusal of leave to appeal (*Nichtzulassungsbeschwerde*). An appeal can also be accepted by the Federal Social Court in the event of a procedural irregularity by the Higher Social Court. An appeal application will be accepted if the legal issue involved is significant in principle (i.e. if its significance goes beyond the individual case and is generally relevant) or if the court decision deviates from relevant High or Federal Court rulings. This is because the role of the Federal Social Court is to ensure legal uniformity and the development of the law.¹⁰⁴⁴

On all levels, the social courts consist of panels of professional career judges and lay judges.¹⁰⁴⁵ The panel in the first instance consists of one professional judge and two lay judges. On the *länder* and on the Federal level, the panels consist of three professional and two lay judges. The lay judges are appointed by the state on the recommendation of certain organisations representing the interests involved, particularly of trade unions and employers' organisations. The panels decide by majority vote.

The accessibility to the dispute resolution system is improved by the range of appeal processes available, which include internal review, court action and constitutional challenge.¹⁰⁴⁶ A person who is dissatisfied with an administrative decision can lodge an appeal with a Social Court. Further appeals or applications for review can be made to the Higher Social Courts and then to the Federal Social Court. Before an appeal against an administrative decision can be lodged with a Social Court, a complainant is required to first lodge an application for reconsideration of the decision with the relevant authority or institution that made the decision, apart in circumstances where a law provides for an exception from this principle.¹⁰⁴⁷ The sequential and complementary review and appeal framework and the multi-tiered Social Courts system allows for the resolution of disputes at an appropriate level. This leads to a small number (10 percent) of cases dealt with in one level of the Social Courts framework proceeding to a higher court (in 2005 the Social Courts

¹⁰⁴⁴ Bundessozialgericht *Bundessozialgericht und Sozialgerichtsbarkeit - eine Information* (English Summary) Kassel, September 2008, 35.

¹⁰⁴⁵ Federal Ministry of Labour and Social Affairs *Social security at a glance - total summary* Bonn (January 2011) 162.

¹⁰⁴⁶ OECD *Better regulation in Europe: Germany* (2010) 130.

¹⁰⁴⁷ See Article 78 of the Code of Social Court Procedure.

dealt with about 280,000 cases, while the Higher Social Courts dealt with about 27,500 and the Federal Social Court about 2,400).¹⁰⁴⁸

6.1 Reconsideration by social security administrative institution

A person who is unhappy with a decision of a social security administrative institution has a right to apply for reconsideration or review (a procedure known as *Widerspruchsverfahren*). An application for reconsideration of the decision must be lodged with the relevant authority or institution within one month of the decision being made.¹⁰⁴⁹ However, in exceptional cases, shorter deadlines may be required or longer periods provided for.¹⁰⁵⁰ This ensures that public administration is able to regulate itself and gives an applicant and the social security institution an opportunity to settle the dispute without involving the courts.¹⁰⁵¹

A senior official in the administrative institution or a higher administrative body deals with any opposition or objection (*Widerspruch*), by considering the lawfulness and – in cases of discretion – the appropriateness of the decision.¹⁰⁵² Where the application for reconsideration is successful, the administrative institution reverses the disputed decision or grants the decision sought. Where the relevant authority or institution rejects the application, it issues a notice rejecting the application for reconsideration and affirming its initial decision. In case of a rejection of the application for reconsideration or where the initial decision remains unchanged, a complaint can be lodge with a Social Court.¹⁰⁵³

¹⁰⁴⁸ Bundessozialgericht *Bundessozialgericht und Sozialgerichtsbarkeit - eine Information* (English Summary) Kassel, September 2008, 35.

¹⁰⁴⁹ Federal Ministry of Labour and Social Affairs *Social security at a glance total summary* Bonn (January 2011) 162-163.

¹⁰⁵⁰ OECD *Better regulation in Europe: Germany* (2010) 133.

¹⁰⁵¹ Gärditz KF *Judicial review and remedies in a nutshell: Annual report 2010 – Germany* Ius Publicum (May 2011) 6.

¹⁰⁵² OECD *Better regulation in Europe: Germany* (2010) 136.

¹⁰⁵³ Federal Ministry of Labour and Social Affairs *Social security at a glance total summary* Bonn (January 2011) 163.

6.2 Dispute resolution by the Social Courts

6.2.1 Accessibility of the Social Courts

The right to seek redress is, with few exceptions, restricted to the person whose rights are affected. Usually the claimant must show that she or he can possibly have been aggrieved by the administrative decision.¹⁰⁵⁴

A complainant can lodge the complaint with a Social Court in writing or by describing the dispute to a clerk of the Social Court, who puts the complaint in writing.¹⁰⁵⁵ The complaint must include the name of the complainant and of the respondent. It must also state the remedy sought by the complainant. The complaint must also identify the decision notice against which the complaint is directed (where applicable). The complaint must also include facts and evidence that support it.¹⁰⁵⁶ However, all these requirements are not very strict. If the complaint is lodged in time with any domestic public authority or with any German consulate, it will be regarded as being filed in proper time.¹⁰⁵⁷ And if the complaint does not have the proper form or is incomplete, the presiding judge of the panel has to take steps to have such deficiencies repaired.¹⁰⁵⁸ A complaint must first be lodged with the Social Court having jurisdiction of the complainant's residential area at the time of lodging the dispute. An appeal must be made to the Social Court within a month of notification of the decision or rejection of the review application, if the decision included information as to the available avenues of appeal. If this was not the case, the time is one year.¹⁰⁵⁹

Bringing a dispute to the social courts is free of charge to insured persons in the statutory insurance system, social assistance applicants and beneficiaries and person with disabilities.¹⁰⁶⁰ This relieves applicants of the burden of court fees, which may restrict access to courts. However, other complainants such as public authorities and public-law institutions

¹⁰⁵⁴ Section 54(1) of the Code of Social Court Procedure.

¹⁰⁵⁵ Federal Ministry of Labour and Social Affairs *Social security at a glance total summary* Bonn (January 2011) 162.

¹⁰⁵⁶ Federal Ministry of Labour and Social Affairs *Social security at a glance total summary* Bonn (January 2011) 162.

¹⁰⁵⁷ Article 91 of the Code of Social Court Procedure.

¹⁰⁵⁸ Article 92(2) of the Code of Social Court Procedure.

¹⁰⁵⁹ Article 66 of the Code of Social Court Procedure.

¹⁰⁶⁰ Federal Ministry of Labour and Social Affairs *Social security at a glance - total summary* Bonn (January 2011) 164.

(such as insurers or public support institutions (*Versorgungsamt*)) or doctors or hospitals disputing about their fee are required to pay a flat rate fee or a fee depending on the amount in dispute.¹⁰⁶¹

The availability of legal aid to parties in social court proceedings further promotes access to these courts. The Legal Advice Assistance Act requires German States to establish a framework for the provision of legal assistance either through legal advice centres or by reimbursement of private lawyers who assist needy persons.¹⁰⁶² This is granted when a case has a good chance of success; and a party cannot afford to pay legal fees due to his or her income or assets.¹⁰⁶³ The court that hears the appeal decides on a person's eligibility for legal aid. Where an application for legal aid is refused, a person may appeal to the higher social court. Where legal aid is granted, a person within the court system representing the state interest can appeal as well.

6.2.2 Scope of jurisdiction and powers of the Social Courts

The jurisdiction of Social Courts consists of Statutory Pension Insurance for Workers and Employees; Craftsmen Insurance; Pension for Farmers; Statutory Accident Insurance; Compulsory Health Insurance; Social Long Term Care Insurance; Artists' Social Security; the Law (regulating the practice) of Panel Doctors; tasks undertaken by the Federal Labour Agency (which comprises unemployment insurance and support in case of insolvency; basic financial security for the unemployed; Social compensation for damage to health (such as care for war victims, soldiers, compensation for injuries from immunisation, compensation for victims of violence, and certain aspects of the Severely Handicapped Persons Act); Issues of Social Aid and issues arising under the Asylum Seekers' Benefit Act; and other welfare benefits (such as basic security benefits for job-seekers and social assistance).¹⁰⁶⁴ The Social

¹⁰⁶¹ Federal Ministry of Labour and Social Affairs *Social security at a glance - total summary* Bonn (January 2011) 164 and Küsters H *Social Partnership: Basic Aspects of Labour Relations in Germany* Friedrich Ebert Stiftung (2007) 14.

¹⁰⁶² European Union Agency for Fundamental Rights (FRA) *Access to justice in Europe: an overview of challenges and opportunities* (National Thematic Study - Germany)(2010) 12.

¹⁰⁶³ See Herbert G *Administrative justice in Europe: Report for Germany* Questionnaire presented to the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union seminar on Administrative Justice in Europe held in Trier on 12 December 2005, 6-7. See also Küsters H *Social Partnership: Basic Aspects of Labour Relations in Germany* Friedrich Ebert Stiftung (2007) 14.

¹⁰⁶⁴ Böckenförde M *et al Max Planck Manual on the Judicial Systems in Germany and the Sudan* (2006) 37-38; Bundessozialgericht *Bundessozialgericht und Sozialgerichtsbarkeit - eine Information* (English Summary)

Courts thus have a wide jurisdiction, covering over almost the whole of the German social security system.

Social Courts also have wide powers in the resolution of disputes. Where a court reviews an administrative action, it can make a rescissory order (*Anfechtungsurteil*) or make an order to take a decision which had been refused or failed to be taken (*Verpflichtungsurteil*).¹⁰⁶⁵ This rescinds the administrative action in dispute, eliminating the impairment of the applicant's rights.¹⁰⁶⁶ In combination with the rescissory order the defendant authority can also be sentenced to award the benefit claimed.¹⁰⁶⁷ The courts also have the power to make a performance order (*allgemeine Leistungsklage*), if an administrative decision is not needed. A performance order obliges the administrative authority to implement the order.¹⁰⁶⁸ The court can also enforce its decision, if not implemented by the administrative authority. In some cases where it is sufficient just to state the legal situation a court can make a declaratory order (*Feststellungsklage*).¹⁰⁶⁹

The Code of Social Court Procedure also provides for the adoption of interim measures. An example is the suspensory effect of the application for a rescissory order, which suspends the implementation of an administrative action until a decision is made by the court. However, there are exceptions to the automatic suspensory effect of the rescissory application, such as where there is a special provision for the immediate enforcement of an administrative action. However, an applicant can request the court to completely or partly order or restore the suspensory effect. Courts can also provide interim measures in pending cases. Interim measures can be provided before a dispute is lodged if there is a risk of an applicant's rights being impaired or to prevent disadvantage.¹⁰⁷⁰ Such an interim measure can be utilised to maintain payment of social aid benefits to an applicant, thus securing the minimum maintenance until the case has been decided.

Kassel, September 2008, 34; and Federal Ministry of Labour and Social Affairs *Social security at a glance - total summary* Bonn (January 2011) 162.

¹⁰⁶⁵ Section 54(1) of the Code of Social Court Procedure.

¹⁰⁶⁶ Section 131 of the Code of Social Court Procedure.

¹⁰⁶⁷ Article 54(4) of the Code of Social Court Procedure

¹⁰⁶⁸ Section 131 of the Code of Social Court Procedure.

¹⁰⁶⁹ Article 55 of the Code of Social Court Procedure.

¹⁰⁷⁰ Gärditz KF *Judicial review and remedies in a nutshell: Annual report 2010 – Germany* Ius Publicum (May 2011) 7.

6.2.3 Fairness of Social Court procedures

The procedures of the Social Courts and their organisation are regulated by the Code of Social Court Procedure. However, the judge who hears the appeal defines the precise procedures of the proceedings.¹⁰⁷¹ The social courts, like all other public law courts, have to examine the relevant facts of the case.¹⁰⁷² The procedures adopted for the resolution of disputes lead to effective running of court proceedings.¹⁰⁷³

The fundamental right to be heard, guaranteed in Article 103(1) of the Constitution, requires that a court considers every relevant aspect brought by the parties in a case.¹⁰⁷⁴ A judge is required to discuss the factual and legal aspects of the dispute and to ask questions.¹⁰⁷⁵ Parties are encouraged to submit full statements on all relevant facts on time and to submit relevant requests.¹⁰⁷⁶

Proceedings of the Social Court usually involve an oral hearing.¹⁰⁷⁷ An oral hearing is carried out in public, chaired by the presiding judge. Once the facts and the dispute are presented, evidence is then presented (if necessary). The presentation of evidence includes the hearing of witnesses, including expert witnesses such as doctors, and review of documents submitted in support of specific factual claims. The Social Court is not restricted to the evidence submitted by the parties to a dispute. The Court is empowered to investigate the matter on its own initiative. The Court is required to determine all facts material to making a decision on a dispute. Parties to the dispute can also be called to assist in determining all facts material to making a decision. In this instance, the complainant and respondent state their case, after which the oral hearing comes to an end. A hearing is concluded at the end of the oral hearing and usually a decision is announced immediately.

¹⁰⁷¹ Hueck C *The Justice System of the Federal Republic of Germany: Lessons for Developing and Transition Countries* The World Bank and German Foundation for International Legal Cooperation (May 2002) 11.

¹⁰⁷² Article 103 of the Code of Social Court Procedure.

¹⁰⁷³ Hueck C *The Justice System of the Federal Republic of Germany: Lessons for Developing and Transition Countries* The World Bank and German Foundation for International Legal Cooperation (May 2002) 11.

¹⁰⁷⁴ Gärditz KF *Judicial review and remedies in a nutshell: Annual report 2010 – Germany* Ius Publicum (May 2011) 5.

¹⁰⁷⁵ Section 139 of the Civil Procedure Code. See also section 86(1) of the Code of Administrative Court Procedure.

¹⁰⁷⁶ Hueck C *The Justice System of the Federal Republic of Germany: Lessons for Developing and Transition Countries* The World Bank and German Foundation for International Legal Cooperation (May 2002) 9.

¹⁰⁷⁷ Federal Ministry of Labour and Social Affairs *Social security at a glance - total summary* Bonn (January 2011) 163.

Representation by a lawyer is not mandatory for proceedings in the Social and Higher Social Courts. However, due to the complicated issues dealt with in social security cases, representation is usually required (at least in the Higher Social Courts). Representation is necessary for proceedings before the Federal Social Court. A party can be represented by a professional attorney, representatives or members of trade unions and employers' organisations or other professional organisations.¹⁰⁷⁸

Usually the presiding judge has to prepare the case by all necessary actions in order to finish the case by one formal hearing.¹⁰⁷⁹ A formal oral hearing may be preceded by a preliminary hearing. This is undertaken by the presiding judge alone. A preliminary hearing is used to clarify issues in dispute, to give directions, to ascertain the potential of success of the dispute and to explain matters to the plaintiff.¹⁰⁸⁰ Settlement of a dispute through an agreement is also encouraged, as it promotes legal peace and the expedition of dispute resolution.¹⁰⁸¹ Courts strive to achieve conciliatory settlement of a dispute at every stage of the dispute resolution process. Courts may also submit a proposed settlement prior to the oral hearing, which the parties can accept through a written statement to the court. If a party to the dispute does not appear for the hearing, the court can decide the dispute according to the documentary evidence available.¹⁰⁸²

6.2.4 Expertise, independence and impartiality of Social Courts

The competence of the Social Courts relates to their ability to provide redress to persons whose rights are violated by public authority. The Constitution states that judges are independent and subject only to the law.¹⁰⁸³ The courts are thus required to be independent and impartial; and to have the necessary expertise to perform their duties. Such independence, impartiality and expertise enable them to provide effective redress to applicants.

¹⁰⁷⁸ See Küsters H *Social Partnership: Basic Aspects of Labour Relations in Germany* Friedrich Ebert Stiftung (2007) 14; and Böckenförde M *et al Max Planck Manual on the Judicial Systems in Germany and the Sudan* (2006) 39.

¹⁰⁷⁹ Articles 106 and 106a of the Code of Social Court Procedure.

¹⁰⁸⁰ Discussions with Judges Daniela Evers and Henning Muller, Judges of the Social Court in Darmstadt (Hesse, Germany) on 11 April 2012.

¹⁰⁸¹ Section 794(1) of the Civil Procedure Code.

¹⁰⁸² Article 110 (1) of the Code of Social Court Procedure.

¹⁰⁸³ Article 97(1) of the German Constitution.

The independence and impartiality of courts is protected through procedures for appointment and the conditions of service of judges. The Constitution provides that states may regulate the appointment of judges jointly by the *Land* Minister of Justice and a committee for the selection of judges.¹⁰⁸⁴ As a result, in the State of Hesse, the appointment of judges in the Social Court is undertaken by a committee consisting of 5 judges, seven members of the state parliament and the president of the state's Bar Association.¹⁰⁸⁵ Higher Social Court judges are promoted from the ranks of the Social Court judges on the recommendation of the president of the Higher Social Court and the state minister of justice. Federal Social Court judges are chosen jointly by a committee made up of *Land* ministers of justice and an equal number of members elected by the parliament (the *Bundestag*), presided by the Federal Minister of Justice who has no vote in the committee.¹⁰⁸⁶ Spreading the function of appointing judges amongst many persons minimises the risk of interference in the selection of judges.

Judges are also protected from arbitrary discipline and termination. The Constitution states that permanent full-time judges may be involuntarily dismissed, permanently or temporarily suspended, transferred, or retired before the expiration of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by law. It also empowers the legislature to set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or in their districts, judges may be transferred to another court or removed from office, provided they retain their full salary.¹⁰⁸⁷

The constitutional protection of the independence of judges is further reinforced by statute. A judge may only be appointed for life, for a specified term, on probation, or by commission.¹⁰⁸⁸ Only judges appointed for life can act as judges of a court, except where a

¹⁰⁸⁴ Article 98(4) of the German Constitution.

¹⁰⁸⁵ Discussions with Ms Daniela Evers and Mr Henning Muller, Judges of the Social Court in Darmstadt (Hesse, Germany 11 April 2012).

¹⁰⁸⁶ Article 95(2) of the German Constitution and the *Richterwahlgesetz* (Federal Judges Election Code).

¹⁰⁸⁷ Article 97(2) of the German Constitution.

¹⁰⁸⁸ Section 8 of the German Judiciary Act. A person employable as a judge for life may be appointed as a judge on probation - section 12(1) of the German Judiciary Act. A judge on probation is appointed a judge for life within five years of his or her appointment. However, the five-year time limit is extended for any unpaid leave taken - section 12(2) of the German Judiciary Act. A judge appointed on probation can be employed without his consent only at a court, at a court administration authority or at a public prosecution office - section 13 of the German Judiciary Act. A person who is appointed as a civil servant for life or for a specified term can be appointed a judge by commission if he is later to be employed as a judge for life - section 14(1) of the German Judiciary Act. A judge appointed by commission must be appointed a judge for life or he or she must be nominated to a judicial selection committee for selection within two years of his or her appointment. Where a judge declines an appointment his judicial tenure by commission ceases - section 16(1) of the German Judiciary Act.

federal statute provides otherwise.¹⁰⁸⁹ In addition, only a judge may preside over a court. Where a court takes action, a judge appointed for life must act as the presiding judge.¹⁰⁹⁰ Where a court gives a decision, no more than one judge on probation or one judge by commission or one judge on secondment can participate in the decision-making. In such cases the judge concerned must be identified on the roster allocating court business as a judge on probation, by commission or on secondment.¹⁰⁹¹

Professional judges are appointed for life and can only be removed in terms of prescribed procedures.¹⁰⁹² The German Judiciary Act provides that an appointment as a judge is null and void where it is made by an authority that is not competent to make such appointment. The appointment cannot be confirmed retrospectively.¹⁰⁹³ An appointment as a judge is also null and void where at the time of the appointment, the person appointed was not a German in terms of Article 116 of the Constitution or he or she did not have the capacity to hold public office.¹⁰⁹⁴ The appointment as a judge for life or for a specified term can only be nullified after a court declaration having final and binding effect.¹⁰⁹⁵

Statutory provisions also clearly specify the grounds on which a judge appointed for life or for a specified term can be transferred to another office or discharged from office without his own written consent;¹⁰⁹⁶ how a judge can be supervised;¹⁰⁹⁷ circumstances in which an

¹⁰⁸⁹ Section 28(1) of the German Judiciary Act.

¹⁰⁹⁰ Section 28(2) of the German Judiciary Act.

¹⁰⁹¹ Section 29 of the German Judiciary Act.

¹⁰⁹² European Union Agency for Fundamental Rights (FRA) *Access to justice in Europe: an overview of challenges and opportunities* (National Thematic Study: Germany)(2010) 2.

¹⁰⁹³ Section 18(1) of the German Judiciary Act of 19 April 1972 (*Bundesgesetzblatt*, Part I p.713) as last amended by Article 1 of the Law of 11 July 2002 (*Bundesgesetzblatt*, Part I p.2592).

¹⁰⁹⁴ Section 18(2) of the German Judiciary Act.

¹⁰⁹⁵ Section 18(3) of the German Judiciary Act.

¹⁰⁹⁶ In terms of section 30 of the German Judiciary Act, this can only be done in judicial impeachment proceedings in terms of section 98(2) and (5) of the German Constitution; in formal disciplinary proceedings before a court; in the interests of the administration of justice in terms of section 31 (section 31 of the German Judiciary Act states that a judge for life or for a specified term can be transferred to another judicial office with the same final basic salary, provisionally retired or retired in the interests of the administration of justice); or on changes being made in the organisation of the courts in terms of section 32 (in terms of section 32 where a change is made in the organisation of the courts or their districts, another judicial office can be conferred on a judge for life or for a specified term who is attached to the courts concerned. Where employment is not possible in a judicial office with the same final basic salary, a judicial office with a lower final basic salary can be conferred on the judge concerned. Where it is not possible for another judicial office to be conferred on the judge concerned he can be discharged from office. A new judicial office can be conferred on him at any time, including one with a lower final basic salary. Conferment of another judicial office and discharge from office must be effected not later than three months after the change has taken place. In these instances the judge is paid his previous final salary including any pensionable or irrevocable service allowances and continues to move up the seniority scale within his previous salary grade - section 33 of the German Judiciary Act). A transfer or discharge from office can only be done on the basis of a final and binding judicial ruling, except where a

appointment as a judge can be revoked;¹⁰⁹⁸ circumstances in which a judge can be dismissed;¹⁰⁹⁹ and conditions for a judge to retire.¹¹⁰⁰

transfer or discharge is due to changes being made in the organisation of the courts - section 30(2) of the German Judiciary Act.

¹⁰⁹⁷ A judge can only be supervised if the supervision does not infringe on his or her independence - section 26(1) of the German Judiciary Act. Supervision includes the power to censure an improper mode of executing an official duty and to urge proper and prompt attention to official duties - section 26(1) of the German Judiciary Act. Where a judge applies to a court for a ruling that a supervisory measure infringes on his or her independence, the court is required to give a ruling in compliance with the Act - section 26(3) of the German Judiciary Act.

¹⁰⁹⁸ An appointment can be revoked where the person appointed was not qualified to hold judicial office; or where there was a failure of a judicial selection committee to participate in the appointment (as required by statute) and the judicial selection committee refuses to confirm the appointment. Appointment as a judge will also be revoked where he or she was appointed through coercion, wilful deceit or bribery. An appointment will further be revoked where it was not known that the person appointed had committed a minor or serious criminal offence that makes him seem unworthy of holding judicial tenure. This is also the case where, on account of the criminal offence committed, he or she was or will be sentenced to a penalty with final and binding effect - section 19(1) of the German Judiciary Act. An appointment can also be revoked where it was not known that a court order had been made removing the person appointed from office or from his profession or withdrawing his pension rights - section 19(2) of the German Judiciary Act. In the case of a judge appointed for life or for a specified term, where he or she does not give written consent, his or her appointment can be revoked only through a final and binding judicial decision - section 19(3) of the German Judiciary Act

¹⁰⁹⁹ a judge can be dismissed where he or she loses his status of being a German in terms of Article 116 of the Constitution; where he or she takes up employment with another public employer (except where provided by statute); or where he or she is appointed a professional soldier or as a soldier serving for a specified term - section 21(1) of the German Judiciary Act. In the case where a person takes up employment with another public employer the highest service authority concerned can, with the agreement of the new service employer and with the consent of the judge, direct that the judge continue court service in addition to the new position or office held. Dismissal in these instances can also only be effected through a final and binding judicial decision - section 21(3) of the German Judiciary Act. A judge can also be dismissed where he or she refuses to take the judicial oath (in terms of section 38); where at the time of his or her appointment he or she was a member of the *Bundestag* (Federal Parliament) or of a *Land* parliament and did not resign his parliamentary seat within the reasonable time-limit set by the highest service authority concerned; where he was appointed after reaching the age-limit; where he requests his own dismissal in writing; where he has reached the age-limit or is unfit for service and the service relationship has not ended in his retirement, or where he takes up abode or permanent residence abroad without the consent of the highest service authority. In this case the judge can only be dismissed through a final and binding judicial decision, except where he or she gives his or her written consent - section 21(2) of the German Judiciary Act.

A judge on probation can be dismissed on expiry of six, twelve, eighteen or twenty-four months following his appointment - section 22(1) of the German Judiciary Act. A judge on probation can be dismissed on expiry of the third or fourth year where he is not suitable for judicial office or where a judicial selection committee refuses to give him judicial tenure for life or for a specified term - Section 22(2) of the German Judiciary Act. A judge can also be dismissed if he/she conducts himself/herself in a manner which leads, in the case of a judge for life, to a disciplinary measure imposable in formal disciplinary proceedings before a court - section 22(2) of the German Judiciary Act. Where a judge is dismissed on expiry of a time limit, he or she must be notified of the dismissal order at least six weeks before the day of dismissal - section 22(5) of the German Judiciary Act.

A judge appointed on commission can also be dismissed on expiry of six, twelve, eighteen or twenty-four months following his appointment; or at the end of the third or fourth year of service where he or she is found to be unsuitable for judicial office or a judicial selection committee refuses to appoint him or her for life or for a specified term - section 23 read with section 22(1) and (2) of the German Judiciary Act. In this case the judge must also be notified of the dismissal order at least six weeks before the day of dismissal - section 23 read with section 22(5) of the German Judiciary Act. A judge appointed on commission can also be dismissed if he or she conducts himself or herself in a manner which leads to a disciplinary action being taken against him or her in formal disciplinary proceedings before a court - section 23 read with section 22(3) of the German Judiciary Act. A judge also ceases to serve where a court makes a judgment in terms of the Judiciary Act which imposes a sentence of at least one year's imprisonment for a criminal offence committed with intent; a sentence of imprisonment for a criminal offence committed with intent and punishable in accordance with the provisions

German judges are also not subject to orders from judges of higher courts, despite the hierarchy of the court. They are not bound by prior decisions of higher courts, except the decisions of the Federal Supreme Courts on remand of the same cases and decisions of the Constitutional Court in similar cases.¹¹⁰¹

The courts are administratively independent from other government institutions. However, the *Land* minister of finance decides the budget of the courts. This has the potential of affecting the efficient administration of justice.¹¹⁰²

The judges of a panel have to follow orders of the presiding judge as to every day procedure, such as when to meet, but they are free in all judicial decisions. In a court, all cases have to be assigned to a specific panel by abstract ruling not related to certain cases. And this is done by a committee elected by the professional judges of the court.

The expertise and specialisation of Social Courts also ensures their competence. The German court system is organised under the principles of “specialisation” and “decentralisation” due to Germany’s federal status and the historical development and codification of its law. As a result, the Social Courts (as is the case with the other German courts) are specialised courts with specific and exclusive jurisdiction.¹¹⁰³

Each Social Court consists of a number of chambers, each chamber dealing with specific areas of law within the social court jurisdiction. The Social Courts Code stipulates that each chamber of the Social Court must be composed of one professional and two honorary (lay)

concerning the ban on wars of aggression, high treason, jeopardy to the democratic constitutional state or concerning espionage and jeopardy to external security; disqualification from holding public office; or forfeiture of a basic right under Article 18 of the Constitution - section 24 of the German Judiciary Act.

¹¹⁰⁰ A judge appointed for life retires upon reaching the statutory retirement age or on his or her own application – section 48 of the German Judiciary Act. A judge (whether appointed for life or for a specified term) can be provisionally retired or retired where his or her retirement is imperative in order to avoid grave prejudice to the administration of justice - section 31 of the German Judiciary Act. A judge can also be retired due to unfitness for service where a court decision has been made in this regard - section 34 of the German Judiciary Act.

¹¹⁰¹ European Union Agency for Fundamental Rights (FRA) *Access to justice in Europe: an overview of challenges and opportunities* (National Thematic Study: Germany) (2010) 2.

¹¹⁰² Discussions with Judges Daniela Evers and Henning Muller, Judges of the Social Court in Darmstadt (Hesse, Germany) on 11 April 2012.

¹¹⁰³ Damle SV “Specialize the judge, not the court: a lesson from the German Constitutional Court” 2005 *Virginia Law Review* Vol. 91:1267-1311 at 1289-1291.

judges.¹¹⁰⁴ At the Higher Social Court and the Federal Social Court, three professional judges are supported by again two honorary judges.¹¹⁰⁵

A person can be appointed as a judge if he/she satisfies the legal training requirements.¹¹⁰⁶ These requirements involve the completion of studies at a university (including written and oral examinations) and written examinations by a state committee both being combined to be the first examination. After university studies, a person is further required to complete a subsequent period of preparatory training after which he/she is required to pass a second state examination (written and oral). The university part of the first examination comprises an assessment on specialist subjects, while the state examinations are on compulsory core subjects. In addition, every full professor of law at a university within the area of application of the German Judiciary Act is qualified to hold judicial office.¹¹⁰⁷

A person can be appointed as a judge if he/she qualified to hold judicial office, and has the requisite social skill or competence to be a judge.¹¹⁰⁸ A person who has worked as a judge for at least three years after acquiring the qualification to hold judicial office may be appointed a judge for life.¹¹⁰⁹ In calculating the three-year work period, work that was done after the second state exam in some areas is taken into consideration.¹¹¹⁰

¹¹⁰⁴ Section 12(1) of the Social Courts Code.

¹¹⁰⁵ Sections 33(1) and 40(1) of the Social Courts Code.

¹¹⁰⁶ Section 5(1) of the German Judiciary Act.

¹¹⁰⁷ Section 7 of the German Judiciary Act.

¹¹⁰⁸ Section 9 of the German Judiciary Act. See, for example, the North-Rhine/Westphalia Judicial Competence Framework for the social skills or competence required for appointment as a judge in the Lander. In terms of the framework, social competence of a judge include ability to work in a team, ability to communicate, ability to deal with conflicts and to mediate (prepared to compromise; fairness, positive approach in dealing with colleagues; constructive criticism; ability to mediate; and being accepted as an authority); and awareness of judicial service aspects (respect for interests and concerns of parties and witnesses; politeness; keeping to schedules; and taking the necessary amount of time) – see Thomas C *Review of Judicial Training and Education in Other Jurisdictions* (Report prepared for the Judicial Studies Board)(May 2006) 122.

¹¹⁰⁹ Section 10(1) of the German Judiciary Act.

¹¹¹⁰ Section 10(2) of the German Judiciary Act. In terms of section 11, these include work done as a civil servant in the higher civil service; work done in the German civil service or in the service of an international or supranational institution, provided that the type and significance of the work done was similar to that involved in the execution of an office within the higher civil service; work done as a teacher of law at a German scientific institution of higher education, being a teacher qualified to give instruction at a university; and work done as counsel (*Rechtsanwalt*), as a notary, or as a lawyer who, having acquired the qualification to hold judicial office (Assessor), assisted counsel or a notary. Work done in other professions is also considered, provided that the type and significance of the work done was, like also fit for imparting knowledge and experience for exercising judicial office. The taking into account of more than two years of work done presupposes special knowledge and experience on the part of the person to be appointed. Appointment as a judge for a specified term is only permissible under the conditions and for the duties stipulated by federal legislation.

Lay judges are therefore selected for their particular experience as practitioners in the applicable area of law.¹¹¹¹ And by the way of proposal and appointment they bring in an element of representation. However, the professional judges remain the real experts regarding the law. Having expert judges who are knowledgeable in the intricacies of a particular part of the code (in this case the huge mass of social statutes) works to the benefit of the legal system, as the legal codes and their interpretation is complex (they are utilised to resolve all legal problems within the area of law). The lay judges are often experts in the field of worklife or other elements of practice relevant to a certain case and thus their presence can lead to better-reasoned and more efficient dispute resolution.¹¹¹²

However, it is argued that the involvement of non-professionals may result in a prolongation of trials, since they are entitled to actively take part in the hearings and in rendering a decision. Furthermore, lay judges might be overwhelmed by the complexity of the cases they are confronted with and of the legal basis underlying these cases. Some opponents assert that conversely their involvement may even lead to a loss of judicial independence as they are more likely to be influenced by the media or nongovernmental organisations, particularly in highly contested cases. Putting an emphasis on the benefits of expert knowledge of honorary judges disregards the fact that judges also need to keep a holistic view of all the parts of the legal system that is to be considered in the specific case.¹¹¹³

The efficiency of the German Social Courts is facilitated through the expeditious resolution of disputes. Their independence and impartiality (also due their perceived absence of corruption) engenders high regard and general acceptance by users. This leads to the withdrawal of some review applications on the advice of judges.¹¹¹⁴ However, the expeditious resolution of disputes is hampered by the limited number of judges as this leads to longer trial durations. Some procedures intended to protect the rights of applicants also lead to longer trial times (such as the right of an applicant to get the opinion of an additional medical practitioner in healthcare cases).

¹¹¹¹ Federal Ministry of Labour and Social Affairs *Social security at a glance - total summary* Bonn (January 2011) 162.

¹¹¹² Damle SV “Specialize the judge, not the court: a lesson from the German Constitutional Court” 2005 *Virginia Law Review* Vol. 91:1267-1311 at 1290.

¹¹¹³ Hoffmann-Holland K and Putzer M *From common sense to special knowledge? – The role of lay judges in Germany* (undated) accessed at www.droit.ens.fr/IMG/pdf/HoffmannHollandPutzerLayJudgesGermany-1.pdf on 30 March 2012.

¹¹¹⁴ Discussions with Judges Daniela Evers and Henning Muller, Judges of the Social Court in Darmstadt (Hesse, Germany) on 11 April 2012.

7. CONCLUSIONS

SADC countries have not yet established institutions and procedures for the resolution of social security disputes. However, such frameworks have been specifically established in Australia, New Zealand, the United Kingdom and Germany to review administrative decisions and to provide effective redress. In each of these jurisdictions there is a system of sequential and complementary internal review (review by the ministry or agency responsible for the administration of social security) and external reviews of the decision. External review of decisions is also undertaken by specialist multi-tiered tribunals and/or courts (the SSAT and AAT of Australia; New Zealand's SSAA; the United Kingdom's First-tier and Upper Tribunals; and Germany's Social Courts). These ensure the resolution of disputes quickly and easily at the most appropriate level.

The independence and impartiality of the institutions is guaranteed. In the case of tribunals, they are mostly created as independent statutory bodies under the supervision of the relevant ministry of Justice.

A wide scope of persons can bring disputes to the tribunals and courts. In addition, the scope of disputes covered by the institutions is wide, with limited circumscription. The institutions are also afforded wide powers in the resolution of disputes. Wide powers also enable them to provide an array of possible remedies.

There is a wide geographical spread of the institutions in each of the jurisdictions to ensure effective assess and participation of claimants. Accessibility is also facilitated through multiple claims lodgement options and reasonable timeframes. Face-to-face hearings are mostly preferred to promote participation of claimants, but other logistical arrangements are possible where necessary. The speedy resolution of disputes is guaranteed as dispute resolution timeframes are stipulated. In cases where an institution has the status of a court, they have the power to enforce their decision. In other instances the decisions are forwarded to administrative institutions for implementation.

The appointment of members of the institutions promotes their effectiveness. They are appointed by the national executive heads on the recommendation of the relevant Ministers; or by multi-stakeholder committees. For example, the Queen of England appoints the Senior

President of Tribunals (head of the Tribunals service), while the Governor-Generals (the Queen's Representatives and Heads of State of Australia and New Zealand) appoint members of the Social Security Appeal Tribunal and the Social Security Appeal Authority. Judges in Germany's Social Courts are appointed by committees. The conditions of service of the members of these institutions are also prescribed by statute.

Efforts are also made to promote the effectiveness of the institutions by stating minimum academic qualifications and relevant professional and other experience. This ensures that only suitably qualified persons are appointed as members of these institutions.

The responsible government departments provide funding and administrative support service. This includes FaHCSIA and the Attorney-General in the case of Australia's SSAT and AAT respectively, the Ministries of Justice in New Zealand, the United Kingdom and Germany.

Governance, oversight and supervision arrangements are undertaken for the tribunals, but these vary between the three countries. While FaHCSIA undertakes governance, oversight and supervision of the Social Security Appeal; New Zealand's Department of Social Development is supervised by parliament. A Board is responsible for overseeing the Courts and Tribunals Service in the United Kingdom.

Therefore, these institutions are generally enabled to effectively resolve disputes that arise in the area of social security. They can thus be said to ensure access to justice for social security claimants in their respective jurisdictions.

CHAPTER SIX

CURRENT SOUTH AFRICAN SOCIAL SECURITY DISPUTE RESOLUTION SYSTEM

1. INTRODUCTION

This chapter analyses the current South African social security dispute resolution system. This involves an investigation of the dispute resolution institutions/forums established and their procedures. There is currently no uniform social security adjudication institution, due to the piecemeal fashion in which schemes were established or protection against individual risks regulated. The result is that each statute provides for its own dispute resolution institution(s) and processes. Therefore, reviewing South Africa's current social security dispute resolution framework involves a consideration of the institutions and processes provided in each statute.

This is to assess their compliance with constitutional prerequisites and international standards. It is also to compare and/or contrast them with social security dispute resolution systems in comparative international jurisdictions, as well as comparative South African (non-social security) systems. It also seeks to identify what gaps and challenges exist (if any) in the present social security dispute resolution framework. This is to assess their effectiveness in ensuring that every social security applicant or beneficiary (irrespective of their social, economic and other conditions) has access to a streamlined, integrated and coordinated system that resolves social security disputes in a fair, expeditious and participatory manner. A review of the current adjudication system will provide guidelines for proposals towards the development of a new adjudicative and institutional framework.

This chapter thus evaluates the dispute resolution systems established in terms of major social security legislation, such as the SAA; COIDA; ODMWA; the UIA; the RAFA; the Pension Funds Act; and the Medical Schemes Act. In addition, the role of the High Court is examined, as it is the external appeals institution for many of the social security dispute resolution institutions.

The Labour Court also resolves some social security disputes.¹¹¹⁵ Social security statutes do not provide for specific powers to be exercised and procedures to be adopted by the Labour Court in the resolution of disputes arising in terms of the relevant statutes. Therefore, the powers exercised and the procedures adopted by the court in the resolution of disputes within its jurisdiction will be the powers and procedures applicable.

2. SOCIAL ASSISTANCE ACT DISPUTE RESOLUTION FRAMEWORK

The Social Assistance Act created a framework for the resolution of disputes consisting of sequential and complementary review or reconsideration and appeal processes. Internal reconsideration is undertaken by the South African Social Security Agency (SASSA) which administers the social grants system, while the Independent Tribunal for Social Assistance Appeals (ITSAA) was established for consideration of appeals. The High Court, Supreme Court of Appeal and Constitutional Court are further avenues for appeals.

2.1 Reconsideration by the South African Social Security Agency (SASSA)

The Social Assistance Act states that an applicant for, a beneficiary of social assistance or a person acting on his or her behalf who disagrees with the decision and reasons for the decision by the SASSA may apply to SASSA requesting reconsideration of its decision.¹¹¹⁶ An application for reconsideration must be lodged in the prescribed manner within 90 days of the decision being made.¹¹¹⁷

¹¹¹⁵ The primary objective of the Labour Court is not to resolve social security disputes - section 1 of the LRA. However, provision is made in some social security laws for the referral of certain disputes to the Labour Court. An example can be found in the is the Unemployment Insurance Act, which provides for objections to compliance orders to be referred to the Labour Court; and for a compliance order to be referred to the Labour Court to be made an order of the Court if the employer has not complied with the order - section 41 of the Unemployment Insurance Act. In addition, the UIA states that unless provided otherwise, the Labour Court has jurisdiction in respect of all matters in terms of the Act, except in respect of an offence in terms of the Act - section 66 of the Unemployment Insurance Act. The Act further empowers the Director-General of the Department of Labour to state a case for decision by the Labour Court of his or her own initiative or at the request of a party with sufficient interest in the matter - section 67 of the Unemployment Insurance Act.

¹¹¹⁶ Section 18(1) of the Social Assistance Act 13 of 2004.

¹¹¹⁷ Regulation 2(2) of the of the Regulations relating to the Lodging and Consideration of Applications for Reconsideration of Social Assistance Application by the Agency and Social Assistance Appeals by the Independent Tribunal (GN R746 published in GG 34618 of 19 September 2011) (Regulations to the Social Assistance Act of 19 September 2011).

Internal review is performed by a senior official from SASSA, who is independent from the original decision-maker.¹¹¹⁸ The Regulations further state that the Chief Executive Officer of the Agency or his or her delegate must assign such number of officials as may be necessary to consider applications.¹¹¹⁹ The designated official must occupy a position that is higher in rank to that of the official or officials who considered the application in respect of which the applicant or beneficiary or a person acting on his or her behalf is requesting reconsideration.¹¹²⁰ However, neither the Act nor the regulations ensure that officials, designated to handle applications for reconsideration, are appropriately qualified to undertake reviews. It is therefore necessary that these officials are trained. It may also be necessary for officials designated to undertake review functions to do so on an ongoing and full-time basis.

2.2 Determination of appeals by Independent Tribunal for Social Assistance Appeals (ITSAA)

The Act further provides that where an applicant or a beneficiary disagrees with a reconsidered decision made by SASSA, that person or a person acting on his or her behalf may lodge a written appeal with the Minister of Social Development against that decision, setting out the reasons why the Minister should vary or set aside that decision.¹¹²¹ When the Minister receives the applicant's or beneficiary's written appeal and the SASSA's reasons for the decision he may confirm, vary or set aside that decision, or appoint an independent tribunal to consider an appeal.¹¹²² If the Minister has appointed an independent tribunal, all appeals must be considered by that tribunal.¹¹²³ The Minister has established the Independent Tribunal for Social Assistance Appeals (ITSAA) to determine all appeals under the Social Assistance Act.

¹¹¹⁸ Regulation 2 of the Regulations to the Social Assistance Act of 19 September 2011. The Regulations state that an applicant, beneficiary or a person acting on his or her behalf, who disagrees with the decision and reasons for the decision by the South African Social Security Agency (SASSA), requesting the Agency to reconsider its decision.

¹¹¹⁹ Regulation 3(1) of the Regulations to the Social Assistance Act of 19 September 2011.

¹¹²⁰ Regulation 3(2) of the Regulations to the Social Assistance Act of 19 September 2011.

¹¹²¹ Section 18(1A) of the Social Assistance Act.

¹¹²² Section 18(2) of the Social Assistance Act.

¹¹²³ Section 18(3) of the Social Assistance Act.

2.2.1 Accessibility of ITSAA

ITSAA panels are currently deciding appeals in regional clusters in Gauteng, KwaZulu-Natal and the Eastern Cape. However, plans are underway for ITSAA “to move from a national to provincial footprint, so that it could get closer to the communities it served”.¹¹²⁴ This would be achieved through the replacement of the three regional clusters with nine functional provincial offices, with six co-ordinators handling KZN, Eastern Cape, Gauteng, Western and Northern Cape, Limpopo/Mpumalanga, and Free State/North West Provinces.¹¹²⁵

The appeal lodgement procedures and time periods also facilitate access for aggrieved persons to ITSAA. Parties who disagree with the decision and reasons of SASSA and who wish to appeal the decision are required to lodge an appeal to the Independent Tribunal in the prescribed form.¹¹²⁶ An appeal can be lodged with the Department of Social Development or the Independent Tribunal; and may be delivered by hand, post, fax or electronic mail.¹¹²⁷

In addition to the required documents, an application must be accompanied by any document provided by SASSA as proof of receipt of an application for social assistance. It must also be accompanied by a copy of a letter of rejection or approval of social assistance application by SASSA; any other relevant document in relation to the application; and (in the case of a person applying on behalf of the beneficiary or applicant) a copy of the power of attorney or proof of his or her appointment by the applicant or beneficiary to act on his or her behalf.¹¹²⁸ When lodging an appeal, the applicant, beneficiary or a person acting on behalf of applicant or beneficiary is allowed to produce any evidence or information which was not provided to SASSA at the time of application for social assistance.¹¹²⁹

An appeal must be lodged within 90 days after reconsideration of original decision by SASSA. However, the Tribunal can condone a late application if good cause is shown. A late application will be condoned taking into account the reason for the delay; whether it is in the

¹¹²⁴ Petersen V *Independent Tribunal for Social Assistance Appeals on its Operational Plan and Progress Report: National Assembly Briefing* (31 Aug 2010).

¹¹²⁵ *Ibid.*

¹¹²⁶ See Form 3 (Lodging of an Appeal) in the Regulations to the Social Assistance Act of 19 September 2011.

¹¹²⁷ Regulation 14(2)(b) of the Regulations to the Social Assistance Act of 19 September 2011.

¹¹²⁸ Regulation 14(2)(c) read with Form 3 in Annexure A of the Regulations to the Social Assistance Act of 19 September 2011.

¹¹²⁹ Regulation 14(3) of the Regulations to the Social Assistance Act of 19 September 2011.

interests of justice that condonation be granted; and if there are reasonable prospects of success.¹¹³⁰

2.2.2 Scope of jurisdiction and powers of ITSAA

Any applicant for social assistance grants or any social assistance grant beneficiary or a person acting on their behalf can lodge an appeal against the decisions of SASSA in relation to all matters regulated by that Social Assistance Act.¹¹³¹ This implies that any decision of SASSA that adversely affects an applicant's or beneficiary's rights to benefits is appealable to ITSAA. Its jurisdiction is therefore wide, although limited to the provisions of the Social Assistance Act.

The powers and functions of each member of an ITSAA panel are circumscribed in the Act. The legal practitioner, as the chairperson, is responsible for deciding and ruling on whether or not an appeal is to be upheld (after consultation with the medical practitioner in respect of appeals on disability, care dependency, war veteran's grants or grant-in-aid and a member of civil society in respect of an appeal relating to a social relief of distress grant).¹¹³² He or she is also responsible for writing down the decision of the Tribunal panel and the reasons thereof, and of signing off on the decision and the reasons.

The medical practitioner is responsible for the assessment of all medical aspects of appeals in respect of disability, care dependency, war veteran's grants or grant-in-aid.¹¹³³ He or she is also responsible for advising the legal practitioner on all medical aspects of the appeals and for making recommendations in respect of appeals relating to disability, care dependency, war veteran's grants or grant-in-aid.

The member of civil society is responsible for advising the Tribunal on the socio-economic aspects of the applicant or the beneficiary in respect of an appeal relating to the social relief of distress grant.¹¹³⁴

¹¹³⁰ Section 18(4) of the Social Assistance Act and Regulation 15 of the Regulations to the Social Assistance Act of 19 September 2011.

¹¹³¹ Section 18 of the Social Assistance Act.

¹¹³² Regulation 9 of the Regulations to the Social Assistance Act of 19 September 2011.

¹¹³³ Regulation 10 of the Regulations to the Social Assistance Act of 19 September 2011.

¹¹³⁴ Regulation 11 of the Regulations to the Social Assistance Act of 19 September 2011.

An ITSAA panel has the power to consider all applications for appeal by applicants, beneficiaries or persons acting on behalf of the applicant or beneficiary in terms of the Social Assistance Act.¹¹³⁵ In an instance where it is adjudicating an appeal and it is not satisfied with reasons provided by an applicant or beneficiary (or a person acting on behalf of the applicant or beneficiary), it may request further written reasons.¹¹³⁶ If the Tribunal is not satisfied by the reasons provided by SASSA for rejecting the beneficiary's or applicant's request for reconsideration, it may also request SASSA to provide written reasons for its decision for rejecting the request for reconsideration in terms of section 18(1) of the Social Assistance Act.¹¹³⁷ The Tribunal is also able to give directions to any party to the appeal on any matter within its jurisdiction in connection with that appeal.¹¹³⁸ It may at any time request any party to the appeal to furnish any written information which is necessary for the determination of the appeal;¹¹³⁹ may refer the applicant or beneficiary for a second and independent medical examination or opinion in terms of regulation 19(1);¹¹⁴⁰ and may postpone the hearing for the consideration of an appeal to such date as it may determine.¹¹⁴¹

When the Tribunal receives the reasons as well as the required information or the required medical report and after consideration of the appeal, the Tribunal may act in accordance with section 18(2)(b) of the Act (confirm or set aside the decision of the SASSA and substitute it with its own).¹¹⁴²

The Tribunal is unable to reconsider its decision as such power is restricted to SASSA only.¹¹⁴³ Neither the Social Assistance Act nor the Regulations to the Act regulate the enforceability of the ITSAA's decisions. This may be because the Tribunal has power to substitute the decision of SASSA with its own and the substituted decision has the same effect as if SASSA had made the decision.

¹¹³⁵ Regulation 12(1)(a) of the Regulations to the Social Assistance Act of 19 September 2011.

¹¹³⁶ Regulation 12(1)(b) of the Regulations to the Social Assistance Act of 19 September 2011.

¹¹³⁷ Regulation 12(1)(c) of the Regulations to the Social Assistance Act of 19 September 2011.

¹¹³⁸ Regulation 12(1)(d) of the Regulations to the Social Assistance Act of 19 September 2011.

¹¹³⁹ Regulation 12(1)(e) of the Regulations to the Social Assistance Act of 19 September 2011.

¹¹⁴⁰ Regulation 12(1)(f) of the Regulations to the Social Assistance Act of 19 September 2011.

¹¹⁴¹ Regulation 12(1)(g) of the Regulations to the Social Assistance Act of 19 September 2011.

¹¹⁴² Regulation 12(3) of the Regulations to the Social Assistance Act of 19 September 2011.

¹¹⁴³ See section 18(1) of the Social Assistance Act and Regulation 3 of the Regulations to the Social Assistance Act of 19 September 2011.

2.2.3 Fairness of ITSAA adjudication procedures

An ITSAA appeal is conducted through consideration of the documentary evidence submitted by the applicant or beneficiary (or a person acting on behalf of applicant or beneficiary) and by SASSA. This is normally done in the absence of the applicant or beneficiary, or a person acting on behalf of an applicant or a beneficiary.¹¹⁴⁴ Hearings where an applicant or a beneficiary can appear in person to present oral arguments are organised only on exceptional bases and at the discretion of the Tribunal.¹¹⁴⁵

The Regulations of the Social Assistance Act seek to ensure the expeditious resolution of disputes by requiring the Tribunal to finalise an appeal within 90 days of receipt.¹¹⁴⁶ This is important in light of reports of the prevalent and widespread problem of unreasonably long delays in processing appeals for disability grants and other social grants in the Eastern Cape and other regions in the country.¹¹⁴⁷ Delays in the resolution of disputes by ITSAA can partly be attributed to backlogs. In *Ntamo and Other v Minister of Social Development and Others*, the Minister of Social Development undertook to implement a reasonable programme to clear existing backlogs of disability appeals by the end of September 2011 and to ensure that appeals are determined without undue delay.¹¹⁴⁸ The clearing of backlogs and the requirements to finalise appeals within 90 of receipt would guarantee the expeditious resolution of disputes by ITSAA.

The Secretariat communicates the appeal findings in writing to an applicant, beneficiary or a person acting on behalf of applicant or beneficiary and to SASSA. Notification is delivered to the address provided by or any other method chosen by applicant, beneficiary or a person acting on behalf of applicant or beneficiary in his or her appeal.¹¹⁴⁹

¹¹⁴⁴ Regulation 16(1) of the Regulations to the Social Assistance Act of 19 September 2011.

¹¹⁴⁵ See *Petersen V Independent Tribunal for Social Assistance Appeals on its Operational Plan and Progress Report: National Assembly Briefing* (31 Aug 2010).

¹¹⁴⁶ Regulation 16(2) of the Regulations to the Social Assistance Act of 19 September 2011.

¹¹⁴⁷ An affidavit by Black Sash in *Ntamo & Others v Minister of Social Development and Others* (Eastern Cape High Court (Grahamstown) Case No. 689/2010 of 27 January 2011) states that delays of one year are common for clients to be allocated an appeal hearing date. See also *Jongile and others v Minister of Social Development and others* Eastern Cape High Court (Grahamstown) Case No. 1962/2008 and Rugege U *Submission to the Department of Social Development SECTION27 /AIDS Law Project* (14 February 2011).

¹¹⁴⁸ *Ntamo & Others v Minister of Social Development and Others* para 1.

¹¹⁴⁹ Regulation 20 of the Regulations to the Social Assistance Act of 19 September 2011.

The Secretariat of the Tribunal, as the custodian of the Tribunal appeal documents, is required to retain a copy of the appeal documents, including notification of decision, record of proceedings and copies of the Agency's file submitted to the Tribunal for a period of five years from the date of communication of the decision on the appeal.¹¹⁵⁰

2.2.4 Expertise, independence and impartiality of ITSAA

The institutional framework, status and composition of ITSAA do not guarantee the perception of independence and impartiality. The members of the ITSAA are appointed by the Minister of Social Development, who is also the institutional head of SASSA. They are appointed for a specific period of time and on terms and conditions determined by Minister.¹¹⁵¹

The discipline and termination of service of ITSAA members is also undertaken by the Minister. In performing their functions and duties, all members of the Independent Tribunal are required to maintain a high standard of integrity; respect the confidentiality of information of all parties to an appeal; maintain acceptable standards of professionalism and ethics; and recuse themselves where there is conflict of interest.¹¹⁵² In addition, a member of ITSAA who is a member of a professional body (such as the legal practitioner or medical practitioner) he or she is also required to observe the ethical rules applicable to the members of such a body.¹¹⁵³

The termination of the service of tribunal members will be undertaken by the Minister as the Minister appoints members on such terms and conditions as the Minister may determine. In addition, the operational arrangements of the ITSAA (its funding;¹¹⁵⁴ human resource and administrative support; managerial framework;¹¹⁵⁵ governance, oversight and supervision;¹¹⁵⁶

¹¹⁵⁰ Regulation 23 of the Regulations to the Social Assistance Act of 19 September 2011. A secretariat which provides Human resource and administrative support to ITSAA is based at the Department of Social Development; and is staffed by full-time employees of the Department.

¹¹⁵¹ See Regulation 4 of the Regulations to the Social Assistance Act of 19 September 2011.

¹¹⁵² Regulation 13(1) of the Regulations to the Social Assistance Act of 19 September 2011.

¹¹⁵³ Regulation 13(2) of the Regulations to the Social Assistance Act of 19 September 2011.

¹¹⁵⁴ The funds of ITSAA are derived from national budget allocation of Department of Social Development - Petersen V *Independent Tribunal for Social Assistance Appeals on its Operational Plan and Progress Report: National Assembly Briefing* (Cape Town, 31 Aug 2010).

¹¹⁵⁵ The operations of ITSAA are managed by a Programme Manager in the Department of Social Development - Department of Social Development *Strategic Plan 2010-2015*, 2.

and accountability and reporting¹¹⁵⁷) indicate that it can effectively be considered to be an administrative unit of the Department of Social Development.

Therefore, ITSAA lacks the institutional separation that is required between administrative accountability, review and revision (on the one hand) and a wholly-independent, substantive system of appeals (on the other). At best, it can be described as a higher instance of internal review within the Department of Social Development. This is the case with the Benefits Review Committee of the Ministries of Social Development and Work and Income in New Zealand.¹¹⁵⁸

ITSAA has been provided with the necessary expertise and specialisation to resolve disputes efficiently. Each ITSAA panel is made up of a legal practitioner, a medical practitioner and a member of civil society¹¹⁵⁹ (the legal practitioner is the Chairperson; while the medical practitioner acts as an assessor in cases of disability, care dependency, war veteran's grants or grant-in-aid appeals. The member of civil society acts as an assessor in cases of social relief or distress grant appeals).

The legal practitioner must be a person who is an admitted attorney; advocate of the High Court of South Africa or a person with experience in the administration of law; who has at least five years' post-admission experience in the practice of law or at least five years' postgraduate experience in the administration of law; who has not been struck off the roll of Attorneys or Advocates; who is a fit and proper person; and whose appointment will not give rise to a conflict of interests.¹¹⁶⁰

¹¹⁵⁶ The Department of Social Development *Strategic Plan 2010-2015* also indicates that the Tribunal is functionally under the supervision of the Director General - Department of Social Development *Strategic Plan 2010-2015*, 2. This implies that governance, oversight and supervision are also undertaken by the Director-General (and Minister).

¹¹⁵⁷ ITSAA does not undertake any financial accountability as its funds are derived from national budget allocation of Department of Social Development. The Department also provides a secretariat. The Tribunal also has no separate institutional status under Public Finance Management Act. As a result, financial accountability for the expenditure of the Tribunal is undertaken by the Department of Social Development. The Tribunal also reports to the Director General as it is under his/her supervision - Department of Social Development *Strategic Plan 2010-2015*, 2.

¹¹⁵⁸ See the discussion on the Benefits Review Committee in Chapter Five para 5.2.

¹¹⁵⁹ Regulation 5(1) of the Regulations to the Social Assistance Act of 19 September 2011.

¹¹⁶⁰ Regulation 6 of the Regulations to the Social Assistance Act of 19 September 2011.

A medical practitioner must be a person who is registered with the Health Professions Council of South Africa; who has at least five years post-registration experience in the practice of medicine; whose registration with the Health Professions Council of South Africa has not been revoked; who is fit and proper; and who is not in the full-time employ of the public health service or in the full-time or part-time employ of the Agency.¹¹⁶¹

A member of civil society must be a person of good standing in the community and whose appointment will not give rise to a conflict of interest.¹¹⁶²

The legal practitioner (as the Chairperson) is responsible for deciding and ruling whether or not an appeal is to be upheld.¹¹⁶³ The decision is made after consultation with the medical practitioner (in respect of appeals relating to disability, care dependency, war veterans or grant-in-aid grant) and a member of civil society (in respect of an appeal relating to a social relief of distress grant). He is also responsible for writing down the decision of the Independent Tribunal and the reasons thereof and to sign off on the decision and reasons for the decision.

3. COIDA ADJUDICATION SYSTEM

COIDA provides for the review of, and objections or appeals against decisions of the Director General/Compensation Commissioner. Further avenues for appeal are to any provincial or local division of the High Court having jurisdiction. COIDA specifies the decisions that can be appealed to the High Court. These are only decision relating to the interpretation of the Act or any other law; the question whether an accident or occupational disease, causing the disablement or death of an employee was attributable to his or her serious and wilful misconduct; the question whether the amount of any compensation awarded is so excessive or so inadequate that the award thereof could not reasonably have been made; or the right to increased compensation in terms of section 56.¹¹⁶⁴ Therefore, a person aggrieved by a decision that does not relate to any one of the four specified grounds can only apply for a review of the decision at the High Court.

¹¹⁶¹ Regulation 7 of the Regulations to the Social Assistance Act of 19 September 2011.

¹¹⁶² Regulation 8 of the Regulations to the Social Assistance Act of 19 September 2011.

¹¹⁶³ Regulation 9 of the Regulations to the Social Assistance Act of 19 September 2011.

¹¹⁶⁴ Section 91(5) of COIDA.

In addition to review and objection/appeal processes, COIDA states that if any question of law arises in the performance of the functions of the Director-General, he or she may of his or her own motion, or at the request of a party with a sufficient interest in any matter or proceedings, state a case for decision by a High Court having jurisdiction.¹¹⁶⁵ When the Director-General states a case, he or she sets out facts that he found proved; and the view of the law which he has adopted in relation to those facts.¹¹⁶⁶ If the Director-General has any doubt as to the correctness of a decision given by the High Court regarding a question of law in connection with the application of COIDA, he may submit such decision to the Supreme Court of Appeal for the question of law to be argued and for the Court to decide the question of law for the future guidance of all courts.¹¹⁶⁷

3.1 Review of decisions by Director-General (Compensation Commissioner)

The system is not properly aligned as COIDA limits the decisions of the Director-General that can be reviewed (with no such limitation regarding the disputes that can be objected to or appealed). In addition, the system is fragmented as some decisions of the Compensation Fund are subject to review by the Director-General, while other decisions are subject to an objection or appeal to a panel consisting of a presiding officer assisted by assessors.

For example, section 90 states that the Director-General may after notice, if possible, to the party concerned and after giving him an opportunity to submit representations, at any time review any decision in connection with a claim for compensation or the award of compensation. The Director-General may review a decision on the ground that the employee has not submitted himself to a medical examination in terms of section 42; a decision that the disablement giving rise to the award is prolonged or aggravated by the unreasonable refusal or failure of the employee to submit himself to medical aid; a decision that compensation awarded in the form of a periodical payment or a pension is excessive or insufficient because of existing or changed circumstances; that a decision or award was based on an incorrect view or misrepresentation of the facts, or that a decision or award would have been otherwise in the light of evidence available at present, but which was not available when the Director-

¹¹⁶⁵ Section 92(1) of COIDA.

¹¹⁶⁶ Section 92(2) of COIDA.

¹¹⁶⁷ Section 92(2) of COIDA.

General made the decision or award.¹¹⁶⁸ After consideration of the evidence and representations submitted to him and making the necessary inquiries, the Director-General may confirm, amend or set aside his decision. He or she may also suspend, discontinue, reduce or increase compensation awarded.¹¹⁶⁹

3.2 Dispute resolution by the Compensation Court (COIDA Panel)

A person affected by a decision of the Director-General/Compensation Commissioner (or a trade union or employer's organisation of which the person was a member at the relevant time) may lodge an objection against that decision with the Compensation Commissioner.¹¹⁷⁰ Such an objection is considered and decided by a panel composed of a presiding officer with the assistance of two assessors (also called the Compensation Court).¹¹⁷¹ The panel of a Presiding Officer, assisted by two assessors, is thus a forum for resolution of objections and appeals against decisions of the Director-General/Compensation Commissioner.

3.2.1 Accessibility of the Compensation Court

A person objects a decision of the Director-General/Compensation Commissioner to the Compensation Court by completing the Compensation Fund's *Objection Against a Decision Form* (Form W.G. 29) and hand it in at, forward it by telefax or send it by registered mail to the Compensation Fund or an office of the Department of Labour or a labour centre.¹¹⁷² An objection must be lodged with the Compensation Commissioner within 180 days of the decision.¹¹⁷³ An objection against a decision submitted later than the required 180 days cannot be considered by the Court, as the presiding officer and assessors are not empowered to condone late lodgement of objections.¹¹⁷⁴

¹¹⁶⁸ Section 90(1) of COIDA.

¹¹⁶⁹ Section 90(2) of COIDA.

¹¹⁷⁰ Section 91(1) of COIDA.

¹¹⁷¹ Section 91(2) read with sections 2(1)(b) and 8(a) of COIDA.

¹¹⁷² See Department of Labour *Rules for the Conduct of Hearings before the Compensation Court in section 91 Hearings of COIDA* (accessed at https://www.labour.gov.za/downloads/documents/useful-documents/compensation-for-occupational-injuries-and-diseases/Conduct%20of%20hearings_CF_PamphletR.pdf on 5 May 2013) Rules 5 and 6 (hereinafter referred to as the *Rules for the Conduct of Hearings before the Compensation Court in section 91 Hearings of COIDA*).

¹¹⁷³ Section 91(1) of COIDA.

¹¹⁷⁴ Sections 91 and 44 of COIDA.

The Compensation Court convenes at any place determined by the Commissioner for the hearing of an objection.¹¹⁷⁵ English is the language for the lodgement of an objection,¹¹⁷⁶ as well as the language used in hearings. However, the Compensation Fund has appointed interpreters in some hearing locations for assistance where an objector is unable to understand the language of the hearing.¹¹⁷⁷

3.2.2 Scope of jurisdiction and powers of the Compensation Court

Any person affected by a decision of the Director-General/Compensation Commissioner (or a trade union (in the case of an employee) or an employer's organisation (in the case of an employer) of which that person was a member) can lodge an objection against a decision with the Commissioner.¹¹⁷⁸ This implies that the scope of jurisdiction of the Court is limited to deciding objections lodged in terms of section 91(1) relating to matters provided for in COIDA and to persons affected by decisions in relation to such matters. In *Venter v Compensation Commissioner*,¹¹⁷⁹ the appellant lodged an objection in terms of section 91(1) of COIDA against a decision of the Director-General that his back injury had not been caused by, or was related to, the injuries suffered in an accident. At a hearing by a tribunal (Compensation Court) appointed in terms of section 91(2), the Tribunal found that the appellant was not an employee as contemplated in the Act at the time of the accident. It thus held that the claim had to be rejected. On appeal of the Tribunal's findings to the High Court, the Court held that tribunal was:

“a creature of statute and derived its powers, obligations and jurisdiction from the four corners of the statute, i.e. from section 91(2) and (3) of COIDA and from no other source. It was in this respect comparable to a Magistrates Court, which was a creature of statute and has no jurisdiction beyond that granted by the statute creating it. It has no inherent jurisdiction such as is possessed by the superior Courts and can claim no authority which cannot be found within the four corners of its constituent Act.”¹¹⁸⁰

¹¹⁷⁵ See the Regulations under COIDA (GN 16 in GG No No. 30646 of 11 January 2008)(hereinafter referred to as Regulations to COIDA of 2008).

¹¹⁷⁶ See the *Objection Against a Decision Form* (Form W.G. 29).

¹¹⁷⁷ Compensation Fund *Annual Report for the year ended 31 March 2009*, 34.

¹¹⁷⁸ Section 91(1) of COIDA.

¹¹⁷⁹ *Venter v Compensation Commissioner* 2001 (4) SA 753 (T).

¹¹⁸⁰ *Venter v Compensation Commissioner* para 757CF.

Therefore, the Compensation Court's only power, duty and jurisdiction are to consider "the objection lodged in terms of this section (section 91)".

In considering an objection, the Court can subpoena any person who is able to give information concerning the objection, or who is suspected to have or has in his possession or custody or under his control any book, document or thing which has a bearing on the objection, to appear before the panel at a time and place specified in the subpoena, to be interrogated or to produce such book, document or thing, and the panel may retain such book, document or thing for further investigation.¹¹⁸¹ The Court can also call and administer an oath to, or accept an affirmation from any person subpoenaed, and may interrogate such person and order him to produce any book, document or thing in his possession or custody or under his control.¹¹⁸²

When the Court considers an objection, the presiding officer can confirm the original decision or make any other decision that he or she deems equitable. The presiding officer can also make such order as to costs and the payment thereof as he may deem equitable.¹¹⁸³ However, he or she can only confirm the decision or give such other decision where at least one of the assessors (excluding the medical assessor) agrees with him or her.¹¹⁸⁴ If none of the assessors agrees with the view of the presiding officer, the presiding officer shall submit the dispute to the High Court for decision.¹¹⁸⁵ Therefore, an objection against a decision of the Compensation Commissioner could potentially be decided at the High Court in the first instance. This may pose difficulties for complainants, due to institutional nature and procedures of the High Court.¹¹⁸⁶

The presiding officer can correct an error or defect that is incorrectly or defectively cited on application by a party and on notice to the parties concerned.¹¹⁸⁷ COIDA does not provide for the Court to enforce its rulings. However, in principle, the Court is considered to have the

¹¹⁸¹ Section 6(1) of COIDA.

¹¹⁸² Section 6(2) of COIDA.

¹¹⁸³ Section 91(4) of COIDA.

¹¹⁸⁴ Section 91(3)(a) of COIDA.

¹¹⁸⁵ Section 91(3)(b) of COIDA.

¹¹⁸⁶ See Chapter Six, para 9 for the High Court dispute resolution framework.

¹¹⁸⁷ See Rule 18 of the *Rules for the Conduct of Hearings before the Compensation Court in section 91 Hearings of COIDA*

status of a court at the level of the Magistrates' Court. As a result, a ruling of the Court is enforced as a decision of a (Magistrates') Court.¹¹⁸⁸

3.2.3 Fairness of Compensation Court adjudication procedures

Dispute resolution proceedings of the Court are carried out in the same manner as proceedings in the Civil Court.¹¹⁸⁹ When the Panel considers and adjudicates an objection, it can carry out such investigation as it may deem necessary or may formally hear the objection.¹¹⁹⁰ The Court can designate a person to investigate an objection, attend a formal hearing, cross-examine witnesses, adduce rebutting evidence and present arguments.¹¹⁹¹ When considering an objection, the Panel of Assessors can carry out an investigation if it deems necessary or it may formally hear the claim.¹¹⁹² Either party to a dispute may request the presiding officer to make an order on the disclosure of the relevant documents. In addition, the parties may agree on the disclosure of the documents.¹¹⁹³

When the Court decides to hold a formal hearing, it gives notice of the date, time and place of the hearing to the parties.¹¹⁹⁴ Parties may appear before the panel at a formal hearing or they may be represented by a lawyer or any member, office bearer or official of a registered trade union or employers' organisation.¹¹⁹⁵ If a party objects to the representation of another party or the presiding officer suspects that the representative does not qualify in terms of the rules of the Compensation Court, he or she determines the issue.¹¹⁹⁶

If an objector is represented at the hearing but fails to attend in person, the presiding officer can continue with the proceedings. He or she can also adjourn the proceedings or dismiss the

¹¹⁸⁸ According to Mr Andile Solwandle of the Compensation Fund (per e-mail correspondence of 27 May 2011).

¹¹⁸⁹ According to Mr Andile Solwandle of the Compensation Fund (per e-mail correspondence of 27 May 2011).

¹¹⁹⁰ Section 45(1) of COIDA.

¹¹⁹¹ Section 46(1)(b) of COIDA.

¹¹⁹² Section 91(2)(c) read with s 45(1) of COIDA.

¹¹⁹³ Rule 9 of the *Rules for the Conduct of Hearings before the Compensation Court in section 91 Hearings of COIDA*.

¹¹⁹⁴ Section 45(2) of COIDA.

¹¹⁹⁵ Section 46(1)(a) of COIDA and Rule 12 of the *Rules for the Conduct of Hearings Before the Compensation Court in s 91 of COIDA*.

¹¹⁹⁶ Rule 8 of the *Rules for the Conduct of Hearings before the Compensation Court in section 91 Hearings of COIDA*. The presiding officer can call upon the representative to establish why he or she (the representative) should be permitted to appear in terms of COIDA. A representative is required to tender any documents requested by the presiding officer in order to establish why the representative should be permitted to appear, including constitutions, payslips, contracts of employment, documents and forms.

matter by issuing a written ruling.¹¹⁹⁷ In exercising a discretion whether to continue with the proceedings; adjourn the proceedings; or dismiss the matter, the presiding officer is required to take into account (*inter alia*) whether an objector has previously failed to attend a hearing; any reason given for the party's failure to attend; whether the hearing can take place effectively in the absence of the objector; and the likely prejudice to the party if the ruling is given. The presiding officer must be satisfied that the objector had been properly notified of the date, time and venue of the proceedings before deciding whether to continue with the proceedings; adjourn the proceedings; or dismiss the matter. If a matter is dismissed, the presiding officer sends copy of the ruling to the parties. The ruling must be supported by written reasons and must clearly and concisely set out a statement of the material facts (in chronological order) on which the ruling is based. It must also be in sufficient detail to enable any person appealing against the ruling to have a basis or grounds to appeal.¹¹⁹⁸

A hearing may be postponed by agreement between the parties, or by application and on notice to the other party. The presiding officer may postpone a hearing without the parties appearing if all the parties to the dispute agree in writing to the postponement and if the written agreement for the postponement is received at least seven days before the scheduled date of the hearing. After considering the written agreement, the presiding officer may postpone the matter without convening a hearing or convene a hearing to determine whether to postpone the matter.¹¹⁹⁹

Parties to a COIDA hearing are required to hold a pre-hearing conference, if directed to do so by the presiding officer. In a pre-hearing conference, the parties must attempt to reach consensus on any means by which the dispute(s) can be settled.¹²⁰⁰ They are also required to attempt to reach consensus on facts that are agreed upon; facts that are in dispute; issues that the presiding officer is required to decide; the precise relief claimed; the sharing and exchange of relevant documents, and the preparation of a bundle of documents in chronological order with each page numbered; the exchange of witness statements; any other

¹¹⁹⁷ Rule 10 of the *Rules for the Conduct of Hearings before the Compensation Court in section 91 Hearings of COIDA*.

¹¹⁹⁸ Rule 10 of the *Rules for the Conduct of Hearings before the Compensation Court in section 91 Hearings of COIDA*.

¹¹⁹⁹ Rule 11 of the *Rules for the Conduct of Hearings before the Compensation Court in section 91 Hearings of COIDA*.

¹²⁰⁰ Rule 13 of the *Rules for the Conduct of Hearings before the Compensation Court in section 91 Hearings of COIDA*.

means by which the proceedings may be shortened; whether an interpreter is required and, if so, for how long and for which languages. Unless, where a dispute is settled, the parties are required to draw up and sign a minute, setting out the facts on which the parties agree and disagree. An objector or his/her representative must ensure that a copy of the pre-hearing conference is delivered to the Presiding Officer within seven days of the conclusion of the pre-hearing conference.

The expeditious resolution of disputes is not guaranteed, as COIDA does not specify timeframes for the consideration of objections by the Court. The timeframe for the resolution of an objection depends on the merits of a particular objection. Finalisation of an objection by the Court is further affected by the limitation of the hearing time for an objection to three hours per day.¹²⁰¹ This is due to the need to ensure financial control by the Compensation Fund (relating to control of expenditure spent on the payment of panel members).

A copy of the Court's decision is forwarded to the Compensation Fund. COIDA requires the Director-General to keep or cause to be kept a record of the proceedings at a formal hearing.¹²⁰² The Court also provides a copy to a party upon payment of the prescribed fees.¹²⁰³ The Compensation Fund is also required to keep a record of any evidence during the hearing, any sworn testimony given during any proceedings in connection with the hearings before the Court, and any judgment or ruling made by Court. The record must be kept in legible hand-written notes or by means of an electronic recording (a party may request a copy of the transcript of a record or a portion of a record upon payment of the prescribed fees).¹²⁰⁴

3.2.4 Expertise, independence and impartiality of the Compensation Court

The Compensation Court also does not appropriately satisfy the requirement for institutional separation between administrative accountability, review and revision (on the one hand) and a wholly-independent, substantive system of appeals (on the other). The Minister of Labour appoints presiding officers to assist the Director-General in the performance of his or her

¹²⁰¹ According to Mr Andile Solwandle of the Compensation Fund (per e-mail correspondence of 27 May 2011).

¹²⁰² Section 91(2)(c) read with section 45(7) of COIDA.

¹²⁰³ Section 91(2)(c) read with section 45(7) of COIDA; and Regulation 8 of the COIDA Regulation of 2008. The prescribed fees is R0.50 per page.

¹²⁰⁴ Rule 14 of the *Rules for the Conduct of Hearings before the Compensation Court in section 91 Hearings of COIDA*.

functions in terms of or under COIDA, subject to relevant laws governing the public service.¹²⁰⁵ The Minister also appoints assessors to assist the Director-General in the hearing of any objection (after consultation with the Compensation Board).¹²⁰⁶ Equal numbers of assessors represent employees and employers, as they are persons deemed by the Minister to represent the interests of employees and employers (the Minister may consult employees' or employers' organisations in this regard).¹²⁰⁷ The Minister can also appoint one or more medical practitioners as medical assessors.¹²⁰⁸

Presiding officers are appointed for a period of three years.¹²⁰⁹ The Minister also determines the period and conditions of appointment of assessor.¹²¹⁰ A presiding officer could thus be considered to be an employee of the public service, as they are officers and employees employed by the Minister according to the laws governing the public service.¹²¹¹ Assessors could be considered as contractors, as they are required to submit claims for remuneration (at an hourly rate) and for travelling and subsistence allowances to the Compensation Fund for attending meetings or hearings or for the investigation of any matter (including where a meeting or hearing is cancelled by the Fund).¹²¹²

It is unclear if and how a presiding officer is disciplined and his or her service terminated as COIDA is silent on both these issues.¹²¹³ However, the Minister of Labour can terminate the appointment of an assessor at any time for misconduct, neglect of duty, inability to perform his or her functions properly or if he or she no longer represents the interests of employees or employers (the grounds on which he or she was appointed).¹²¹⁴

The operational arrangements of the Compensation Court (its funding;¹²¹⁵ human resource and administrative support;¹²¹⁶ managerial framework;¹²¹⁷ governance, oversight and

¹²⁰⁵ Section 2(1)(b) read with the definition of Presiding Officer in section 1 of COIDA.

¹²⁰⁶ Sections 8(1) and (4) and 12(1)(c) of COIDA.

¹²⁰⁷ Section 2 and 8 of COIDA.

¹²⁰⁸ Section 8(4) of COIDA.

¹²⁰⁹ According to Mr Andile Solwandle of the Compensation Fund per e-mail correspondence of 27 May 2011.

¹²¹⁰ Section 8(5) of COIDA.

¹²¹¹ Section 2(1)(b) of COIDA.

¹²¹² See Regulation 4 of the Regulations to COIDA of 2008.

¹²¹³ Section 2(1)(b) of COIDA (read with the definition of Presiding Officer in section 1) only regulates the appointment of a Presiding Officer.

¹²¹⁴ Section 8(5) of COIDA.

¹²¹⁵ There is not a separate funding arrangement relating to the COIDA adjudication panel as Presiding Officers and assessors claim remuneration and travelling and subsistence allowances from the Compensation Fund for attending meetings, hearings or for the investigation of any matter - see Regulation 4 of the COIDA Regulations

supervision;¹²¹⁸ and accountability and reporting¹²¹⁹) also revealed the dependant status of the Court. Therefore, it cannot be considered as an independent and impartial appeal institution for disputes in terms of COIDA.

4. ODMWA DISPUTE RESOLUTION SYSTEM

Two kinds of disputes can potentially arise under the ODMWA. These are disputes relating to the certification of an occupational disease and those relating to the payment of compensation by the Compensation Commissioner for Occupational Diseases. Decisions regarding the presence, nature and degree of a compensatable disease (certification disputes) are taken by the Certification Committee of the Medical Bureau for Occupational Diseases (the Certification Committee).¹²²⁰ The Medical Reviewing Authority for Occupational Diseases reviews decision of the Certification Committee.¹²²¹

The ODMWA does not provide for any internal dispute resolution processes for disputes relating to the payment of compensation by the Compensation Commissioner for Occupational Diseases. This implies that a person who is dissatisfied with by a decision of the Compensation Commissioner for Occupational Diseases can only bring an action in a court with jurisdiction (the High Court). This would be done according to the dispute lodgement processes of the High Court.

of 2008. In addition, administrative support for panel of assessors is provided by the Compensation Fund - Regulation 6 of the Regulations to COIDA of 2008.

¹²¹⁶ There is no separate human resource and organisational structure as human resource and administrative support for panel of assessors is provided by the Compensation Fund. Administration officers in Legal Services Department of the Fund organise the hearings of objection panels - Regulation 6 of the COIDA Regulations of 2008, as confirmed by Mr Andile Solwandle of the Compensation Fund (per e-mail correspondence of 27 May 2011).

¹²¹⁷ The Compensation Fund is responsible for the management of the activities of the panel as the Fund is responsible for organisation of meetings and hearings and coordination of assessor activities - see the Regulations to COIDA of 2008.

¹²¹⁸ Presiding officers and assessors report to the Head of Legal Services of the Compensation Fund on behalf of the Compensation Commissioner and the Director General. Presiding officers and assessors also report to the Head of Legal Services of the Compensation Fund on behalf of the Commissioner and the Director General - according to Mr Andile Solwandle of the Compensation Fund (per e-mail correspondence of 27 May 2011).

¹²¹⁹ The Compensation Court does not have a separate funding arrangement but is funded by Compensation Fund (including remuneration of presiding officers and assessors). In addition, administration officers in Legal Services Department of the Fund organise the hearings of objection panels. Since funding for the activities of the Panels is provided by the Compensation Fund, financial accountability for Panels is undertaken by the Compensation Commissioner as the accounting officer of the Fund.

¹²²⁰ The MBOD was established in terms of section 2 of ODMWA to such functions as may be necessary for the purpose of giving effect to the provisions of ODMWA and such other functions assigned to it by the Minister from time to time.

¹²²¹ Sections 46 and 50 of ODMWA.

The ODMWA also states that (with the consent of the Minister) the Compensation Commissioner for Occupational Diseases can state a special case for the ruling of the High Court on any question of law which arises in connection with any matter in which the Commissioner has given or is required to give a decision under the Act.¹²²² Where the Compensation Commissioner states a special case for the ruling of the High Court, a person who has an interest in the decision in question may appear in person or be represented by counsel at the hearing of any such case.¹²²³

In addition to the dispute resolution procedures in the ODMWA, persons covered by the Act also have the right to institute common law proceedings in the High Court (such as against the employer for delictual damages).¹²²⁴

4.1 Certification of occupational diseases by Certification Committee

Certification of an occupational disease for compensation by the Compensation Commissioner can only be done by the Certification Committee. This is done following a medical examination and (in some cases) the submission of certain medical samples. The medical examination includes a chest x-ray, lung function test and other medical investigations. The certification process entails that for each application submitted and evaluated, in addition to the medical examinations, the work period and degree of risk exposure needs to be verified by the mining company.¹²²⁵

After the Certification Committee makes a finding, the Chairperson (or another person authorised by him/her in writing to do so on his/her behalf) issues a certificate in the prescribed form which sets out the finding of the Committee and contains all other relevant information. The Chairperson sends copies of the certificate to the person who is the subject

¹²²² Section 58(1) of ODMWA.

¹²²³ Section 58(2) of ODMWA.

¹²²⁴ See the recent case of *Mankayi v Anglo Gold Ashanti* (Case CCT 40/10 [2011] ZACC 3).

¹²²⁵ See generally Roberts J *The Hidden Epidemic Amongst Former Miners: Silicosis, Tuberculosis and the Occupational Diseases in Mines and Works Act in the Eastern Cape, South Africa* Health Systems Trust/Department of Health (June 2009); Spoor R “Gold miners return to Lesotho to die” in *Mines and Communities (MAC)* of 30 August 2005; Fultz E and Pieris B *The Social Protection for Migrant Workers in South Africa* ILO/SAMAT (Harare, 1997); and AIDS and Rights Alliance for Southern Africa *The mining sector, tuberculosis and migrant labour in Southern Africa: Policy and Programmatic Interventions for the Cross-Border Control of Tuberculosis between Lesotho and South Africa, Focusing on Miners, Ex-Miners and Their Families* (July 2008).

of the certification; or if the subject of the certification is a deceased person, the Chairperson sends copies of the certificate to the dependants (if any) of the deceased person.¹²²⁶

The person whose disease was certified, or any other person or organisation acting on his or her behalf, or (in the case of a deceased person) the dependants of the deceased or any person or organisation acting on behalf of such dependants can lodge an application for review with the Reviewing Authority based on the certificate of findings and other relevant information.¹²²⁷

It is claimed that it can take up to three years for an application for certification to be completed.¹²²⁸ Where an occupational disease is certified, compensation can take months or even years to process,¹²²⁹ especially if the miner has returned to a rural area or another country and is far away from the necessary medical services.¹²³⁰ As such, workers who forward their medical reports to the Medical Bureau for Occupational Disease in Johannesburg, for certification and onward forwarding to the Compensation Commissioner for Occupational Diseases for payment, have had to wait years for a response and the eventual resolution of their claims. This process may lead to further difficulties for former workers if the administrative burden of the certification institutions were to rise due to more ex-mineworkers being identified and their claims processed. Persons whose diseases are being certified may not be able to appeal to the Reviewing Authority, due to the delay in finalising the certification.

4.2 Review of decisions by Medical Reviewing Authority for Occupational Diseases

The Medical Reviewing Authority for Occupational Diseases (hereinafter called Reviewing Authority) was created as an appeal body to review decisions of the Compensation Committee on the presence, nature and degree of a compensatable disease. A person who disagrees with a decision of the Certification Committee appeals to the Reviewing Authority.

¹²²⁶ Section 48(1) of ODMWA.

¹²²⁷ Section 50(1) of ODMWA.

¹²²⁸ Spoor R “Gold miners return to Lesotho to die” in *Mines and Communities (MAC)* of 30 August 2005. See also Fultz E and Pieris B *The Social Protection for Migrant Workers in South Africa* ILO/SAMAT, Harare, 1997, 12.

¹²²⁹ AngloGold Ashanti *Report to Society Case Studies 2007 – Occupational Safety and Health*, 3.

¹²³⁰ AIDS and Rights Alliance for Southern Africa *The mining sector, tuberculosis and migrant labour in Southern Africa: Policy and Programmatic Interventions for the Cross-Border Control of Tuberculosis between Lesotho and South Africa, Focusing on Miners, Ex-Miners and Their Families* July 2008, 15.

4.2.1 Accessibility of the Reviewing Authority

Reviews by the Reviewing Authority (as well as the activities of the Certification Committee) are undertaken in the premises of the Medical Bureau for Occupational Diseases in Johannesburg. The Reviewing Authority reviews decisions through the consideration of the documentary evidence available to the Authority.¹²³¹ As a result, a (former) worker who wishes to institute a claim for benefits needs to travel to Johannesburg.¹²³²

An application for review must be lodged with the Reviewing Authority within 90 days from the date on which notice of the finding was given by the Certification Committee. Failure to lodge an application within the required 90-day period will invalidate a person's right to apply for a review, as the Reviewing Authority is not empowered to condone the late submission of an application for review to the Authority.¹²³³ The limitation of the review application lodgement period to 90 days limits a person's ability to apply for a review of the Certification Committee's findings. This is especially the case regarding former workers and their dependants, who may be living in remote rural areas or outside of South Africa. They may therefore not be easy to reach, also since the application must be lodged with the Medical Bureau in Johannesburg.¹²³⁴

4.2.2 Scope of jurisdiction and powers of the Reviewing Authority

Any person affected by a finding of the Certification Committee, or a person/organisation acting on his/her behalf, or the dependants of a deceased person or a person/ organisation acting on behalf of the dependants can make an application to the Review Authority for review of the decisions of the Certification Committee.¹²³⁵ The Reviewing Authority can review any finding of the Certification Committee.¹²³⁶

¹²³¹ Findings of the Certification Committee are expressed in the certificate issued in the prescribed form setting out the findings and containing all information relevant to the case.

¹²³² See Rothgiesser S "Social insecurity" in *Mail & Guardian* (September 19 to 25 2008) 21. See also Spoor R "Gold miners return to Lesotho to die" in *Mines and Communities (MAC)* of 30 August 2005.

¹²³³ Section 50(1) of ODMWA.

¹²³⁴ See Roberts J *The Hidden Epidemic Amongst Former Miners: Silicosis, Tuberculosis and the Occupational Diseases in Mines and Works Act in the Eastern Cape, South Africa* Health Systems Trust/Department of Health (June 2009) 28.

¹²³⁵ Section 50(1) of ODMWA.

¹²³⁶ *Ibid.* Some of the reviewable decisions the Certification Committee include decisions on whether a person is suffering from a compensatable disease, or whether he or she was suffering from such a disease at the time of his or her death, and if so, the nature and degree of the disease - section 32 of ODMWA.

When reviewing a Certification Committee finding, the Chairperson of the Review Authority can request a person to submit to him or her any information available to such person which the Chairperson considers necessary for the effective performance of his or her functions. The Chairperson can also request a person to submit to him or her (or a nominee) any book or document in the possession or under the control of the person which contains or is suspected to contain any such information. The Chairperson can examine and make copies of or take extracts from any such book or document. The information may be requested in the form of a sworn declaration by the person furnishing such information.¹²³⁷

The Chairperson of the Reviewing Authority can also request any person to appear before him or her at a specified time and place.¹²³⁸ This is to ask the person questions or request him or her to produce a book or document. The Chairperson can also administer an oath or affirmation to a person and question him or her. The Chairperson can also direct a person to appear before the Authority at a specified time and place (of his or her own motion or at the request of a person whose case is being dealt with by the Authority by notice in writing) to be questioned or to undergo a medical examination.¹²³⁹

The Chairperson (or any medical practitioner that he or she authorises in writing) can enter upon any place where a person whose disease is being certified is (to be) medically examined in terms of the ODMWA, or where a person is being nursed or medically treated.¹²⁴⁰ The Chairperson can also attend a medical examination of such a person and (with his consent) medically examine him or her or request another medical practitioner to medically examine the person. The Chairperson can inspect any instrument or appliance used to examine or treat a person and any book or document which contains information relating to an examination or treatment. He or she can make copies of or extracts from the book or document.

When the Review Authority reviews a decision of the Certification Committee, it can declare that a person is suffering from a compensatable disease or was suffering from such a disease at the time of his death. Where it finds that a person is/was suffering from a compensatable disease, it can decide the nature and degree of the disease. In the case of a person who has

¹²³⁷ Section 42(1) read with section 6(1) and (2) of ODMWA.

¹²³⁸ Section 42(1) read with section 6(3) of ODMWA.

¹²³⁹ Section 42(3) of ODMWA.

¹²⁴⁰ Section 42(1) read with section 5(1) of ODMWA.

previously been found by the certification committee to be suffering from a compensatable disease, the degree of the disease can also be decided.¹²⁴¹

The Reviewing Authority can confirm the findings of the Certification Committee but cannot vary or rescind its findings. Where the Authority disagrees with a decision of the Certification Committee, the Chairperson of the Authority is required to request the Chairperson of the Certification Committee to submit the case for review to a joint meeting of the Certification Committee and the Reviewing Authority.¹²⁴² It is only in a review of a finding of the Certification Committee by a joint Reviewing Authority/Certification Committee meeting that the finding of the Certification Committee can be rescinded or substituted with the joint meeting's own finding.¹²⁴³ The process has been hailed as a beneficial one because:

“this means that before a final decision is made the case has been discussed in at least three meetings by, in all, ten doctors. Every one of these has been able to state his opinion and debate difficult medical points with his colleagues so as to contribute toward a fair decision.”¹²⁴⁴

However, the joint Certification Committee/Reviewing Authority meeting portrays a conflation of first- and second-level adjudication procedures and of the administrative and adjudicative roles. This brings into question both the existence and effectiveness of the Reviewing Authority as an independent body established to review the findings of the Certification Committee.

The Review Authority is not empowered to reconsider its findings, as the power to reconsider a finding is afforded only to the Certification Committee.¹²⁴⁵ In addition, the ODMWA does not regulate whether the decisions of the Reviewing Authority can be enforced and (if so) how they can be enforced. This implies that where the Compensation Commissioner fails to implement a decision of the Reviewing Authority, an aggrieved person may have to enforce his or her rights in a court with jurisdiction.

¹²⁴¹ Section 50 read with section 46 of ODMWA.

¹²⁴² Section 50(2) of ODMWA.

¹²⁴³ Section 52(1) ODMWA.

¹²⁴⁴ Wiles FJ “Compensation for Occupational Diseases” *SAMJ* vol. 71 (April 1987) 416 at 417.

¹²⁴⁵ Section 47 of ODMWA.

4.2.3 Fairness of Reviewing Authority adjudication procedures

Generally, the Reviewing Authority considers the findings and all other relevant information issued in the certificate of findings by the Certification Committee.¹²⁴⁶ However, if a person requests to appear in person before the Authority, he or she is permitted to appear. The person may also be accompanied by any person of his choice to address the Authority on his/her behalf such as a doctor, a lawyer or a trade union official.¹²⁴⁷

In addition, when reviewing a finding, the Chairperson can request a person to submit to him or her the information necessary for the effective review of a finding. A person can also be requested to appear before the Chairperson to answer questions that are put to him or her by the chairperson or another member of the Reviewing Authority, or in order to undergo a medical examination.¹²⁴⁸ The Chairperson can enter a place where a person who works or has worked or intends to work at a controlled mine or a controlled works is medically examined or to be examined.¹²⁴⁹ He can also enter where a person who works or has worked at a controlled mine or a controlled works is being nursed or medically treated. He or she can also be present in the medical examination of a person and can medically examine him or her (with his consent) or have him or her medically examined by any other medical practitioner. The Chairperson can inspect an instrument or appliance used in the medical examination or treatment of a person. He or she can demand inspection of a book or document which contains information relating to a medical examination or treatment, and can make copies of or extracts from the book or document.

After the review, the Chairperson of the Authority or an authorised person issues a certificate which sets out the finding(s) and contains all relevant information. The Chairperson or a representative sends copies of the certificate to the MBOD; to the Compensation Commissioner; to the owner of the mine or works where the person who is the subject of the finding works (if the person is still employed at the mine or works); to the person concerned or (if the person concerned is deceased) to the dependants (if any) of the deceased. If the

¹²⁴⁶ According to Mr Simon Masilela of the MBOD in a telephone interview on 25 May 2011.

¹²⁴⁷ Wiles FJ “Compensation for Occupational Diseases” *SAMJ* vol. 71 (April 1987) 416 at 417.

¹²⁴⁸ Section 42 read with section 6 of ODMWA. . See generally, the powers and functions of the Reviewing Authority discussed in Chapter Six para 4.2.2 of (Scope of jurisdiction and powers of the Reviewing Authority) *supra*.

¹²⁴⁹ Section 42(1) read with s 5(1) of ODMWA.

finding is that of tuberculosis, copies are sent to the local authority of the area in which the person concerned resides.¹²⁵⁰

4.2.4 Expertise, independence and impartiality of the Reviewing Authority

The institutional framework and composition of the Reviewing Authority point out that the Authority is not independent of the Department of Health (the Medical Bureau for Occupational Diseases and the Compensation Commissioner for Occupational Diseases are within the Department of Health). This is revealed by the formalities for the appointment of members of the Authority; their discipline and termination of service; and the operational arrangements of the Authority (funding;¹²⁵¹ human resource and administrative support;¹²⁵² managerial framework;¹²⁵³ governance, oversight and supervision;¹²⁵⁴ and (financial) accountability and reporting).¹²⁵⁵

The Reviewing Authority is established by the Minister of Health to review decisions of the Certification Committee.¹²⁵⁶ Members (and alternate members) of the Reviewing Authority are appointed by the Minister (after consideration of representations (if any) by owners of controlled mines or controlled works (or by any organisation acting on behalf of owners) and workers of controlled mines or controlled works (or by any organisation acting on behalf of

¹²⁵⁰ Section 52(3) read with s 48 of ODMWA.

¹²⁵¹ There is no separate funding arrangement for the reviewing authority as administrative support is provided by the MBOD - According to Mr Simon Masilela of the MBOD (per telephone interview of 9th May 2011). In addition, members (alternate members) of the reviewing authority who are not in the full-time service of the State are remunerated by the Minister of Health - section 41(1) of ODMWA.

¹²⁵² The Reviewing Authority does not have a distinct human resource and organisational structure since the MBOD provides administrative support for the Reviewing Authority - confirmation by Mr Simon Masilela of the MBOD (per telephone interview of 9th May 2011).

¹²⁵³ The Minister appoints a member of the Reviewing Authority as its Chairperson and designates another member to act as chairperson when there is no chairperson or the chairperson is absent or is for any other reason unable to perform his or her functions - section 40(3) ODMWA.

¹²⁵⁴ The Minister exercises governance, oversight and supervision over the Review Authority, as the Director of the MBOD is required to furnish the Minister with a report on the activities of the Review Authority (also the MBOD, and the Certification Committee) - section 8 of ODMWA.

¹²⁵⁵ Human resource and administrative support for the Reviewing Authority is provided by the Medical Bureau for Occupational Diseases. As a result, the Bureau undertakes financial reporting for the expenditure of the Reviewing Authority. The Director of the MBOD is required to furnish the Minister of Health with a report on the activities of the Review Authority (together with the MBOD and the Certification Committee) as soon as possible after the close of each financial year - section 8 of ODMWA. The Compensation Commissioner for Occupational Diseases is also required to furnish the Minister with a report on his activities with all the necessary information in connection with the compensation fund (as soon as possible after the close of each financial year) - section 77(2) of ODMWA.

¹²⁵⁶ Section 40 of ODMWA.

such workers).¹²⁵⁷ The Review Authority consists of three or four members who are all medical practitioners.¹²⁵⁸ In order to maintain institutional separation between the Reviewing Authority, the Certification Committee and the Medical Bureau for Occupational Diseases, a member (or alternate member) of the Certification Committee or a medical practitioner in the employ of the Medical Bureau for Occupational Diseases cannot be appointed as a member of the Reviewing Authority.¹²⁵⁹

A member (alternate member) is appointed for five years. A member (alternate member) who is not in the full-time service of the State is appointed on remuneration and other conditions of service as the Minister determines in consultation with the Minister of Finance.¹²⁶⁰ This means employees of the public service can be appointed as members of the Reviewing Authority. This raises a perception of an absence of impartiality on the part of such members.

Members of the Review Authority are also subject to the discipline of the Minister, who determines their conditions of service and can remove them from service. The Minister can remove a member (alternate member) by notice, in writing, if the Minister is of the opinion that the member (alternate member) is not competent to serve.¹²⁶¹ A member's (alternate member's) service can also be terminated if he or she becomes insolvent; becomes of unsound mind; is convicted of an offence and sentenced to imprisonment without the option of a fine; or absents himself/ herself from five consecutive meetings without leave of the Reviewing Authority.¹²⁶²

The formalities for the appointment of members; their discipline and termination of service; and the Authority's operational arrangements point to unsuitability to act as an appeal forum due to the absence of institutional separation with the Department of Health. Its lack of powers to vary or rescind a finding of the Certification Committee and to substitute its own also makes it an improper higher level internal review forum.

¹²⁵⁷ Section 40(2)(b) of ODMWA.

¹²⁵⁸ Section 40(2)(a) of ODMWA.

¹²⁵⁹ Section 40(4) of ODMWA.

¹²⁶⁰ Section 41(1) of ODMWA.

¹²⁶¹ Section 41(3) of ODMWA.

¹²⁶² Section 41(2) of ODMWA.

5. UIA DISPUTE RESOLUTION FRAMEWORK

The Unemployment Insurance Act established a system of internal reviews and “external appeals” that are sequential and complementary. It thus created Regional Appeals Committees and a National Appeals Committee of the Board of the Unemployment Insurance Fund. Therefore, the Regional Appeals Committees and the National Appeals Committee of the UIF Board provide an avenue for appeals against decisions of the Regional Appeals Committees relating to objections against the decisions of the Commissioner or claims officers.

5.1 Review of decisions by Regional Appeals Committees of the UIF Board

The Act provides that a person who is dissatisfied with a decision of the Unemployment Insurance Commissioner to suspend his or her right to benefits or of a claims officer in relation to the payment or non-payment of benefits may appeal to a Regional Appeals Committee of the UIF Board.¹²⁶³

Regional Appeals Committees are situated at Labour Centres of the Department of Labour throughout the country. An appeal to a Regional Appeals Committee is made by submitting a *Notice of Appeal Form* (Form UI 13) either by hand or by registered post to the Regional Appeals Committee at the respective Labour Centres of the Department of Labour.¹²⁶⁴

Decisions of a Regional Appeals Committee are determined by a majority vote of its members. After considering an appeal, the committee can confirm or vary the decision of the Unemployment Insurance Fund, or rescind it and substitute the decision with its own.¹²⁶⁵ If the person is still not satisfied with the decision of a Regional Appeals Committee, he or she may appeal to the National Appeals Committee.¹²⁶⁶

¹²⁶³ Section 36A of the Unemployment Insurance Act. See also Regulation 8 of the Unemployment Insurance Regulations (published in GN 400 in GG 23283 of 28 March 2002).

¹²⁶⁴ Regulation 8(1) of the Regulations to the Unemployment Insurance Act (GN 400 in GG 23283 of 28 March 2002).

¹²⁶⁵ Section 37(4) of the Unemployment Insurance Act.

¹²⁶⁶ Section 37(2) of the Unemployment Insurance Act.

5.2 Appeals to the National Appeals Committee of the UIF Board

The National Appeals Committee of the UIF Board is the last instance of appeal in matters falling under the Unemployment Insurance Act. The Act states that decisions by the Committee are final, subject to judicial review. This implies that the institutional status, independence and impartiality as well as the procedures of such a forum must realise the right of access to justice (and related) rights of users. The absence of these would require enquiry into the nature and efficiency of the forum by the High Court in judicial review proceedings. The nature and efficiency of the National Appeals Committee in achieving access to justice and other rights of users is, therefore, paramount.

5.2.1 Accessibility of the National Appeals Committee

The National Appeals Committee is located at the head office of the UIF in 94 Church Street, Pretoria. An appeal is made to the Committee by submitting the Notice of Appeal Form (UI 13) to the head office of the UIF. The appeal can be submitted by hand or by registered post. An appeal must be lodged within 90 days of the decision.¹²⁶⁷ However, the Appeals Committee may at any time permit a person to refer a dispute after the time limit where good cause is shown.¹²⁶⁸

5.2.2 Scope of jurisdiction and powers of the National Appeals Committee

Any person can bring a an appeal against a decision of the UIF Commissioner to suspend his/her right to benefits; or against a decision of a claims officer relating to the payment or non-payment of benefits.¹²⁶⁹ Any person who is entitled to benefits in terms of the Unemployment Insurance Act, and who is aggrieved by a decision of the Regional Appeals Committee, can appeal to the National Appeals Committee of the Board.¹²⁷⁰

The national appeals committee cannot decide disputes relating to the refusal by the UIF to pay benefits due to the late submission of a claim. The Committee's jurisdiction is limited to

¹²⁶⁷ Regulation 8(2) of the Regulations to the Unemployment Insurance Act of 2002.

¹²⁶⁸ Regulation 9(3) of the Regulations to the Unemployment Insurance Act of 2002.

¹²⁶⁹ Section 37(1) of the UIA.

¹²⁷⁰ Section 37(2) of the UIA.

decisions of the Commissioner to suspend a person's right to benefits, or of a claims officer relating to the payment or non-payment of benefits.¹²⁷¹

After considering an appeal, the National Appeals Committee can confirm or vary the decision, or rescind it and substitute the decision of a Regional Appeals Committee.¹²⁷²

The UIA does not regulate the ability of the National Appeals Committee (and Regional Appeals Committees) to enforce their decisions. However, an inference could be drawn that since they are committees of the UIF Board, their decisions are the decisions of the Board and must be enforced by the Fund.

5.2.3 Fairness of National Appeals Committee procedures

The National Appeals Committee may require the appellant to submit any further information that it considers necessary to deal with the appeal. This implies that an appeal to the National Appeal Committee is decided through the consideration of the documentary evidence submitted with no indication of personal appearance before the Committee. Therefore, representation by a lawyer or another representative is not required. The decisions of the National Appeals Committee are determined by majority vote.¹²⁷³ The UIA does not empower the Committee to reconsider an original decision. Also, no timeframes are provided for dispute resolution by the Committee. However, the Committee notifies the appellant, in writing, within 30 days of its decision.¹²⁷⁴

5.2.4 Independence and impartiality of the National Appeals Committee

There is a (perceived) lack of independence and impartiality in the resolution of disputes by the National Appeals Committee. This results from the appointment and conditions of service of its members; their discipline and termination; and the Committee's dependence on the UIF for operational support.

¹²⁷¹ Therefore, the power to condone the late submission of a claim for benefits is limited to the UIF Commissioner - see sections 17(2), 22 (2), 25(2), 28(2) and 31(2)) of the UIA.

¹²⁷² Section 37(4)(b) of the UIA.

¹²⁷³ Section 37(4)(a) of the UIA.

¹²⁷⁴ Regulation 8(4) of the Regulations to the UIA of 2002.

The Board of the Unemployment Insurance Fund is established by the Minister of Labour to undertake various duties specified in the UIA.¹²⁷⁵ Board members also perform any other functions which may be requested by the Minister for the purpose of giving effect to the UIA. It is required that the UIF Board should prepare and adopt a constitution (subject to approval by the Minister) as soon as possible after the appointment of its members.¹²⁷⁶ The constitution of the Board should provide for the establishment and functions of committees of the Board, including an appeals committee.¹²⁷⁷ As a result, the National Appeals Committee is one of the committees of the UIF Board.¹²⁷⁸

The Board consists of 14 members (including a chairperson and the UIF Commissioner).¹²⁷⁹ Organised labour, organised business, community and development interest organisations and the State are each represented by three Board members.¹²⁸⁰ Board members are appointed for a period of three years and may be reappointed for a further period of three years.¹²⁸¹ Members of the UIF Board could be considered to be office bearers, as they are nominated or appointed to represent various interest groups.¹²⁸² The UIA states that a member of the UIF Board, or its committees who is not in the full-time employment of the State, is paid remuneration and allowances determined by the Minister in terms of National Treasury instructions.¹²⁸³ This implies that full-time employees of the State can be appointed to the Board of the UIF (and the National Appeals Committee). They could thus be perceived to be dependent on the State and unlikely to be impartial.

The service of members of the Appeals Committees (as members of the UIF Board) can be terminated by the Minister of Labour; or through their resignation.¹²⁸⁴ In addition, NEDLAC can request the termination of its nominated members for serious misconduct; for permanent incapacity; for being absent from three meetings of the Board without prior permission of the

¹²⁷⁵ Sections 47 and 48(1) of the UIA.

¹²⁷⁶ Section 50(1) of the UIA.

¹²⁷⁷ Section 50(2)(a)(i) of the UIA.

¹²⁷⁸ See Unemployment Insurance Fund *Annual Report 2009/10*, 11-12.

¹²⁷⁹ Section 49(1) of the UIA.

¹²⁸⁰ Section 49(2) of the UIA. The Board members that represent organised labour, organised business and community and development interest organisations are nominated by NEDLAC. The members who represent the interests of the State are nominated by the Minister of Labour.

¹²⁸¹ Section 49(3)(a) of the UIA.

¹²⁸² Section 49 of the UIA.

¹²⁸³ Section 52 of the UIA.

¹²⁸⁴ Section 49 of the UIA.

Board unless just cause is shown by the member; or for engaging in any activity that might undermine the functions of the Board.

The perception of independence and impartiality of the National Appeals Committee in the resolution of disputes between the UIF and an applicant or beneficiary is further undermined by its funding;¹²⁸⁵ human resources and administrative support;¹²⁸⁶ management;¹²⁸⁷ governance, oversight and supervision;¹²⁸⁸ and accountability and reporting arrangements.¹²⁸⁹ These arrangements point out its dependence on the UIF and Department of Labour. Therefore, it can best be described as a higher level of internal review of UIF decisions.

6. ROAD ACCIDENT FUND ACT DISPUTE RESOLUTION FRAMEWORK

Two kinds of disputes that can arise under the Road Accident Fund Act are disputes relating to assessments of motor vehicle accident injuries and disputes relating to claims for the payment of compensation for injuries or death resulting from a motor accident.

6.1 Review of decisions by the Road Accident Fund

The Act does not establish any internal dispute resolution procedures for disputes relating to claims for the payment of compensation for injuries or death. It states that in such cases, “an action to enforce a claim against the Road Accident Fund or an agent of the Fund should be brought in any competent court within whose area of jurisdiction the occurrence (accident)

¹²⁸⁵ The National Appeals Committee is not provided direct funding by the National Treasury but by the Unemployment Insurance Fund. The Unemployment Insurance Act states that the UIF Commissioner is responsible for administering the affairs of the Board - section 51(1) of the UIA. It further states that in order to enable the Board to perform its functions effectively the Director-General must provide the Board with the necessary financial resources - section 51(2) of the UIA.

¹²⁸⁶ There is not a distinct human resource and administrative framework for the National Appeals Committee. The Director-General is required to provide the Board with the necessary administrative resources and, subject to the laws governing the Public Service, with the necessary personnel - section 51(2) of the UIA.

¹²⁸⁷ The Board is headed by a chairperson appointed by the Minister - section 49 of the UIA.

¹²⁸⁸ Governance, oversight and supervision is undertaken by the Minister of Labour as the Board exercises its powers and performs its duties subject to any directions issued by the Minister; and any guidelines determined by the Director-General - section 48(2) of the UIA.

¹²⁸⁹ The Commissioner is responsible for administering the affairs of the Board, while the Director-General provides the Board with the necessary financial resources. As a result, the UIF Board does not undertake any financial reporting. Financial reporting is undertaken by Director-General as the accounting officer of the UIF - section 11 of the UIA. The Board is accountable to the Director-General and Minister of Labour, since the powers and duties of the Board are exercised and performed subject to any directions issued by the Minister and any guidelines determined by the Director-General - section 48(2) of the UIA. Furthermore, the UIF Board prepares and adopts a constitution subject to the approval of the Minister - section 50(1) of the UIA.

which caused the injury or death took place”.¹²⁹⁰ Such cases are brought to the High Court.¹²⁹¹

Procedures for the resolution of disputes relating to assessments of motor vehicle accident injuries are regulated in the Act. There is no provision for the reconsideration of decisions by the Road Accident Fund. Disputes relating to assessments of motor vehicle accident injuries (disputes where the Road Accident Fund or its agent objects to a serious injury report by a medical practitioner; or where an injured person objects to the Road Accident Fund’s or its agent’s rejection of a serious injury assessment report by a medical practitioner) are resolved by an Appeal Tribunal appointed by the Registrar of the Health Professions Council of South Africa (HPCSA) (the Road Accident Fund (RAF) Tribunal).¹²⁹² A person who is dissatisfied with the decision of the Tribunal can appeal to the High Court for a review of the Tribunal’s decision.

6.2 Adjudication of disputes by the Road Accident Fund Appeal Tribunal

6.2.1 Accessibility of the Road Accident Fund Appeal Tribunal

Appeals that are to be determined solely on documentary evidence (appeals without a hearing) are conducted at the offices of the HPCSA in Pretoria. An exception is where the Tribunal requires the injured party to submit to further medical assessment.¹²⁹³ Where an appeal is to be determined through a hearing, the venue of the Appeal Tribunal panel hearing is determined by the Chairperson of the Panel. Hearings can be held in any location in South Africa, depending on logistical needs.¹²⁹⁴ Where the Appeal Tribunal decides that a hearing is necessary (for the purpose of considering legal arguments), the hearing is convened at a place determined by the appointed presiding advocate or attorney.¹²⁹⁵ Where an applicant is required to attend a hearing, the Appeal Tribunal provides transport and accommodation (where necessary)(the Road Accident Fund provides these on behalf of the Appeal

¹²⁹⁰ Section 15(2) of the Road Accident Fund Act.

¹²⁹¹ See e.g. *Road Accident Fund v Mdeyide (Minister of Transport, Intervening)* [2007] ZACC 7; 2008 (1) SA 535 (CC); 2007 (7) BCLR 805 (CC).

¹²⁹² Regulation 3(4) of the Regulations to the Road Accident Fund Act (GN 769 in GG No 31249 of 21 July 2008)(hereinafter called Regulations to the Road Accident Fund Act of 2008).

¹²⁹³ Regulation 3(11) of the Regulations to the Road Accident Fund Act of 2008.

¹²⁹⁴ According to Mr Matome Seisa of the HPCSA Legal Department (per telephone interview of 27 May 2011).

¹²⁹⁵ Regulation 3(10)(e) of the Regulations to the Road Accident Fund Act of 2008.

Tribunal).¹²⁹⁶ However, transport and accommodation are not provided where the applicant is the RAF).

The RAF (when it rejects an assessment by a medical practitioner) or a claimant (in case of the rejection of the assessment by the RAF) notifies the Registrar that the assessment or rejection is disputed by lodging an *Accident Fund Objection Form*. The notification sets out the grounds upon which the rejection or assessment is disputed. It also includes submissions, medical reports and opinions that the applicant relies on. If the RAF is the disputant, it provides all available contact details of the other party to the dispute.¹²⁹⁷

A claimant lodges a dispute within 90 days of being notified of the outcome of the “not serious” assessment by the RAF, or 90 days of being notified of the rejection of the “Serious Injury Assessment Report” by the RAF. The RAF (or its agent) also lodges an application within 90 days where it disputes the assessment performed by a medical practitioner.¹²⁹⁸ The Appeal Tribunal can condone late notification where an application for condonation is sent to the Registrar as well as to the other party to the dispute. The Appeal Tribunal does not have the power to condone claim applications that is rejected by the Fund because it was not submitted within the prescribed time limits.¹²⁹⁹

6.2.2 Scope of jurisdiction of the Road Accident Fund Appeal Tribunal

A person who is injured in a motor vehicle accident and whose injury has been assessed as being “not serious” can appeal against such an assessment to the Tribunal. The Road Accident Fund can also apply to the Tribunal where it objects to a decision of a medical practitioner where a motor vehicle accident is assessed as “serious” (Serious Injury Assessment Report).¹³⁰⁰

The Appeal Tribunal has powers to verify the nature and extent of a person’s injury.¹³⁰¹ These powers include the power to direct an injured person to submit to a further assessment

¹²⁹⁶ According to Mr Matome Seisa of the HPCSA Legal Department (per telephone interview of 27 May 2011).

¹²⁹⁷ Regulation 3(4) of the Regulations to the Road Accident Fund Act of 2008.

¹²⁹⁸ Regulation 3(4)(a) of the Regulations to the Road Accident Fund Act of 2008.

¹²⁹⁹ See section 23 of the Road Accident Fund Act and Regulation 3(5) of the Regulations to the Road Accident Fund Act of 2008.

¹³⁰⁰ Regulation 3(4) of the Regulations to the Road Accident Fund Act of 2008.

¹³⁰¹ Regulation 3(11) of the Regulations to the Road Accident Fund Act of 2008.

by a medical practitioner that it designates to ascertain whether an injury is serious (at the cost of the Fund or its agent); to request a person (with five day's written notice) to appear before it at a specified place and time so as to examine his or her injury and assess whether the injury is serious; to direct that further medical reports should be obtained by one or more of the parties and be placed before it; to direct that relevant pre- and post-accident medical, health and treatment records pertaining to the injured person be obtained and made available to it; to direct that further submissions be made by one or more of the parties and stipulate the timeframe within which such further submissions must be placed before it; to refuse to decide the dispute until a party has complied with any earlier direction; to determine whether, in its majority view, the injury under assessment is serious; to confirm the assessment of the medical practitioner or substitute it with its own assessment, if the majority of the members of the Tribunal consider it appropriate to substitute; and to confirm the rejection of the serious injury reassessment report by the Fund (or an agent) or accept the report.

The Appeal Tribunal's findings are final and binding on the Road Accident Fund and therefore must be implemented.¹³⁰²

6.2.3 Fairness of Road Accident Fund Appeal Tribunal adjudication procedures

The appeal is undertaken through a review of the findings of a medical practitioner in the Serious Injury Assessment Report.¹³⁰³ Where the Appeal Tribunal decides that a hearing is necessary (for the purpose of considering legal arguments), the presiding officer notifies the Registrar of this in writing, stating the reasons.¹³⁰⁴ The Registrar requests the Chairperson of the relevant bar council or law society to appoint an advocate or attorney to consider the reasons of the Appeal Tribunal presiding officer and make a recommendation in writing whether a hearing is required. The Tribunal considers the advocate's/attorney's recommendations and determines in writing whether the nature of the dispute requires a hearing for the purpose of considering legal arguments.¹³⁰⁵

¹³⁰² Regulation 3(13) of the Regulations to the Road Accident Fund Act of 2008.

¹³⁰³ As confirmed by Mr Matome Seisa of the HPCSA Legal Department (per telephone interview of 27 May 2011).

¹³⁰⁴ Regulation 3(10)(a) and (b) of the Regulations to the Road Accident Fund Act of 2008.

¹³⁰⁵ Regulation 3(10)(c) and (d) of the Regulations to the Road Accident Fund Act of 2008.

If a hearing is necessary, the Registrar informs the parties to the dispute that a hearing will be held at a place and time determined by the appointed advocate or attorney; the parties' right to legal representation at the hearing (at their own cost); and of any additional procedures adopted by the advocate or attorney appointed to preside at the hearing. This indicates that personal appearance is permitted where the Tribunal determines that a hearing for the purpose of considering legal arguments is necessary. Where a hearing is held, the advocate/attorney appointed presides over the hearing.¹³⁰⁶

If the Tribunal decides that the nature of a dispute does not require a hearing (or where the legal issues have been determined), the Tribunal considers the relevant information (such as the dispute resolution form and the submissions, medical reports and opinions) relied upon by the parties. After consideration of the relevant information, the Tribunal determines through a vote whether the majority of the panel members view the injury concerned as serious.¹³⁰⁷ The language of Appeal Tribunal hearings is English. However, interpreters are provided for non-English speakers.¹³⁰⁸

There is no guarantee that disputes must be resolved quickly, as there are no timeframes for the finalisation of an appeal. Finalisation depends on whether there is a need for further assessments.¹³⁰⁹ However, where an advocate or attorney is required to consider the need for a hearing on legal issues, he/she is required to make a recommendation within 10 days for consideration by the Appeal Tribunal.¹³¹⁰

After consideration of an appeal, the Tribunal notifies the Registrar of its findings within 90 days after the referral of the dispute, or after any additional period that the Registrar authorises in writing on application by the Appeal Tribunal.¹³¹¹ The Registrar then informs the parties of the findings of the Appeal Tribunal.¹³¹²

¹³⁰⁶ Regulation 3(10)(e) of the Regulations to the Road Accident Fund Act of 2008.

¹³⁰⁷ Regulation 3(10)(h) and (11) of the Regulations to the Road Accident Fund Act of 2008. The Tribunal can then confirm the assessment of the medical practitioner or substitute it with its own assessment if the majority of the members of the Appeal Tribunal consider it appropriate to substitute. It can also confirm the rejection of the serious injury reassessment report by the Fund (or an agent) or accept the report.

¹³⁰⁸ According to Mr Matome Seisa of the HPCSA Legal Department (per telephone interview of 27 May 2011).

¹³⁰⁹ According to Mr Matome Seisa of the HPCSA Legal Department (per telephone interview of 27 May 2011).

¹³¹⁰ Regulation 3(10)(f) of the Regulations to the Road Accident Fund Act of 2008.

¹³¹¹ Regulation 3(13) of the Regulations to the Road Accident Fund Act of 2008.

¹³¹² Regulation 3(10)(f) of the Regulations to the Road Accident Fund Act of 2008.

6.2.4 Expertise, independence and impartiality of the Road Accident Fund Appeal Tribunal

The Road Accident Fund Appeal Tribunal possesses the necessary expertise to resolve disputes. It can also be considered independent of the Road Accident Fund and impartial due to the procedures for the appointment of its members, their discipline and termination and its organisational arrangements (funding;¹³¹³ human resource and administrative support;¹³¹⁴ managerial framework;¹³¹⁵ governance, oversight and supervision;¹³¹⁶ and accountability and reporting¹³¹⁷).

The Registrar of the HPCSA appoints the Tribunal. The Tribunal consists of three independent medical practitioners with expertise in the appropriate areas of medicine. The Registrar designates one of them as the presiding officer of the appeal.¹³¹⁸ The Registrar can also appoint an additional independent health practitioner with expertise in any appropriate health profession to assist the Tribunal in an advisory capacity.¹³¹⁹

When the Registrar appoints the Tribunal members, he or she informs the parties of the medical practitioners appointed to the panel (in writing).¹³²⁰ Within 10 days of being

¹³¹³ Funding for the Appeal Tribunal is provided by the Road Accident Fund, as the Regulations to the Road Accident Fund Act state that a dispute is referred for consideration by an appeal tribunal paid for by the Fund - Regulation 3(8)(a) of the Regulations to the Road Accident Fund Act of 2008.

¹³¹⁴ The Appeal Tribunal does not have a distinct human resource and administrative structure, as it consists of a roll of 10 medical practitioners, from which a panel of 3-4 members are constituted for an appeal - Regulation 3(8)(b) of the Regulations to the Road Accident Fund Act of 2008. The HPCSA (Legal department) provides administrative and support staff for the coordination of the Appeal Tribunal's functions on behalf of the Road Accident Fund. The Road Accident Fund compensates the HPCSA for the cost of providing human resource and administrative support to the Appeal Tribunal - according to Mr Matome Seisa of the HPCSA Legal Department (per telephone interview of 27 May 2011).

¹³¹⁵ An Appeal Tribunal is headed by one of the medical practitioners designated as the presiding officer - Regulation 3(8)(b) of the Regulations to the Road Accident Fund Act of 2008.

¹³¹⁶ Governance, oversight and supervision over the Appeal Tribunal is undertaken by the HPCSA General Manager on delegation from the Registrar of the activities of the Appeal Tribunal is by the HPCSA General Manager on delegation from the Registrar - according to Mr Matome Seisa of the HPCSA Legal Department (per telephone interview of 27 May 2011).

¹³¹⁷ The fees and reasonable expenses of members of the Appeal tribunal are paid by the Road Accident Fund. In addition, Fund compensates the HPCSA for the cost of providing human resource and administrative support to the Appeal Tribunal. As a result, financial accountability for the expenditure of the Tribunal is by the RAF. In terms of reporting, members of the Appeal Tribunal report to the HPCSA General Manager as a delegate of the Registrar - according to Mr Matome Seisa of the HPCSA Legal Department (per telephone interview of 27 May 2011).

¹³¹⁸ Regulation 3(8)(b) of the Regulations to the Road Accident Fund Act of 2008. The HPCSA is a statutory body established in terms of the Health Professions Act 56 of 1974 to provide for control over the education, training and registration for and practising of health professionals.

¹³¹⁹ Regulation 3(8)(c) of the Regulations to the Road Accident Fund Act of 2008.

¹³²⁰ Regulation 3(9)(a) of the Regulations to the Road Accident Fund Act of 2008.

informed, a party that is unhappy with any of the appointments can send a written motivation to the Registrar and to the other party to the dispute. The motivation must set out the grounds for his or her or its objections to the appointment(s). The other party to the dispute may respond within 10 days by delivering a response to the Registrar and the aggrieved party. When the Registrar receives the written motivation and the response to the motivation (if any), he can either confirm the appointment(s) or substitute a member of the Tribunal. Thereafter, the Registrar's decision is final.¹³²¹

The Registrar creates a roll of 10 medical practitioners from which members making up an Appeal Tribunal hearing panel are appointed. A medical practitioner is nominated as a panellist for one or two years. Appeal Tribunal panellists are not employees of the RAF or of the HPCSA. They could be considered as office bearers.¹³²² However, the fees and reasonable expenses of members of the Appeal tribunal are paid by the Road Accident Fund.¹³²³

As independent medical practitioners, the Appeal Tribunal members are not subject to the discipline of the RAF. However, as medical practitioners, undertaking professional duties, they are subject to the discipline of the Professional Conduct Committee of the HPCSA.¹³²⁴ The Registrar can remove a panellist from the list of panellists (and possibly from the roll of medical practitioners) upon the recommendation of the Professional Conduct Committee of the Council.¹³²⁵

The procedures for the appointment of its members, their discipline and termination and its organisational arrangements enable the Appeal Tribunal to be independent of the Road Accident Fund. Therefore, it is (perceived as) impartial in the resolution of disputes against the Fund. It can also resolve disputes effectively due to its procedures, powers and the expertise of its members.

¹³²¹ Regulation 3(8)(b) of the Regulations to the Road Accident Fund Act of 2008.

¹³²² According to Mr Matome Seisa of the HPCSA Legal Department (per telephone interview of 27 May 2011).

¹³²³ Regulation 3(14)(b) of the Regulations to the Road Accident Fund Act of 2008.

¹³²⁴ Discipline of Tribunal members is by the Professional Conduct Committee of the HPCSA in terms of section 15(5)(f) of the Health Professions Act

¹³²⁵ According to Mr Matome Seisa of the HPCSA Legal Department (per telephone interview of 27 May 2011).

7. PENSION FUNDS ACT DISPUTE RESOLUTION SYSTEM

The Pension Funds Act created a dispute resolution system of reconsideration (reviews) and appeals. Reconsideration of a decision is undertaken by a pension fund which took an initial decision; while appeals for decisions of pension funds are decided by the Office of the Pension Funds Adjudicator.

7.1 Reconsideration of decisions by a retirement fund

The Pension Funds Act requires pension funds to reconsider decisions when a member of the fund lodges an application for reconsideration. The Act states that, notwithstanding the rules of any fund, a complainant may lodge a written complaint with a fund for consideration by the board of the fund.¹³²⁶ When a complaint is lodged, the fund or the employer who participates in the fund is required to properly consider it and reply in writing within 30 days after receipt of the complaint.¹³²⁷

If a complainant is not satisfied with the reply of the fund or the employer, or if the fund or the employer fails to reply within 30 days after the receipt of the complaint, the complainant may lodge the complaint with the Office of the Pension Funds Adjudicator.¹³²⁸

7.2 Review of decisions by Office of the Pension Funds Adjudicator

The Office of the Pension Funds Adjudicator is an autonomous statutory body established, in terms of the Pension Funds Act, to resolve disputes between members and private retirement (pension) funds “in a procedurally fair, economical and expeditious manner”.¹³²⁹ Its organisational arrangements and procedures are thus designed to enable it achieve its objective.

¹³²⁶ Section 30A(1) of the Pension Funds Act 24 of 1956.

¹³²⁷ Section 30A(2) of the Pension Funds Act.

¹³²⁸ Section 30A(3) of the Pension Funds Act.

¹³²⁹ See sections 30B(1) and 30D of the Pension Funds Act.

7.2.1 Accessibility of the Office of the Pension Funds Adjudicator

The Pension Funds Adjudicator operates from a single national office in Johannesburg. All complaints have to be sent to this office. A complaint to the Adjudicator is submitted in writing, as the Adjudicator does not accept complaints by telephone or in person.¹³³⁰ Furthermore, he or she does not enter into discussions with a person who has not lodged a complaint in writing. The Pension Funds Adjudicator does not investigate a complaint if the act or omission which is the basis of the complaint occurred or came to the complainant's attention more than three years before the date of the application.¹³³¹ If the complainant was unaware that the act or omission to which the complaint relates had occurred, the prescription period of three years only commences on the date on which the complainant became aware or reasonably ought to have become aware of the act or omission.¹³³²

Where good cause is shown for delay in application, the Adjudicator can extend the claims lodgement period, either before or after the expiry of any prescribed period of his or her own motion.¹³³³ Some of the relevant factors considered in the condonation of non-compliance with any prescribed time limit include the degree of lateness, explanation of the lateness, prospects of success, importance of the case and the existence of good faith endeavours to resolve the dispute.¹³³⁴ Where no order is made by the Adjudicator extending the time period or condoning non-compliance and no request is made for such extension or condonation, the Adjudicator is precluded from dealing with a complaint.¹³³⁵

7.2.2 Scope of jurisdiction and powers of the Office of the Pension Funds Adjudicator

The Pension Funds Adjudicator has a wide personal scope of jurisdiction. The Adjudicator resolves a "complaint" submitted by a "complainant". A 'complainant' means any person who is, or who claims to be a member or former member of a fund; a beneficiary or former

¹³³⁰ Sections 30A(3) and 30I of the Pension Funds Act.

¹³³¹ Section 30I(1) of the Pension Funds Act. See also *Delbridge and Others v Liberty Group Ltd and Others* [2011] 1 BPLR 19 (PFA) and *Beach v Pick 'n Pay Stores Ltd and Another* [2002] 6 BPLR 3531 (PFA).

¹³³² Section 30I(2) of the Pension Funds Act. See also *Baloyi v Dichawu National Provident Fund and Others* [2007] 3 BPLR 281 (PFA) and *Beldon v Industex Group Pension Fund* [2004] 10 BPLR 6148 (PFA).

¹³³³ Section 30I(3) of the Pension Funds Act. See also *Baloyi v Dichawu National Provident Fund and Others* [2007] 3 BPLR 281 (PFA).

¹³³⁴ See *Anderson and Others v The HA Swanepoel Group Pension Fund and Another* [2003] 10 BPLR 5179 (PFA); *Anderson v Premier Retirement Fund* [2000] 10 BPLR 1069 (PFA) and *Beach v Pick 'n Pay Stores Ltd and Another* [2002] 6 BPLR 3531 (PFA).

¹³³⁵ See *Tongaat-Hulett Group Ltd v Murphy NO and Others* [2000] 9 BPLR 973 (PFA).

beneficiary of a fund; an employer who participates in a fund; a group of members (former members) or purported members (former members), beneficiaries (former beneficiaries) or purported beneficiaries (former beneficiaries) and employers who participates in a fund; a board of a fund or member thereof; or any person who has an interest in a complaint.¹³³⁶

The Act states that a “complaint” means a complaint relating to the administration of a fund; the investment of its funds or the interpretation and application of its rules which alleges one of four issues. Therefore, a complaint must relate to at least one of the specified issues. The complaint must either allege that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers; that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission; that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund. However, it does not include a complaint which does not relate to a specific complainant.¹³³⁷ This indicates that the Adjudicator’s jurisdiction is circumscribed to investigating and resolving complaints as lodged. He or she is restricted to the issues pleaded in the complaint, and does not have a general power to investigate issues and/or formulate issues for investigation *mero motu*.¹³³⁸

The Pension Funds Adjudicator resolves disputes in the private retirement insurance environment. As a result, it also does not have jurisdiction in relation to institutions that do not provide retirement insurance benefits.¹³³⁹ However, its jurisdiction excludes pension funds that were established by, or continued through, a collective agreement concluded in a bargaining or statutory council in terms of the LRA.¹³⁴⁰

The Adjudicator cannot investigate a complaint if, before the lodging of the complaint, proceedings have been instituted in any civil court in respect of a matter which would

¹³³⁶ Section 1 of the Pension Funds Act.

¹³³⁷ Section 1 of the Pension Funds Act. See also *Armcor v Murphy NO and Others* [1999] 11 PBLR 227 (PFA).

¹³³⁸ See *Mine Employees Pension Fund v Murphy NO and Others* [2004] 11 BPLR 6204 (W).

¹³³⁹ *Beauzec v Old Mutual Life Assurance Company (SA) Ltd* [2011] 1 BPLR 11(PFA) and *Old Mutual Life Assurance Co SA Ltd v The Pension Funds Adjudicator and Others; In re Old Mutual* [2008] 2 BPLR 97 (D).

¹³⁴⁰ See section 2(1) of the Pension Funds Act. See also *Arendse v Metal Industries Provident Fund and Another* [2001] 7 BPLR 2182 (PFA).

constitute the subject matter of the investigation.¹³⁴¹ This implies that the Act permits multiple causes of action and dispute resolution institutions, as a complainant can bring an action directly to a court with jurisdiction (the High Court). This negates the objective of the establishment of the Office of the Adjudicator (to resolve disputes in a procedurally fair, economical and expeditious manner).

The Adjudicator is empowered to do anything necessary or expedient for the achievement of his or her objects and the performance of his or her functions.¹³⁴² In order to achieve his or her main objective, the Adjudicator is empowered to investigate any complaint and may make an order which any court of law can make.¹³⁴³ In order to facilitate the speedy resolution of disputes, the Adjudicator can require a complainant to first approach an organisation established to resolve disputes in the pension funds industry (and approved by the Registrar of Pension Funds).¹³⁴⁴

The Adjudicator's determination is deemed to be a civil judgment of any court of law, as if the matter in question been heard by such a court, and is noted as such by the clerk or the registrar of the court. In addition, a writ or warrant of execution may be issued by the clerk or the registrar of such a court and be executed by the sheriff, six weeks after the date of the determination (if an appeal has not been made to the High Court).¹³⁴⁵

7.2.3 Fairness of Office of the Pension Funds Adjudicator adjudication procedures

When the Adjudicator receives written submissions from both the complainant and the pension fund, and any other party involved, the adjudicator investigates the complaint by phoning or writing to the fund/employer or fund member for more information (if necessary). Any further written replies are copied to all the parties as the Adjudicator is required to provide the pension fund or person against whom the complaint is made the opportunity to comment on the allegations.¹³⁴⁶ The Adjudicator determines and applies the relevant law to the facts of the dispute and makes a decision.¹³⁴⁷ Since there is no hearing in disputes before

¹³⁴¹ Section 30H(2) of the Pension Funds Act.

¹³⁴² Section 30Q(g) of the Pension Funds Act.

¹³⁴³ Section 30E(1)(a) of the Pension Funds Act.

¹³⁴⁴ Section 30E(1)(b) of the Pension Funds Act.

¹³⁴⁵ Section 30O of the Pension Funds Act.

¹³⁴⁶ Section 30F of the Pension Funds Act.

¹³⁴⁷ The Pension Funds Adjudicator *What you need to know about lodging a complaint* (Undated)

the Adjudicator, parties do not appear in person and are not entitled to legal representation.¹³⁴⁸

A complaint can be resolved by an organisation established to resolve disputes in the pension funds industry (and approved by the Registrar of Pension Funds) before investigation by the Adjudicator. This will be the case where the Adjudicator considers it expedient to do so (it will facilitate the speedy resolution of the dispute). A complaint dealt with by such an organisation is recorded and deemed to be receipt of the complaint by the Adjudicator. However, if the complaint is not resolved, the complainant can lodge the complaint with the Adjudicator to deal with it.¹³⁴⁹

Although timeframes within which the Adjudicator must resolve a dispute are not stipulated in the Pension Funds Act, one of the objectives of the Adjudicator is to dispose of complaints in an expeditious manner.¹³⁵⁰ The parties to the dispute receive the decision of the Adjudicator in the form of a determination or a letter stating reasons for the finding. The Adjudicator also sends the determination to the clerk or registrar of the court, which would have had jurisdiction had the matter been heard by a court.¹³⁵¹ Any person may obtain a readable copy of the record of a determination by the Pension Funds Adjudicator on payment of a fee determined by the Adjudicator.¹³⁵² The Adjudicator keeps a permanent record of the proceedings relating to the adjudication of a complaint and the evidence given during the determination, either in writing or by mechanical or electronic means.¹³⁵³

A party that is unhappy with the determination of the Pension Funds Adjudicator can lodge an appeal to the High Court. When a determination is appealed to the High Court, it is once again decided on its merits. In addition, determinations by the Pension Funds Adjudicator are currently the only tribunal decisions that are reported on a regular basis.¹³⁵⁴

¹³⁴⁸ S 30K of the Pension Funds Act.

¹³⁴⁹ Section 30E(1)(b), (2) and (3) of the Pension Funds Act.

¹³⁵⁰ Section 30D of the Pension Funds Act.

¹³⁵¹ Section 30M of the Pension Funds Act.

¹³⁵² Section 30L(1) and (2) of the Pension Funds Act.

¹³⁵³ Section 30L(1) and (2) of the Pension Funds Act.

¹³⁵⁴ See, for example, the various cases cited here, reported in the Butterworths Pension Law Reports (BPLR).

7.2.4 Expertise, independence and impartiality of the Office of the Pension Funds Adjudicator

To enable the Pension Funds Adjudicator to achieve its objective, he or she must have the necessary expertise and independence. This has been achieved through the conditions of appointment and his or discipline and termination of service and the organisational arrangements of the Office (funding;¹³⁵⁵ human resource and administrative support;¹³⁵⁶ managerial framework;¹³⁵⁷ governance, oversight and supervision;¹³⁵⁸ and accountability and reporting¹³⁵⁹).

Before a person can be appointed as an (acting) Adjudicator, he or she must be qualified to be admitted to practise as an advocate under the Admission of Advocates Act¹³⁶⁰ or admitted to practise as an attorney under the Attorneys Act.¹³⁶¹ He or she must have practised as an advocate or an attorney for an uninterrupted period of at least 10 years. However, a person can also be appointed if he or she has been involved in the teaching of law for an uninterrupted period of at least 10 years and also practised as an advocate or attorney for a period that renders him or her suitable for appointment as an (acting) Adjudicator or possesses such other experience as renders him or her suitable for appointment.¹³⁶²

¹³⁵⁵ The Office of the Pension Funds Adjudicator is funded through funds provided by the Financial Services Board through a budget submitted to and approved of by the Financial Services Board; as well as money accruing to the Office from other sources - section 30R of the Pension Funds Act.

¹³⁵⁶ The Office of the Pension Funds Adjudicator human resource and administrative structure is made up of the Adjudicator (or Acting Adjudicator); the Deputy Adjudicator(s) and employees of the Office. The Pension Funds Adjudicator appoints employees of the Office and determines the remuneration and other terms and conditions of employment with the concurrence of the Financial Services Board - sections 30Q(d) and 30S(1)(a) and (b) of the Pension Funds Act.

¹³⁵⁷ The Office of the Pension Funds Adjudicator is managed by the (Acting) Adjudicator (assisted by the Deputy Adjudicator(s) - section 30 B(2) of the Pension Funds Act.

¹³⁵⁸ Governance, oversight and supervision is undertaken by the Financial Services Board - see for example sections 30Q, 30R and 30S of the Pension Funds Act.

¹³⁵⁹ The Office of the Pension Funds Adjudicator is listed as a public entity in Schedule 3A of the Public Finance Management Act. The Adjudicator (or one of his or her employees designated by him or her) is charged with the accountability in respect of all moneys received and payments made by the Office - section 30T(1) of the Pension Funds Act. As the accounting officer, the Adjudicator is required keep full and correct record of all money received or expended by, and of all assets, liabilities and financial transactions of, the Office. He or she must also, as soon as is practicable, but not later than three months, after the end of each financial year, prepare annual financial statements reflecting, with suitable particulars, money received and expenses incurred by the Adjudicator during, and his or her assets and liabilities at the end of, the financial year in question. The records and financial statements are audited by the Auditor-General - section 30T(2) and (3) of the Pension Funds Act. The Adjudicator submits a report on his or her affairs and functions during a financial year to the Minister, including the audited financial statements. This is done within six months after the end of the financial year - section 30U of the Pension Funds Act.

¹³⁶⁰ Admission of Advocates Act 67 of 1964.

¹³⁶¹ Attorneys Act 53 of 1979.

¹³⁶² Section 30C(2) of the Pension Funds Act.

The Office of the Pension Funds Adjudicator is made up of the Adjudicator, Deputy Adjudicator(s) and employees.¹³⁶³ The Minister of Finance appoints the Pension Funds Adjudicator or Acting Adjudicator and Deputy Adjudicator(s) after consultation with the Financial Services Board.¹³⁶⁴ The Adjudicator is appointed for a period of three years and may be reappointed upon the expiry of his or her term of office.¹³⁶⁵ The remuneration and other terms and conditions of employment of the Adjudicator are determined by the Financial Services Board, while the remuneration and other terms and conditions of employment of the employees of the Office of the Pension Funds Adjudicator are determined by the Adjudicator (with the concurrence of the Financial Services Board).¹³⁶⁶ The remuneration of the Adjudicator and his or her employees is paid out of the funds of the Office of the Pension Funds Adjudicator.¹³⁶⁷

The Pension Funds Adjudicator may resign at any time as Adjudicator by tendering his or her resignation in writing to the Minister. The resignation must be forwarded to the Minister at least three calendar months prior to the date on which the Adjudicator wishes to vacate his or her office, unless the Minister allows a shorter period.¹³⁶⁸

The Minister of Finance may remove the (Acting) Pension Funds Adjudicator or Deputy Adjudicator on the grounds of misbehaviour, incapacity or incompetence after consultation with the Financial Services Board.¹³⁶⁹

The Office of the Adjudicator is independent of the private pension funds industry whose disputes it resolves. It is also autonomous, which enables it to resolve disputes objectively and impartially.

¹³⁶³ Sections 30C and 30S of the Pension Funds Act.

¹³⁶⁴ Section 30C(1) of the Pension Funds Act.

¹³⁶⁵ Section 30C(3) of the Pension Funds Act.

¹³⁶⁶ Section 30S(1)(a) and (b) of the Pension Funds Act.

¹³⁶⁷ Section 30S(2) of the Pension Funds Act.

¹³⁶⁸ Section 30C(4) of the Pension Funds Act.

¹³⁶⁹ Section 30C(5) of the Pension Funds Act.

8. MEDICAL SCHEMES ACT DISPUTE RESOLUTION SYSTEM

The dispute resolution framework created in terms of the Medical Schemes Act foresees the resolution of disputes by the Registrar of the CMS and the CMS. Appeals against decisions of the Registrar are decided by an Appeal Board of the CMS.

8.1 Resolution of disputes by Registrar of CMS and CMS

When the dispute is lodged with the CMS, the Registrar analyses the complaint and refers it to a medical scheme for comments within four days of receiving it. A medical scheme is obliged to provide a written response to the Registrar's Office within 30 days.¹³⁷⁰ The Registrar then analyses the response (if any) and attempts to resolve the matter as soon as possible after receipt of any comments furnished to him or her. If the Registrar cannot resolve the matter, he or she forwards it to the Council to make a decision or ruling (normally within 120 days of the date of referral of the complaint) and the decision is communicated to the parties.¹³⁷¹

A party that is aggrieved by a decision relating to the settlement of a complaint or dispute may appeal the decision to the CMS within three months after Registrar's decision.¹³⁷² Where an appeal is submitted after three months of the decision, the Council can condone its late submission (where good cause is shown).¹³⁷³ The Council is empowered to either confirm or vary the decision concerned, or rescind it and give such other decision that it deems just.¹³⁷⁴ Affected parties have the right to a further appeal to the Appeal Board of the Council.

8.2 Resolution of disputes by the CMS Appeal Board

The Appeal Board of the CMS provides a complainant (i.e. members of medical schemes) with a transparent, equitable, accessible, expeditious, reasonable and procedurally fair dispute

¹³⁷⁰ Section 47(1) of the Medical Schemes Act.

¹³⁷¹ Section 47(2) of the Medical Schemes Act. See also www.medicalschemes.com

¹³⁷² Section 48(1) of the Medical Schemes Act.

¹³⁷³ Section 48(2) of the Medical Schemes Act.

¹³⁷⁴ Section 48(8) of the Medical Schemes Act. A person who is aggrieved by a decision of the Registrar (excluding a decision that has been made with the concurrence of the Council) can also appeal against such decision to the Council. The Council can also make an order on such an appeal as it deems just - section 49(1) of the Medical Schemes Act.

resolution process against a decision of the Registrar (acting with the concurrence of the Council) or by a decision of the Council.¹³⁷⁵

8.2.1 Accessibility of the CMS Appeal Board

The CMS has a national office in Pretoria serving the Republic. A person who is unhappy with a decision of the Registrar or the Council submits an appeal application to the national office. Appeal applications are submitted in writing. In addition, a fee of R2000 is required to be paid by the appellant in submitting an appeal.¹³⁷⁶ This may restrict access to the Appeal Board for persons who cannot afford to pay the fee. However, if the Appeal Board sets aside a decision of the Council, the appeal application fee is refunded to the appellant. Where the Appeal Board varies any decision on appeal, it may also refund all or part of the application fee.

A person who lodges an appeal to the Appeal Board is required to submit with his or her appeal written arguments or explanations of the grounds of his or her appeal.¹³⁷⁷ The aggrieved party must appeal the decision to the Appeal Board within 60 days of the decision being made.¹³⁷⁸

8.2.2 Scope of jurisdiction and powers of the CMS Appeal Board

A person aggrieved by a decision of the Registrar (acting with the concurrence of the Council) or by a decision of the Council can appeal against the decision to the Appeal Board.¹³⁷⁹ The Act defines “complaint” as a complaint against any person required to be registered or accredited in terms of the Act (or any person whose professional activities are regulated by the Act). The complaint should allege that such a person has acted or failed to act in contravention of the Act; or acted improperly in relation to any matter which falls within the jurisdiction of the CMS.¹³⁸⁰ Therefore, the personal jurisdiction of the Appeal Board is restricted to complainants who are members of medical schemes.

¹³⁷⁵ Section 50(3) of the Medical Schemes Act. See also Council for Medical Schemes “The complaints procedure” accessed at <http://www.medicalschemes.com/Content.aspx?1>.

¹³⁷⁶ See section 50(19) of the Medical Schemes Act.

¹³⁷⁷ Section 50(4) of the Medical Schemes Act.

¹³⁷⁸ Section 50(3) of the Medical Schemes Act.

¹³⁷⁹ Section 50(3) of the Medical Schemes Act.

¹³⁸⁰ Section 1 of the Medical Schemes Act.

The scope of disputes is also limited to matters related to the business of a medical scheme (a person required to be registered or accredited, or a professional (such as a broker or an actuary) regulated by the Act.

In considering an appeal, the Appeal Board has the powers which a High Court has to summon witnesses, to cause an oath or affirmation to be administered by them, to examine them, and to call for the production of books, documents and objects.¹³⁸¹

The Appeal Board may, after hearing the appeal confirm, set aside or vary the decision under appeal, or order that the decision is given effect to.¹³⁸² When the Appeal Board makes a decision, it is not empowered to reconsider the decision. After hearing an appeal, the Appeal Board has the power to order that the decision be given effect to by the Registrar or the relevant medical scheme.¹³⁸³

8.2.3 Fairness of CMS Appeal Board procedures

An appeal is heard on a date and time and at a place fixed by the Appeal Board. The secretary of the Board notifies the appellant as well as the Council of the date, place and time fixed by the Appeal Board in writing.¹³⁸⁴

All the evidence and submissions heard by the Appeal Board are heard in public. However, in his or her discretion, the Chairperson can exclude from a hearing any class of persons or all persons whose presence at the hearing is deemed unnecessary or undesirable.¹³⁸⁵ The procedure at the hearing of an appeal is determined by the Chairperson of the Appeal Board.¹³⁸⁶ The appellant and the Registrar (or the CMS) are entitled to be represented at an appeal hearing by a legal practitioner.¹³⁸⁷

In order to ensure the (perceived) impartiality of the Appeal Board, the Act requires that a member of the Appeal Board recuses himself or herself and be replaced for the duration of

¹³⁸¹ Section 50(9) of the Medical Schemes Act.

¹³⁸² Section 50(16) of the Medical Schemes Act.

¹³⁸³ Section 50(16)(b) of the Medical Schemes Act.

¹³⁸⁴ Section 50(8) of the Medical Schemes Act.

¹³⁸⁵ Section 50(13) of the Medical Schemes Act.

¹³⁸⁶ Section 50(14) of the Medical Schemes Act.

¹³⁸⁷ Section 50(15) of the Medical Schemes Act.

the hearing. This is required where it transpires before or during a hearing that the member has any direct or indirect personal interest in the outcome of that appeal.¹³⁸⁸

The decision of the Appeal Board is taken by majority vote of the members.¹³⁸⁹ No timeframes are stipulated for the Appeal Board to finalise an appeal. The decision of the Appeal Board is in writing and a copy thereof is furnished to the appellant and to the Council.¹³⁹⁰

8.2.4 Expertise, independence and impartiality of the CMS Appeal Board

In order for the Appeal Board to achieve its objective, the Board is equipped with the required expertise and independence from medical schemes. The Appeal Board consists of three persons, with a staff member of the Council designated by the Registrar as the secretary of the Appeal Board.¹³⁹¹ The Chairperson of the Appeal Board is appointed on account of his or her knowledge of the law; while the other members are appointed on the basis of their knowledge of medical schemes.¹³⁹²

The Appeal Board is established by the Minister of Health to hear appeals in medical scheme disputes.¹³⁹³ The members of the Appeal Board are appointed by the Minister of Health for three years, although they are eligible for reappointment on the expiration of their term of office.¹³⁹⁴ Members of the Appeal Board could be either employees of the State or independent contractors. In terms of the Act, a member of the Appeal Board who is not in the full-time employment of the State is paid such remuneration for his or her services as a member of the Board (including re-imbursement for transport, travelling and subsistence expenses incurred by him or her in performing his or her functions as a member of the Appeal Board) as the Minister of Health determines with the concurrence of the Minister of Finance.¹³⁹⁵

¹³⁸⁸ Section 50(5) of the Medical Schemes Act.

¹³⁸⁹ Section 50(17) of the Medical Schemes Act.

¹³⁹⁰ Section 50(18) of the Medical Schemes Act.

¹³⁹¹ Section 50(1) and (2) of the Medical Schemes Act.

¹³⁹² Section 50(1)(a) of the Medical Schemes Act.

¹³⁹³ The Appeal Board is established in terms of section 50 of the Medical Schemes Act.

¹³⁹⁴ Section 50(1) and (6) of the Medical Schemes Act.

¹³⁹⁵ Section 50(20) of the Medical Schemes Act.

The Medical Schemes Act is silent on the discipline of members of the Appeal Board. However, since members of the Appeal Board are appointed by the Minister of Health, the inference could be drawn that they would be subject to the discipline of the Minister.¹³⁹⁶

The Medical Schemes Act also does not regulate the termination of the services of Appeal Board members. It is only stated that any casual vacancy that occurs on the Appeal Board is filled by the appointment of another person by the Minister. The person appointed holds office for the unexpired period of office of his or her predecessor.¹³⁹⁷

The effectiveness of the Appeal Board in realising its objectives is further enhanced by its organisational framework. This relates to its funding;¹³⁹⁸ human resource and administrative support;¹³⁹⁹ managerial framework;¹⁴⁰⁰ governance, oversight and supervision;¹⁴⁰¹ and accountability and reporting arrangements.¹⁴⁰² These aspects reinforce its autonomy and independence from medical schemes, which is imperative for the resolution of disputes in a transparent, equitable, accessible, expeditious, reasonable and procedurally fair manner.

9. RESOLUTION OF SOCIAL SECURITY DISPUTES BY THE HIGH COURT

The High Court is a superior court of record with inherent powers and standing. As a result, except where expressly provided otherwise in a statute, the High Court has the power to

¹³⁹⁶ See section 50(1) of the Medical Schemes Act.

¹³⁹⁷ Section 50(7) of the Medical Schemes Act.

¹³⁹⁸ There is no specific funding arrangement for the Appeal Board. Members of the Appeal Board who are not full-time state employees are paid remuneration for their services as members of the Appeal Board. Funding of the activities of the Appeal Board is provided through the CMS. Funds for the Council are from moneys appropriated by Parliament on terms and conditions determined by the Minister of Health (with the concurrence of the Minister of Finance); fees raised on services rendered by the Registrar; penalties; and interest on overdue fees and penalties in respect of services rendered by the Registrar. The Council can also accept moneys or other goods donated or bequeathed to it - section 12 of the Medical Schemes Act.

¹³⁹⁹ The Appeal Board consists of three members. Administrative support is provided by the Council as the Registrar designates a staff member to act as secretary of the Appeal Board - section 50(1) and (2) of the Medical Schemes Act.

¹⁴⁰⁰ A hearing of the Appeal Board is managed by a chairperson, who determines the procedure at the hearing - section 50(14) of the Medical Schemes Act.

¹⁴⁰¹ Minister of Health undertakes governance, oversight and supervision of the Appeal Board as he or she is the appointing authority - section 50(1) of the Medical Schemes Act.

¹⁴⁰² The CMS is listed as a public entity in Schedule 3A of the Public Finance Management Act. This entails a direct budgetary appropriation by Parliament; and autonomous accountability for the budget. The Registrar of Medical Schemes, as the accounting officer of the Council is responsible for the financial accountability and reporting of the Council - section 13 of the Medical Schemes Act.

The Council is required to submit to the Minister before the end of June of each year a report on the Council's activities during the previous financial year. It must also publish or make available the annual report after submission thereof to the Minister - section 14(1) and (2) of the Medical Schemes Act.

review the decisions of all social security institutions due to its inherent review powers. The High Court also hears appeals against the decisions of some of the social security adjudication forums. In some cases (such the failure of assessors to agree with the presiding officer in a COIDA Compensation Court hearing) the High Court decides social security disputes at first instance. The Road Accident Fund Act also requires a person with a claim against the fund to bring an action in any High Court within whose area of jurisdiction the occurrence which caused the injury or death took place.¹⁴⁰³

In addition, various social security statutes specifically provide for some issues to be dealt with by the High Court. For example, COIDA outlines issues to be dealt with by High Court. The Compensation Commissioner can also state a case on a question of law to the High Court.¹⁴⁰⁴ In terms of the ODMWA, the Compensation Commissioner for Occupational Diseases can also state a case on question of law to the High Court on appeal.¹⁴⁰⁵

The High Court is thus an integral part of the current South Africa social security system, which requires its institutional framework and processes to promote the realisation of the rights of parties in social security disputes.

9.1 Accessibility of the High Court

Provincial or local divisions of the High Court are currently located in Port Elizabeth, Durban Umtata/Mthatha, Pietermaritzburg, Grahamstown, Cape Town, Bhisho, Polokwane, Thohoyandou, Johannesburg Pretoria, Mmabatho/Mafikeng, Kimberley and Bloemfontein.¹⁴⁰⁶ An appellant can bring an action in the High Court at any time as there is no time limit for the lodging of a case (except where required in a particular law). However, a claim could prescribe if it is not lodged within the relevant time limits stipulated in the Prescription Act.¹⁴⁰⁷

¹⁴⁰³ Section 15(2) Road Accident Fund Act.

¹⁴⁰⁴ Section 92 of COIDA.

¹⁴⁰⁵ Section 58(1) of ODMWA.

¹⁴⁰⁶ See Renaming of High Courts Act 30 of 2008.

¹⁴⁰⁷ Prescription Act 68 of 1969.

A person (especially an indigent person) may have limited or no access to the High Court due to the high cost of court proceedings and the absence of legal aid.¹⁴⁰⁸ In addition, the purely technical and legalistic basis of dealing with cases means a person who brings a case to the High Court requires legal representation, which an indigent person can hardly afford. In relation to social security (specifically social assistance) litigants' ability to pay legal fees, Wallis AJ in *Cele v the South African Social Security Agency and 22 related cases* rightly wondered how people so impoverished that they qualify for social assistance grants can afford to pay fees.¹⁴⁰⁹

The inaccessibility of (High) Court proceedings for poor and /or marginalised persons has been revealed by many court cases. In *The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza*, the Supreme Court of Appeal held that:

“the law is a scarce resource in South Africa. This case shows that justice is even harder to come by. It (this case) concerns the way in which the poorest of the poor are to be permitted to access both (the law and justice).”¹⁴¹⁰

In utilising the constitutional right to bring a class action,¹⁴¹¹ the court in was able to secure access to court for a category of particularly vulnerable and desperate persons (social assistance (disability grant) beneficiaries whose grants had been unlawfully terminated) to enforce their right of access to social security. In this instance the court remarked that:

“[T]he situation seemed pattern-made for class proceedings. The class the applicants present is drawn from the very poorest within our society – those in need of statutory social assistance. They also have the least chance of vindicating their rights through the legal process. Their individual claims are small: the value of the social assistance they receive – a few hundred rands every month – would secure them hardly a single hour's consultation at current rates with most urban lawyers. They are scattered throughout the Eastern Cape Province, many of them in small towns and remote rural areas. What they have in common is that they are victims of official excess, bureaucratic misdirection and unlawful administrative methods.

¹⁴⁰⁸ See Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present- Protecting the Future* (Draft Consolidated Report) March 2002, 124.

¹⁴⁰⁹ *Cele v the South African Social Security Agency and 22 related cases* (2009 (5) SA 105 (D) para 2.

¹⁴¹⁰ *The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* 2001 4 SA 1184 (SCA) para 1.

¹⁴¹¹ See section 38 of the Constitution.

It is the needs of such persons, who are most lacking in protective and assertive armour, that the Constitutional Court has repeatedly emphasised must animate our understanding of the Constitution's provisions. And it is against the background of their constitutional entitlements that we must interpret the class action provision in the Bill of Rights.

The circumstances of this particular case – unlawful conduct by a party against a disparate body of claimants lacking access to individualised legal services, with small claims unsuitable for if not incapable of enforcement in isolation – should have led to the conclusion, in short order, that the applicants' assertion of authority to institute class action proceedings was unassailable.¹⁴¹²

9.2 Scope of jurisdiction and powers of the High Court

The High Court has a wide scope of jurisdiction as it hears and determines appeals from local courts within its jurisdiction. It also reviews proceedings of all local courts in its area of jurisdiction. A High Court has jurisdiction over all persons and in relation to all matters arising within its area of jurisdiction. It also has jurisdiction over all other matters entrusted to it according to law.¹⁴¹³ The High Court also has jurisdiction over a person who resides outside the court's area of jurisdiction if the person is joined to a proceeding in the court or becomes a party to the proceedings in terms of a third party notice.¹⁴¹⁴

The High Court decides on all constitutional matters (except matters that only the Constitutional Court can decide or matters assigned to a court of similar status (such as the Labour Court)).¹⁴¹⁵ The High Court also decides on any other matter not assigned to another court by an Act of Parliament.¹⁴¹⁶

When the High Court decides a constitutional matter, it can declare that a law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and can make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity, and an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.¹⁴¹⁷ The High

¹⁴¹² *The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* paras 11-16.

¹⁴¹³ Section 19(1)(a) of the Supreme Court Act 59 of 1959.

¹⁴¹⁴ Section 19(1)(b) of the Supreme Court Act 59 of 1959.

¹⁴¹⁵ Section 169(a) of Constitution.

¹⁴¹⁶ Section 169(b) of Constitution.

¹⁴¹⁷ Section 172 of the Constitution.

Court can provide any relief that is appropriate and can make any order that is just and equitable.¹⁴¹⁸

The powers of the High Court to deal with social security matters are unsatisfactory, as it mostly has (judicial) review powers with limited appeal powers. In judicial review proceedings, a court cannot enquire into the merits of the decision. In addition, it can only set aside the decision and refer it back to the decision-maker. This means the original decision-maker can make the original decision if it complies with all the legal requirements. In addition, the Court would more readily defer to the decision of an administrative authority or appeal body if the subject matter is very technical or of a kind in which the court has no expertise.¹⁴¹⁹ This may not be adequate, as the Court may need to interfere more in the affairs of some of the social security dispute resolution institutions/forums, in view of their institutional status and expertise.

What may be required is an appeal process where the court can enquire into the merits of the original decision and can substitute or amend the decision. It has been argued that:

“A right of appeal is an invaluable safeguard. It provides an aggrieved individual with the assurance that the decision will be *reconsidered* by a second decision-maker. The appellate body is able to exercise a calmer, more objective and reflective judgment. Detached from the ‘dust of the arena’, as it were, and the immediacy of the initial decision, the second decision-maker is in a better position to discern a *faulty reasoning process* and, in particular, to evaluate facts ... In the end the final decision will have been the subject of more careful scrutiny, prolonged debate and sober reflection.”¹⁴²⁰

9.3 Fairness of High Court adjudication procedures

Adjudication is conducted in terms of litigation in public (open court) except if the court directs otherwise in special cases.¹⁴²¹ However, in a civil case the High Court can refer certain matters to a referee for investigation and can adopt the referee’s report and make an

¹⁴¹⁸ Sections 38 and 172 of the Constitution.

¹⁴¹⁹ *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* [2003] 2 All SA 616 (SCA) para 33. In *Pushmanathan v Canada (Minister of Citizenship and Immigration)* (1998) 160 DLR (4th) 193 (SCC) para 33, it was stated that a court would consider three issues in evaluating relative expertise of an administrative authority or appeal body: the court must characterise the expertise of the tribunal in question; it must consider its own expertise relative to that of the tribunal; and it must identify the nature of the specific issue before the administrative decision-maker relative to its expertise.

¹⁴²⁰ Baxter L *Administrative Law* (Juta, 1984) 255.

¹⁴²¹ Section 16 of the Supreme Court Act 59 of 1959.

order in relation to the report when necessary or desirable.¹⁴²² Such a report is considered a finding of the court. In proceedings before the High Court, parties are represented by a legal practitioner as everyone has a common law right to be represented by a legal practitioner in cases before a court of law.¹⁴²³

The use of litigation as the dispute resolution procedure of the High Court causes many problems for parties to social security disputes. Some of these problems include undue delays in the finalisation of cases and a purely technical and legalistic basis of dealing with cases, with little regard to broader fairness considerations.¹⁴²⁴ This has an impact on the rights of social security applicants and beneficiaries as some have to wait for years while disputes regarding benefits are resolved.

There is no possibility of the High Court reconsidering an original decision. In addition, no timeframes are prescribed for the finalisation of disputes by the High Court. When a judgment is handed, the sheriff of the High Court or his or her deputy executes all sentences, decrees, judgments, writs, summonses, rules, orders, warrants, commands and processes of the court.¹⁴²⁵

9.4 Independence and impartiality of the High Court

The independence and impartiality of the High Court is guaranteed by the Constitution.¹⁴²⁶ This is promoted through the conditions for appoint, discipline and termination and the organisation arrangements of the Court.

The President of the Republic appoints judges of the High Court on the advice of the Judicial Services Commission.¹⁴²⁷ A Judge of the High Court is paid an annual salary at a rate determined by the President by proclamation in the Government Gazette (on the

¹⁴²² Section 19(2) of the Supreme Court Act 59 of 1959.

¹⁴²³ See *MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani* (2004) 25 ILJ 2311 (SCA).

¹⁴²⁴ See Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present- Protecting the Future* (Draft Consolidated Report) March 2002, 124.

¹⁴²⁵ Section 36 of the Supreme Court Act 59 of 1959

¹⁴²⁶ Section 165 states that the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. No person or organ of state may interfere with the functioning of the courts. Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

¹⁴²⁷ Section 174(6) of the Constitution.

recommendation of the Independent Commission for the Remuneration of Office Bearers).¹⁴²⁸ The annual salary and allowance of a judge is paid out of the National Revenue Fund.¹⁴²⁹

A judge of the High Court is removed from office by the President if the Judicial Service Commission finds that the judge is incapable, is grossly incompetent or is guilty of gross misconduct; and the National Assembly calls for the judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.¹⁴³⁰

The service of a judge employed in a permanent capacity is terminated when he or she attains the age of 70 years. If a judge has been in active service for not less than 10 years, or if he or she has not been in service for 10 years, his or her service is terminated on the date immediately following the day on which he or she completes 10 years of service.¹⁴³¹

The service of a judge employed in a permanent capacity who is 65 years of age or older and has performed active service for 15 years is discharged by the President if he or she informs the Minister in writing that he or she no longer wishes to perform the service of a judge. The service of a judge can also be terminated at any time on his or her request and with the approval of the President if there is any reason which the President deems sufficient.¹⁴³² A judge can also be terminated by the President at any if he or she is afflicted with a permanent infirmity of mind or body rendering him or her incapable of performing his or her official duties.¹⁴³³

Professional and judicial discipline of a judge is undertaken by the (Judicial Conduct Committee and Judicial Conduct Tribunal of the) Judicial Services Commission.¹⁴³⁴ A judge or magistrate is also subject to the discipline of another judge of a higher court. A judge of a higher court supervises the manner in which a judge of a lower court discharges his or her functions.¹⁴³⁵

¹⁴²⁸ Section 2(1) of Judges' Remuneration and Conditions of Employment Act 47 of 2001

¹⁴²⁹ Section 2(5) of Judges' Remuneration and Conditions of Employment Act 47 of 2001.

¹⁴³⁰ Section 177(1) and (2) of the Constitution.

¹⁴³¹ Section 3(2)(a) of the Judges' Remuneration and Conditions of Employment Act 47 of 2001.

¹⁴³² Section 3(2)(b) of the Judges' Remuneration and Conditions of Employment Act 47 of 2001.

¹⁴³³ Section 3(2)(c) of the Judges' Remuneration and Conditions of Employment Act 47 of 2001.

¹⁴³⁴ See Chapters 2 and 3 of the Judicial Service Commission Act 9 of 1994.

¹⁴³⁵ See *S and Others v van Rooyen & Others* 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) para 24.

The funding;¹⁴³⁶ human resource and administrative support;¹⁴³⁷ managerial framework;¹⁴³⁸ governance, oversight and supervision;¹⁴³⁹ and accounting and reporting¹⁴⁴⁰ arrangements for the High Court also facilitate its independence and impartiality.

10. CONCLUSIONS

There are various gaps and challenges in the current South African social security dispute resolution system. Some of these challenges relate to the uncoordinated and fragmented nature of the system; inaccessibility of some social security institutions; inappropriateness of some current appeal institutions; the lack of a systematic approach in establishing appeal institutions; the limited scope of jurisdiction and powers of adjudication institutions; inconsistencies in review and/or appeal provisions in various laws; the unavailability of alternative dispute resolution procedures; and the absence of institutional independence of adjudication institutions or forums.

10.1 Fragmentation of South African social security dispute resolution

It is clear that the South African social security dispute resolution system is fragmented and uncoordinated. There is a wide array of laws providing for dispute resolution institutions or forums and procedures. Appeal mechanisms are also fragmented across the social security

¹⁴³⁶ Funding of the High Court (together with all other courts) is provided by the Department of Justice and Constitutional Development in terms of the Department's national budget. The Department is responsible for the administration of Courts - see Department of Justice and Constitutional Development Annual Report 2009/2010. However, the Office of the Chief Justice has been established (through a Proclamation by the President in terms of the Public Service Act of 1994) in anticipation of the enactment of the Superior Courts Act. The Superior Courts Bill proposes the creation of this Office, comprising an Executive Director appointed by the Minister with the concurrence of the Chief Justice. This is a transition to the establishment of a separate court administration for the judiciary as a separate branch of government. The court administration will be responsible for the administration of all courts - section 12 of the Superior Courts Bill of 2010. In addition, the budget of the courts will be determined by the Chief Justice in consultation with the heads of courts. The Minister is entrusted with the responsibility of processing the budget requests through the normal budgetary channels and processes prescribed by the PFMA. The Director-General is charged with the responsibility of accounting for the budget of the courts - Section 15 of the Superior Courts Bill.

¹⁴³⁷ A division of the High Court consists of a Judge President, a Deputy Judge President, Judges, the registrar(s) and officers of the Court - section 3 of the Supreme Court Act 59 of 1959.

¹⁴³⁸ A division of the High Court is managed by Judge President, and a Deputy Judge President or Deputy Judge Presidents - section 3 of the Supreme Court Act 59 of 1959.

¹⁴³⁹ Governance, oversight and supervision of the Court is undertaken by the Judicial Services Commission established in terms of s 178 of the Constitution.

¹⁴⁴⁰ Financial (and other) administration of the High Court and all other courts is undertaken by the Department of Justice and Constitutional Development. As a result, financial accountability for PFMA purposes is done by the Director-General of Justice and Constitutional Development as the accounting officer - see Department of Justice and Constitutional Development *Annual Report 2009/2010*. Reporting of the Court is to the Judicial Services Commission established in terms of s 178 of the Constitution.

system, at times involving specially constituted appeal bodies (such as the HPCSA) and at times the High Court.

10.2 Inaccessibility of some social security institutions

The accessibility of the various adjudication institutions/ forums is not always appropriately ensured. While some forums are geographically spread across the Republic, others are centrally located (the Certification Committee and the Medical Reviewing Authority in terms of the ODMWA (together with the Medical Bureau for Occupational Diseases (MBOD) are located in Johannesburg, while the National Appeals Committee of the UIF Board is located in Pretoria). Legislation also empowers some of the adjudications forums to be convened at any determined place.

The accessibility of the various adjudication forums is also facilitated through multiple application lodgement options (by hand, telefax or registered mail) and reasonable timeframes (mostly 90 days after (notification of) the decision and 180 days in the case of COIDA). The relevant documentation for the lodging of applications and consideration of disputes are in English (e.g. the ODMWA's "Objection Against a Decision Form" W.G. 29 and the RAF Objection Form) and the hearings (where applicable) are also conducted in English. However, interpreters are provided where necessary. In addition, the Road Accident provides for the travel and accommodation needs of persons required to attend a hearing. The parties to a dispute are also notified of the dispute resolution outcome.

However, the speedy resolution of disputes is not guaranteed, as timeframes for finalisation have not been stated in many statutes.¹⁴⁴¹ In addition no power is granted to the adjudication forums to reconsider their original decision (except as provided in terms of COIDA that a Presiding Officer may correct the error or defect). Furthermore, avenues for alternative (speedier, more flexible) dispute resolution are not available for most disputes (only in terms of COIDA are the parties to a hearing required to hold a pre-hearing conference).

The adjudication forums adopt a variety of dispute resolution procedures. Where necessary, some of the adjudication forums can convene a hearing, in which case personal attendance of

¹⁴⁴¹ It is only the Independent Tribunal for Social Assistance Appeals is required to finalise an appeal within 90 days from the date on which the appeal was received.

the parties and other interested persons is possible. However, some forums resolve disputes only by means of documentary evidence.¹⁴⁴²

External dispute resolution avenues are only through litigation in the High Court (at times the Labour Court).¹⁴⁴³ Due to its inherent review powers, all the decisions of public social security institutions are reviewable (on the basis of judicial review) by the High Court (except where expressly provided otherwise). Specific issues to be dealt with by High Court on the basis of appeal are also outlined in some laws.¹⁴⁴⁴ In addition, some laws provide for the resolution of disputes by the High Court in the first instance. For example, the Road Accident Fund Act requires a person with a claim against the fund to bring a claim in any High Court within whose area of jurisdiction the occurrence which caused the injury or death took place. It is doubtful whether the High Court is the appropriate venue for the resolution of such disputes due to its inaccessibility.

10.3 Inappropriateness of some current appeal institutions

Some social security statutes provide for reviews by and appeals to the ordinary courts (especially the High Court). However, the ordinary courts are not always the appropriate forums to deal with social security appeals. The powers of these courts to deal with the matters are unsatisfactory; as the courts mostly have review powers with little appeal powers. They are also apparently not specialised enough to deal effectively with social security matters. Appeals to such courts may also pose difficulties for aggrieved persons, due to *inter alia* limited access to the courts especially for indigent persons (also due to costs in the absence of legal aid); undue delays that characterise court proceedings; the technical and legalistic basis with which cases are dealt (with little regard to broader fairness considerations). This leads to the contention that:

¹⁴⁴² See for example the review of a Certification Committee disease certification decision by the Medical Reviewing Authority for Occupational Diseases in terms of ODMWA; the consideration of the decision of the Regional Appeals Committees by the National Appeals Committee of the UIF Board; the consideration of the (reconsidered) decisions of the South African Social Security Agency (SASSA) by the Independent Tribunal for Social Assistance Appeals; and the resolution of appeals by the Road Accident Fund Appeals Tribunal.

¹⁴⁴³ Such as in section 66 of the UIA which provides for objections to compliance orders to be referred to the Labour Court; and for a compliance order to be referred to the Labour Court to be made an order of the Court)

¹⁴⁴⁴ In terms of section 92 of COIDA, the Compensation Commissioner can also state a case on a question of law to the High Court; ODMWA also empowers the Compensation Commissioner for Occupational Diseases (CCOD) to also state a case on question of law to the High Court on appeal.

“the current South African social security system has a large backlog in terms of the pool of beneficiaries. Yet, the adjudication system is not sufficiently specialised and localised, from the perspective of access to the system. Instead, the beneficiaries cannot financially afford the system of legal representation in the normal court context. Those who could afford to pay the costs still face a punitive snail paced legal bureaucratic process. Tedious as it is, the system leaves out the bulk of marginalised social security beneficiaries when they lodge a complaint”.¹⁴⁴⁵

10.4 Lack of a systematic approach in establishing appeal institutions

There is also a lack of a systematic approach to the regulation of appeals in the South African social security system. While some laws specifically provide for the establishment and functioning of appeal institutions and mechanisms; other laws leave such issues to the discretion of the relevant Minister.¹⁴⁴⁶ It is inappropriate to establish an appeal tribunal purely on the basis of Ministerial or Registrar direction/regulation, also due to the gravity and importance of the issues at stake, such as the establishment of the institution; the appointment of its members; its main objective(s); its jurisdiction, functions and powers; procedures for the disposal of complaints; giving parties an opportunity to comment and to be represented; time limits; record-keeping; making a determination and enforceability of determinations; review possibility; accountability; remuneration; and limitation on liability etc.¹⁴⁴⁷

10.5 Limited scope of jurisdiction and powers of adjudication institutions

The scope of jurisdiction and powers of the social security adjudication institutions/forums is limited. They can only exercise the powers and functions as circumscribed in legislation. The scope of jurisdiction and powers of the High Court as the appeal institution is also sometimes limited, particularly in relation to the types of cases or issues that it can decide. The High Court is mostly empowered to review decisions taken by the institutions concerned.

¹⁴⁴⁵ Kanyane H “Exploring and developing a culture of good governance” in Olivier MP and Kuhnle S (eds) *Norms and Institutional Design: Social Security in Norway and South Africa* (2008) 104.

¹⁴⁴⁶ An example of such a situation is the Social Assistance Act which empowers the Minister (of Social Development) to either consider an appeal against a decision of the South African Social Security Agency him/herself; or appoint an independent tribunal to consider such an appeal. Where a tribunal is so appointed, all appeals against decisions of the Agency must from then on be considered by that tribunal. In addition, in the case of the Road Accident Fund, upon receipt of the notification from a party to the dispute or 60 days after receiving submissions, medical reports and opinions relevant to the dispute period, the Registrar will refer the dispute for consideration by an Appeal Tribunal paid for by the Road Accident Fund - Regulation 3(8)(a) of the RAF Act Regulations.

¹⁴⁴⁷ See Olivier M, Fourie E & Nyenti MAT “Commentary on the regulations to the Social Assistance Act, Act 13 of 2004 (A Report to the Department of Social Development)” October 2005, 6.

The possible remedies that can be provided by the social security institutions are also limited due to the circumscription of such remedies in the various statutes. This emanates from the circumscribed powers afforded to the social security institutions.

Some of the social security statutes stipulate that the decisions of the adjudication forums are binding on the administrative institutions; and the Compensation Court is considered to have the status of a magistrate court (with its decisions enforced as such). However, most of the adjudication forums are not afforded the power and mechanisms to enforce their rulings.

In addition, effectiveness of some of the institutions is restricted due to the provision of multiple dispute resolution avenues in some statutes. An example is in the Pension Funds Act where a party could lodge a complaint within the jurisdiction of the Adjudicator in a civil court (High Court). This is problematic as it encourages “forum shopping”¹⁴⁴⁸ and undermines the objective of the establishment of the Office of the Adjudicator – to dispose of complaints in a procedurally fair, economical and expeditious manner.

10.6 Inconsistencies in review and/or appeal provisions in various laws

Most social security statutes fail to make an appropriate distinction between (internal) reviews and (external) appeal procedures. Social security adjudication standards require that the administrative organs/institutions that undertake the determination of applicants’ rights to social security benefits should also undertake internal review procedures (first level adjudication procedures). This implies that where an applicant for social security benefits is aggrieved by a decision of the administering institution, he/she should be able to request a revision of the initial decision. After the exhaustion of the internal review (first level) processes, applicants should have access to an external appeal mechanism or institution (second level procedures).

There is a lack of consistency in the provisions relating to reviews and appeals in the various laws. Some laws make provision for appeals to appeal bodies established in terms of the relevant laws (see for example the case of the UIA and ODMWA), while other laws provide

¹⁴⁴⁸ Forum shopping refers to the practice where a party selects a dispute resolution avenue with the best possible prospects.

for appeals to other adjudication bodies such as the Health Professions Council of South Africa and the High Court.

10.7 Unavailability of alternative dispute resolution procedures

Social security disputes are resolved mainly by resort to litigation (adversarial adjudication). Few social security statutes provide for other external dispute resolution avenues other than litigation in the normal court system.¹⁴⁴⁹ The absence of alternative dispute resolution avenues in South African social security statutes implies that persons not satisfied with the internal adjudication processes can only have their right of access to social security enforced by means of (adversarial) litigation in the ordinary courts of law. However, the various problems plaguing the current court structure indicate that the courts are not the most appropriate forum for the resolution of social security disputes. Litigation therefore has an adverse impact on the right to social security of beneficiaries/applicants, as it restricts access to adjudication. Therefore, alternative mechanisms for the resolution of disputes should be considered in the South African social security system. This is to ensure proper redress for social security litigants and promote their right of access to social security.

10.8 Lack of institutional independence of adjudication institutions/forums

The review of the current South African social security dispute resolution institutions/forums revealed that most of the adjudication forums or institutions can effectively be regarded as internal organs of the social security institutions and therefore not independent of these institutions (the only exceptions are the Office of the Pension Funds Adjudicator and (in some respects) the CMS (Appeal Board). In the first place, the Ministers or Directors-General of the relevant Departments in charge of the relevant social security institution are in most instances responsible for the appointment of members of the adjudication forums (the only exception is the Road Accident Fund Appeal Tribunal which is established by the Registrar of the HPCSA.¹⁴⁵⁰ The relevant Ministers or Directors-General also determine the length and

¹⁴⁴⁹ The only exception can be found in COIDA (which provides for the organisation of pre-trial conferences); the Pension Funds Act (which provides for alternative dispute resolution mechanisms, including conciliation and/or arbitration) and the LRA (which can stay proceedings and refer a dispute to arbitration; or with the consent of the parties and if it is expedient to do so, continue with the proceedings with the Court sitting as an arbitrator).

¹⁴⁵⁰ See for example section 2(1)(b) read with the definition of presiding officer in section 1 in COIDA; section 40(2)(b) of ODMWA; section 47 of the UIA and Regulation 4 of the Regulations relating to the Lodging and

(other) conditions of employment of members, including remuneration. Ministers or Directors-General can further discipline the members and terminate their appointment.

In addition, most of the social security adjudications institutions/forums also do not have independent funding through direct appropriations from parliament (the Office of the Pension Funds Adjudicator and the CMS being the exception). They are mostly funded by the relevant Departments as part of the Departments' annual budget allocations.¹⁴⁵¹ The financial dependence of the adjudication forums is also indicated by the fact that they are not independent accountable institutions in terms of the Public Finance management Act (PFMA). Management governance, oversight and supervision are also undertaken by the Departmental or institutional heads; and the adjudication forums are also required to report to Departmental or institutional heads (in the case of the Road Accident Fund Appeal Tribunal, to the Registrar of the HPCSA). Human resource and administrative support is provided either by the social security administration institutions or (in the case of the Road Accident Fund Appeal Tribunal, the HPCSA).

10.9 Appropriate framework

The gaps and challenges in the current social security dispute resolution system indicate that it is unable to realise the right of access to justice and related rights of users of the system. There is thus a need for the establishment of an appropriate framework. The establishment of such a framework is further motivated by the gravity and importance of the issues at stake.

This calls for the introduction of special and earmarked adjudication institutions and procedures, in order to deal effectively with social security disputes. As noted by the Committee of Inquiry into a Comprehensive System of Social Security in South Africa:

“One of the guiding principles in devising an appropriate social security adjudication system is the need to ensure that an institutional separation exists between administrative accountability, review and revision, and a wholly independent, substantive system of adjudication. The Committee recommends that a uniform adjudication system be established to deal conclusively with all social security claims.

Consideration of Applications for Reconsideration of Social Assistance Application by the Agency and Social Assistance Appeals by the Independent Tribunal (GN R746 published in GG 34618 of 19 September 2011).

¹⁴⁵¹ See Regulation 6 of the Regulations to COIDA of 2008; (section 41(1) of ODMWA; section 51 of the UIA; and Regulation 3(8)(a) of the Regulations to the Road Accident Fund Act of 2008.

It should, in the first instance, involve an independent internal review or appeal institution. It should, in the second place, involve a court (which could be a specialised court) which has the power to finally adjudicate all social security matters, and that this court has the power to determine cases on the basis of law and fairness. The jurisdiction of this court should cover all social security claims, whether under the new UIA, the RAFA, the COIDA and all the other benefits (including the Social Assistance Act) emanating from the social security system (including claims falling under the jurisdiction of the Pension Funds Adjudicator).”¹⁴⁵²

¹⁴⁵² Committee of Inquiry into a Comprehensive System of Social Security in South Africa: *Transforming the Present – Protecting the Future* (Draft Consolidated Report)(March 2002) 124.

CHAPTER SEVEN

ESTABLISHMENT OF AN EFFECTIVE SOCIAL SECURITY DISPUTE RESOLUTION FRAMEWORK IN SOUTH AFRICA

1. INTRODUCTION

The five chapters immediately preceding this chapter have laid down norms, principles and standards on the development of a social security dispute resolution system that guarantees the right (of access) to justice (and other relevant rights). They are drawn from the Constitution¹⁴⁵³ and international standards;¹⁴⁵⁴ and from the implementation of these (or lack thereof) in comparative South African dispute resolution systems;¹⁴⁵⁵ social security dispute resolution systems in comparative international jurisdictions¹⁴⁵⁶ and in the current South African social security dispute resolution systems.¹⁴⁵⁷ These norms, principles and standards provide benchmarks and guidelines on the development of an effective and efficient social security dispute resolution system in South Africa.

This chapter distils the applicable legal principles, norms and standards pertaining to the social security adjudicative and institutional frameworks that should inform and guide the development of an effective and efficient social security dispute resolution system in South Africa. On the basis of these legal principles, norms and standards, the chapter then proposes the most appropriate adjudicative (and institutional) framework for effective and efficient social security provisioning, taking into account their applicability in the South African context.

¹⁴⁵³ See Chapter Two (constitutional perspectives on developing an effective social security adjudication framework).

¹⁴⁵⁴ See Chapter Three (social security adjudication standards in international and regional instruments).

¹⁴⁵⁵ Chapter Four (dispute resolution systems in key comparative South African (non-social security) jurisdictions).

¹⁴⁵⁶ Chapter Five (social security dispute resolution systems in comparative international jurisdictions).

¹⁴⁵⁷ Chapter Six (current South African social security dispute resolution system).

2. PRINCIPLES AND STANDARDS INFORMING THE REFORM OF THE SOUTH AFRICAN SOCIAL SECURITY ADJUDICATION FRAMEWORK

2.1 An integrated approach to realisation of rights

The dispute resolution system established to give effect to the rights of access to justice and to social security for social security claimants must have regard to the values that underpin the Constitution.¹⁴⁵⁸ The promotion of equality requires that not only should all persons have access to the dispute resolution mechanisms necessary to protect their rights and interests (i.e. sameness of treatment irrespective of circumstance (formal equality)), but also that positive measures should be adopted to create the conditions for full and equal participation (substantive equality).¹⁴⁵⁹ Such measures to empower (potential) users of the system include measures aimed at breaking down barriers that may prevent the poor and indigent from accessing the social security dispute resolution system. Therefore, in establishing a system, the social and economic context of (potential) users should be taken into consideration.¹⁴⁶⁰

The framework must also have regard to other rights that have a bearing on these rights (including but not limited to the rights to human dignity, just administrative action and to the enforcement of rights) as all of these rights are interrelated, interdependent and mutually supporting.¹⁴⁶¹ It must also be informed by constitutional principles on courts and administration of justice and basic values and principles governing public administration.

2.2 Creation of a new uniform dispute resolution system

The current South African social security dispute resolution framework is fragmented, with a wide array of laws providing for dispute resolution institutions or forums and procedures.¹⁴⁶² As a result, it was recommended by the Committee of Inquiry into a Comprehensive System

¹⁴⁵⁸ The Constitution states that some of South Africa's foundational values are human dignity, the achievement of equality and the advancement of human rights and freedoms (section 1(a) of the Constitution). See generally Chapter Two para 2.2 (the impact of the values underpinning the Constitution).

¹⁴⁵⁹ See the discussion on (formal and substantive) equality in Chapter Two para 2.2.1.

¹⁴⁶⁰ See Chapter 2 para 3.3.1 (the nature and scope of the right to bring a dispute to court (access to justice)).

¹⁴⁶¹ See for example *Government of the Republic of South Africa and Others v Grootboom and Others* (2000) 11 BCLR 1169 (CC) para 24.

¹⁴⁶² See Chapter Six para 10.1 (fragmentation of South African social security dispute resolution).

of Social Security in South Africa that a uniform adjudication system be established to deal conclusively with all social security claims.¹⁴⁶³

2.3 Establishment of sequential and complementary (internal) reviews and (external) appeals procedures

International standards require that social security disputes must be settled in two stages: a first complaint phase, generally before the higher level administrative body within the social security institutions, and a second stage of appeal against the decision of the administrative body, generally before an administrative, judicial, labour or social security court or tribunal. This requirement, advanced by South African legislation¹⁴⁶⁴ and various international law instruments,¹⁴⁶⁵ has been implemented in comparative South African jurisdictions,¹⁴⁶⁶ comparative international social security systems¹⁴⁶⁷ and some of the current South African social security dispute resolution frameworks.¹⁴⁶⁸

¹⁴⁶³ See Chapter Six para 11 (recommendation: the need to establish an appropriate resolution framework).

¹⁴⁶⁴ In terms of section 7(2) of PAJA, a court is prohibited from reviewing an administrative action unless any internal remedy provided in any other law has first been exhausted. Therefore, where a social security statute provides for a right to apply for reconsideration, or review to be lodged with the social security institution or an appeal to an appeal body in terms of the statute, section 7(2) requires that the reconsideration, review or appeal must first be undertaken before an application for review to a court is made. However, in exceptional circumstances and on application of the affected person, a court may exempt the need to exhaust internal remedies if it is in the interests of justice (see Chapter Two para 5.2 on the impact of PAJA on social security dispute resolution).

¹⁴⁶⁵ E.g. the ILO's Employment Promotion and Protection against Unemployment Convention 168 of 1988 (Article 27(1)) and Social Security (Minimum Standards) Convention 102 of 1952 (Article 70). See Chapter Three para 4.1 (sequential and complementary reviews and appeals procedures).

¹⁴⁶⁶ See for example the resolution of disputes in the labour relations jurisdiction by the CCMA and then the Labour and Labour Appeals Courts (Chapter Four para 2); and the resolution of disputes in the competition regulation jurisdiction first by the Competition Tribunal and thereafter by the Competition Appeal Court (see Chapter Four para 3).

¹⁴⁶⁷ See for example the resolution of disputes in the Australian social security dispute resolution system (multi-level system of sequential and complementary internal review, by the ministry or agency responsible for the administration of social security and external review of decisions by the SSAT, the AAT, the Federal Court, the High Court, the Court of Appeals and finally the Supreme Court (see Chapter Five para 3)); in the United Kingdom (internal review of decisions by the government departments or institution that administer social security before a hearing by the First-tier Tribunal and onwards to the Upper Tribunal (see Chapter Five para 4)); in Germany (application by a person who is unhappy with a social security decision for reconsideration or review by the relevant authority or institution, before proceeding to the Social Courts, the Higher Social Courts and the Federal Social Court (see Chapter Five para 6).

¹⁴⁶⁸ In terms of the Pension Funds Act, a complainant lodges an application with the Office of the Pension Funds Adjudicator after an application to the relevant pension fund for reconsideration of the fund's decision (see Chapter Six para 7); and the Medical Schemes Act foresees the resolution of disputes by the Registrar of and CMS before adjudication by an Appeal Board of the CMS (see Chapter Six para 8).

2.4 Guarantee of institutional separation of administrative accountability, review and revision

The requirement to establish sequential and complementary (internal) reviews and (external) appeals procedures calls for an institutional separation between administrative accountability, review and revision (internal review institution) on the one hand; and a wholly-independent, substantive system of appeals (external appeal institutions) on the other. This ensures the independence of the appeal institution from the administration that reviewed the initial complaint, which is a necessary aspect of the concept of appeal.¹⁴⁶⁹ The institutional separation of internal review and external appeal institutions, which is already applied in comparative South African jurisdictions,¹⁴⁷⁰ comparative international social security systems¹⁴⁷¹ and in some of the current South African social security dispute resolution frameworks¹⁴⁷² was highlighted by the Committee of Inquiry into a Comprehensive system of Social Security for South Africa.¹⁴⁷³

2.5 Establishment of a court (of general or specialist jurisdiction) or a specialist tribunal

The Constitution and international law do not specify the type of institution that should decide (social security) disputes. The right of access to justice in section 34 of the Constitution provides for the resolution of a dispute by a court or (where appropriate) another

¹⁴⁶⁹ See the provisions of the ILO Employment Promotion and Protection against Unemployment Convention 168 of 1988 (Article 27(1)) and Social Security (Minimum Standards) Convention 102 of 1952 (Article 70) and remarks by the ILO in this regard in Chapter Three para 4.1 (ILO *Social security and the rule of law* (General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization) (Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution) Report III (Part 1B)) International Labour Conference, 100th Session, 2011 (2011) para 434).

¹⁴⁷⁰ See for example the institutional separation between employees, employers and trade unions/employers organisations and the CCMA; and between the CCMA and the Labour and Labour Appeals Courts (Chapter Four para 2); and the institutional separation between the Competition Tribunal and the Competition Appeal Court (see Chapter Four para 3)).

¹⁴⁷¹ See for example the institutional separation between social security administration agencies in Australia (Centrelink, Child Support Agency, Family Assistance Office etc) and the SSAT, the AAT, the Federal Court, the High Court, the Court of Appeals and finally the Supreme Court (see Chapter Five para 3); the institutional separation between social security administration agencies in the United Kingdom (such as Department of Work and Pensions (DWP)) and the First-tier and Upper Tribunals (see Chapter Five para 4); The same is true for Germany (see Chapter Five para 6) and New Zealand (see Chapter Five para 5).

¹⁴⁷² The Office of the Pension Funds Adjudicator is separate and independent of the pension funds whose decisions is hears on appeal (see Chapter Six para 7); while the Registrar of the CMS and the CMS and the Appeal Board of the CMS are separate and independent of the medical schemes whose decisions they hear on appeal (see Chapter Six para 8).

¹⁴⁷³ See Chapter Six para 11 (recommendations: the need to establish an appropriate dispute resolution framework).

tribunal or forum. This gives the State the latitude to decide on the most appropriate institution to give effect to the right of access to justice. Social security disputes can be resolved by a court (of general or specialist jurisdiction) or a specialist tribunal. The choice of institution will be made taking into account the category of persons and particular classes of disputes.¹⁴⁷⁴

The freedom to establish either a court or a tribunal to resolve social security disputes is also afforded to state parties of international instruments, such as the ILO Social Security (Minimum Standards) Convention 102 of 1952.

2.6 Guarantee of independence and impartiality of dispute resolution institution

Dispute resolution institutions that are effective in providing access to justice must be independent and impartial (free from improper internal and external influence). This is required by the Constitution and legislation¹⁴⁷⁵ and in international instruments.¹⁴⁷⁶ The independence and impartiality of social security dispute resolution institutions (that have been established in comparative South African jurisdictions, in international comparative systems and some of the institutions in the current South African social security dispute resolution frameworks) is fostered through security of tenure for the court tribunal or forum

¹⁴⁷⁴ See the discussion in Chapter Two para 3.3.2 (the establishment of a court or another independent and impartial tribunal or forum).

¹⁴⁷⁵ The right of access to justice in section 34 requires disputes to be resolved by independent and impartial courts, tribunals or forums. In addition, the right to procedurally fair administrative action in terms of section 33(3) of the Constitution requires that an aggrieved applicant or beneficiary who applies for reconsideration, review, or appeals a negative decision must be heard by an unbiased decision maker before a decision is taken (See the discussions on the establishment of a court or another independent and impartial tribunal or forum in Chapter Two para 3.3.2 and on the right to procedurally fair administrative action in Chapter Two paras 5.3.3 and 5.5).

¹⁴⁷⁶ The European Convention on Human Rights requires independent tribunals (independent of the parties and of the executive). Independence is ascertained through issues such as the manner of appointment of its members, their terms of office, the existence of guarantees against outside pressures and the question whether there is the appearance of independence (See selected adjudication standards emanating from international instruments in Chapter Three para 4).

The independence and impartiality of adjudication institutions in civil matters is also one of the requirements for a fair hearing in legal proceedings laid down by the African Commission on Human & Peoples' Rights in terms of the African Charter on Human and Peoples' Rights. It requires Judges or members of judicial bodies to have security of tenure until a mandatory retirement age or the expiry of their term of office. The tenure, adequate remuneration, pension, housing, transport, conditions of physical and social security, age of retirement, disciplinary and recourse mechanisms and other conditions of service of judicial officers shall be prescribed and guaranteed by law. An adjudication institution is also expected to be impartial, with its decision based only on objective evidence, arguments and facts presented before it (see Chapter Three para 4.2 for more on the guidelines on the requirements for a fair hearing in all legal proceedings laid down by the African Commission on Human & Peoples' Rights.).

officials (in terms of appointment modalities,¹⁴⁷⁷ conditions of service and discipline and termination);¹⁴⁷⁸ a basic degree of financial independence for the court, tribunal or forum (funding arrangements);¹⁴⁷⁹ and control over administrative decisions affecting institution's judicial functions (human resource and administrative support,¹⁴⁸⁰ managerial

¹⁴⁷⁷ Diverse modalities have been utilised for the appointment of adjudicators in comparative South Africa (non-social security) jurisdictions in order to ensure the independence of the various institutions. In many cases, the adjudicators of the institutions are appointed by the President of the Republic (for example in the case of the Competition Tribunal and National Consumer Tribunal), or by an independent tripartite Governing Body (for example in the case of the CCMA). Only in a few instances are appointments determined by a line Minister (see Chapter Four).

In comparative international jurisdictions, the independence of social security dispute resolution institutions is reflected in the appointment of adjudicators by the national executive heads of the respective countries, on the recommendation of the relevant Ministers (e.g. the Queen of England appoints the Senior President of Tribunals (head of the Tribunals who manages the First-tier and Upper Tribunals); while the Governor-Generals of Australia and New Zealand (representatives of the Queen of England in Australia and New Zealand and Heads of State of these countries) appoint members of the SSAT and SSAA respectively (see generally Chapter five). However, in the current South African social security dispute resolution systems, independence and impartiality is not fostered as the Ministers or Directors-General of the Departments that are in charge of the social security institutions are mostly responsible for the appointment of members of the adjudication institutions. The only exception is the Road Accident Fund Appeal Tribunal which is established by the Registrar of the Health Professions Council of South Africa (HPCSA) (see Chapter Six).

¹⁴⁷⁸ Adjudicators in comparative South Africa (non-social security) jurisdictions, the President of the Republic (for the Competition Tribunal and National Consumer Tribunal) or an independent tripartite Governing Body (for the CCMA) may be responsible for determining the remuneration and conditions of service of adjudicators. In some cases, remuneration and conditions of appointment are determined by a line Minister. In addition, only the appointing authorities are empowered to discipline the adjudicators and to terminate their services (i.e. only the President can discipline adjudicators that he appointed and have their services terminated (see Chapter Four).

In comparative international jurisdictions, the conditions of employment of the adjudicators of social security dispute resolution institutions are often prescribed by the statutes that establish them. In addition, adjudicators of these institutions can only be disciplined and their service terminated by the national executive heads of the respective countries when certain specified circumstances are present (see Chapter Five).

In the current South African social security dispute resolution systems, the relevant Ministers or Directors-General determine the period of appointment and (other) conditions of employment of members, including remuneration. Ministers or Directors-General can further discipline the members and terminate their appointment (see Chapter Six).

¹⁴⁷⁹ The independence and autonomy of comparative South African adjudication institutions that are not courts is promoted through their source of funding and their financial accountability (funding for the CMS, the CCMA, the Competition Commission and Tribunal, and the National Consumer Tribunal comes from moneys appropriated by Parliament) (see Chapter Four).

In New Zealand and the United Kingdom, the respective Departments of Justice provide funding. The AAT of Australia is funded through a variety of sources, including money appropriated by Parliament for the Tribunal and dispute application filing fees; whereas the SSAT is funded by the Department for Families, Housing, Community Services and Indigenous Affairs (FaHCSIA). In Germany, the Land minister of finance decides the budget of the courts) (see generally Chapter Five).

However, most current social security adjudications forums do not have independent funding through direct appropriations from parliament (they are mostly funded by the relevant Departments as part of the Departments' annual budget allocations) and are not independent accountable institutions in terms of the Public Finance Management Act (PFMA) 1 of 1999 (see Chapter Six).

¹⁴⁸⁰ Dispute resolution institutions in comparative South African jurisdictions generally manage their human resource and administrative support by themselves, since they are empowered to independently appoint their own staff (see Chapter Four).

The provision of human resource and administrative support to the adjudication institutions in international comparative social security dispute resolution systems varies (in Australia human resource and administrative support for the SSAT is provided FaHCSIA in terms of an administrative arrangement whereas Staff of the AAT is employed under the Public Service Act of 1999 to assist the Tribunal to carry out its functions; in New

framework);¹⁴⁸¹ through governance, supervision and oversight;¹⁴⁸² and accountability and reporting.¹⁴⁸³

2.7 Promotion of accessibility of social security dispute resolution institutions

The social security dispute resolution system must be accessible to its (potential) users so as to guarantee its effectiveness. Users must be able to reach the institution easily to make an application and present a case. Accessibility means that everyone must be able to bring a dispute to the court or tribunal to seek redress. Accessibility is promoted through aspects such as the geographic or physical location of an institution;¹⁴⁸⁴ hearing venues and modalities;¹⁴⁸⁵

Zealand by the Department of Justice; and in the UK by the Courts and Tribunals Service (an independent government agency) (see Chapter Five).

Human resource and administrative support to most of the institutions in the current South African social security dispute resolution frameworks is provided by the social security administration institutions themselves. The only exceptions are Road Accident Fund Appeal Tribunal, the Office of the Pension Funds Adjudicator and the Appeal Board of the CMS (see Chapter Six).

¹⁴⁸¹ Statutes establishing the comparative South African dispute resolution institutions specifically regulate the management of these institutions (e.g. the Office of the Pension Funds Adjudicator is managed by the Adjudicator, while the CCMA is headed by a Director) (see Chapter Four).

The same is true of dispute resolution institutions in international comparative jurisdictions, with statutes establishing the social security adjudication institutions regulating the management of these institutions by persons appointed for that purpose (see Chapter Five).

Government departments are invariably responsible for the management of these Institutions (see Chapter Six).

¹⁴⁸² Governance, oversight and supervision of the comparative South African dispute resolution institutions vest mostly in Parliament (Compensation Tribunal and National Consumer Tribunal) or in a Board / Governing Body (CCMA). However, Ministers also undertake governance, oversight and supervision functions in the case of the Board of the CMS and the Appeal Board of the FSB (see Chapter Four).

Governance, oversight and supervision arrangements for dispute resolution institutions international comparative jurisdictions are undertaken mostly by Parliament (New Zealand) or by an independent Board (UK) or council (for the AAT by the Administrative Review Council). However, FaHCSIA undertakes governance, oversight and supervision of the SSAT in Australia (see Chapter Five).

In the case of current South African social security dispute resolution institutions, oversight and supervision are as a rule undertaken by the Departmental or institutional heads (see Chapter Six).

¹⁴⁸³ Comparative South African dispute resolution institutions have autonomous financial accountability due to their listing as national public entities in Schedule 3A of the Public Finance Management Act (see Chapter Four).

In international comparative jurisdictions, financial accountability and reporting is either the responsibility of either the line Ministry (in the case of the SSAT in Australia and the SSAA in New Zealand) or the Ministry of Justice (UK – which has designated the Tribunals Service Chief Executive as the Accounting Officer) or the Registrar of the Tribunal in the case of the AAT (see Chapter Five).

Financial reporting for most South African social security dispute resolution institutions is done by the relevant departments, since the departments provide funding and administrative support; and the dispute resolution institutions are not independent accountable institutions in terms of the Public Finance Management Act (PFMA) 1 of 1999 (except in the cases of the Office of the Pension Funds Adjudicator and the CMS that are listed as a public entities in Schedule 3A of the Public Finance Management Act) (see Chapter Six).

¹⁴⁸⁴ Access to comparative adjudication institutions by complainants in South Africa has been facilitated in various ways. The CCMA, for example, has offices in all the provinces (with more than one office in some provinces). In some instances, proper geographical access to institutions is not always sufficiently ensured. As examples, some institutions such as the Pension Funds Adjudicator, the Competition Commission and Tribunal and the National Consumer Tribunal, only rely upon a single, centrally located presence for the fulfilment of their functions (see Chapter Four).

education of claimants on available avenues for redress;¹⁴⁸⁶ the language(s) utilised during proceedings;¹⁴⁸⁷ the friendliness of the prescribed documents and forms;¹⁴⁸⁸ the diversity of

Some current social security dispute resolution institutions are located across country. However, other institutions are located in a single, central venue serving the whole country (such as the Office of the Pension Funds Adjudicator and the Medical Reviewing Authority (together with the Medical Bureau for Occupational Diseases (MBOD)) that are located in Johannesburg; and the National Appeals Committee of the Unemployment Insurance Fund is located in Pretoria (see Chapter Six paras 7.2.1, 4.2.1 and 5.2.1 respectively). Some institutions in comparative international jurisdictions also have a presence across the country. In Australia, the National Office of the SSAT is located in Melbourne; with regional SSAT offices in Sydney (for the Australian Capital Territory and New South Wales), Brisbane (for Queensland / Northern Territory), Adelaide (for South Australia / Tasmania), Melbourne (for Victoria) and Western Australia (Perth) (see Chapter Five para 3.2.1 (accessibility of the SSAT)).

¹⁴⁸⁵ Comparative South African dispute resolution institutions endeavour to facilitate access through hearing venues and modalities. As examples, although Labour Courts are currently situated in Cape Town, Durban, Johannesburg and Port Elizabeth, sessions of the Labour Court can be held in other locations if there are available judges (in which case the court sits as a circuit court) (see Chapter Four para 2.2.1 Accessibility of the Labour Court). In addition, the Competition Appeal Court convenes in different locations around the Republic (see Chapter Four para 3.2.1 (accessibility of the Competition Appeal Court)).

Some of the institutions in comparative international jurisdictions also facilitate access through hearing venues and modalities. For example, the UK's First-tier Tribunal conducts hearings in 152 venues for hearings across England, Scotland and Wales (see Chapter Five para 4.2.1 (accessibility of the First-tier Tribunal)). In addition, in Australia, hearings of the SSAT are generally conducted in its offices in Adelaide, Brisbane, Canberra, Hobart, Melbourne, Perth and Sydney. However, SSAT hearings are also conducted in other regional centres. In addition, the SSAT facilitates the participation of parties by arranging hearings through tele- or video-conference for persons living in regional areas and those unable to attend the hearing at the SSAT premises (see Chapter Five para 3.2.1 (accessibility of the SSAT)).

Some current South African social security dispute resolution institutions also convene for a hearing at any determined place within the country (e.g. the Compensation Court (see Chapter Six para 3.2.1)).

¹⁴⁸⁶ It has been held that the right of access to justice in terms of the Constitution includes the ability to achieve this, which implies (inter alia) that a prospective litigant must have knowledge of the applicable law; must be able to identify that she or he may be able to obtain a remedy from a court; and must have some knowledge about what to do in order to achieve access (see Chapter Two para 3.3.1 (the right to bring a dispute to court (access to justice))). The basic values and principles governing public administration (Chapter 10 of the Constitution) further enjoins the public administration to foster transparency by providing the public with timely, accessible and accurate information. There is thus an obligation to educate social security applicants/beneficiaries about their right of access to courts and to social security, especially due to the limited knowledge of the law and human rights of many South Africans. While some social security statutes recognise the need for education on rights (in terms of section 2(4) of the Social Assistance Act 13 of 2004, the South African Social Security Agency (SASSA) must to publish and distribute to beneficiaries and potential beneficiaries, brochures in all official languages of the Republic setting out in understandable language the rights, duties, obligations, procedures and mechanisms of the Act, as well as contact details of the Agency or anyone acting on its behalf); this is not the case with social security adjudication institutions. It is also not the practice in comparative South African dispute resolution systems. However, some dispute resolution institutions in comparative international jurisdictions educate claimants on their rights and the adjudication system. In Australia, the SSAT assists parties to a hearing by providing information about the review process. It also seeks to improve access to justice through activities and meetings intended to raise awareness of the availability of this mechanism (see Chapter Five para 3.2.1 (accessibility of the SSAT)). The AAT also assists parties to participate as fully as possible in the review process by offering information on its role and procedures in multiple formats. It has published brochures for self-represented applicants to explain the Tribunal's role, when it can assist and the stages in a review. The brochures are designed to be clear and easy to understand, and are available in a range of languages and in large print. The letter of acknowledgement of receipt of an application that is sent to an applicant also sets out basic information about the review process. The AAT's Outreach Programme helps self-represented parties understand the Tribunal's processes and gives them the opportunity to ask questions about practices and procedures. The DVD *Getting decisions right* (subtitled in English for people with a hearing impairment) is also available in Arabic, Greek, Italian, Mandarin, Serbian, Spanish, Turkish and Vietnamese. Comprehensive information about the Tribunal and its procedures is also available on its website (See Chapter Five para 3.3.1 (accessibility of the AAT)).

dispute lodgment options;¹⁴⁸⁹ the reasonableness of timeframes for lodging disputes;¹⁴⁹⁰ and the provision of financial and other support.¹⁴⁹¹

2.8 Resolution of disputes in procedurally-fair manner

The procedures adopted by a social security dispute resolution institution have an impact on the realisation of the right of access to justice of users of the institution. As a result, fair procedures are considered central to the resolution of disputes. The Constitution expects disputes to be resolved in a fair public hearing. It permits proceedings in a tribunal or forum to be different from those of a court as the fairness requirements in terms of section 34 are flexible and depend on different factors. Some of the elements of procedural fairness

¹⁴⁸⁷ Comparative adjudication institutions in South Africa generally provide interpretation services during tribunal processes (e.g. the Competition Tribunal and the CCMA provide skilled interpreters to assist non-English speakers during hearings (see Chapter Four).

¹⁴⁸⁸ Forms and other documentation for dispute lodgment with comparative South Africa dispute resolution institutions are often available only in English (see, for example, Chapter Four para 4.1 (accessibility of the National Consumer Tribunal)).

Documents and forms used by current social security dispute resolution institutions are also mostly in English

¹⁴⁸⁹ Access to some current social security adjudication institutions is promoted through the diversity of dispute lodgment options available (e.g. in the case of the Compensation Court by hand, through telefax or by registered mail to the Compensation Fund or an office of the Department of Labour or a labour centre (see Chapter Six para 3.2.1 (accessibility of the Compensation Court)).

¹⁴⁹⁰ Reasonable notice of the time when a dispute is to be lodged must be given to a person concerned (the notice must be such that it gives the person an adequate and fair opportunity to seek judicial redress. The adjudication institution should also be given the power to condone a failure to comply with any notice requirements). South African comparative adjudication institutions vary with respect to the stipulated claim lodgment time periods and periods of prescription. A period of 30 days is utilised by the CCMA. However, late referrals may be condoned once good cause has been shown for a delay. An applicant who misses the stipulated 30-day period for lodging a dispute with the CCMA, for example, would fill out a simple “Application for Condonation” form, explaining the period of the delay, the reasons for the delay, the prospects of success in the matter and any prejudice likely to be caused to the other party. The other (employer) party is given a chance to respond to this application, after which a Commissioner makes a finding as to whether or not the late referral should be condoned.

Reasonable time periods dispute lodgment are also provided for the lodgment of disputes with some current social security institutions (e.g. a deadline of 180 days after receiving notice of the decision is provided to make an objection to the Compensation Court in terms of COIDA (see Chapter Six para 3.2.1 (accessibility of the Compensation Court)). However, for most institutions, the deadline is 90 days after receiving notice of the decision. In addition institutions are also not empowered to condone late dispute lodgment submissions.

¹⁴⁹¹ Some current social security dispute resolution institutions and institutions in international comparative systems promote access by assisting claimants with expenses and other costs. As examples, the First-tier Tribunal facilitates participation at a hearing by making a contribution towards an applicant’s out-of-pocket expenses in attending a hearing, such as travel costs, loss of wages and child minding expenses (see Chapter Five para 4.2.1 Accessibility of the First-tier Tribunal). The Social Security Appeal Authority also pays the actual and reasonable travelling and accommodation expenses (if any) incurred by the appellant who is requested to appear before it (see Chapter Five para 5.4.1 (accessibility of the Social Security Appeal Authority)).

Some current social security dispute resolution institutions also provide assistance to claimants in order to promote access (e.g. where an applicant (other than the RAF) is required to attend a hearing, the Appeal Tribunal (in this case the Road Accident Fund) provides transport and accommodation (where necessary) (see Chapter Six para 6.2.1 (accessibility of the Road Accident Fund Appeal Tribunal)).

include¹⁴⁹² public proceedings;¹⁴⁹³ procedural equality;¹⁴⁹⁴ the power to determine the appropriate procedures;¹⁴⁹⁵ personal appearance and appropriate representation;¹⁴⁹⁶ the expeditious resolution of disputes and simple proceedings;¹⁴⁹⁷ inexpensive adjudication procedures;¹⁴⁹⁸ provision of free legal assistance by the State to claimants who cannot afford legal assistance;¹⁴⁹⁹ guarantee of an effective remedy;¹⁵⁰⁰ provision of a reasonable

¹⁴⁹² See the discussion on the constitutional requirement of procedural fairness (including the requirement of a public hearing) in Chapter Two para 3.3.3; and Chapter Three para 4 on selected adjudication standards emanating from international instruments.

¹⁴⁹³ The Constitution and international law instruments require the resolution of disputes in a public hearing (see Chapter Two para 3.3.3 on procedural fairness (including the requirement of a public hearing; and Chapter Three para 3 (protection of the right of access to justice in international instruments) and para 4 (selected adjudication standards emanating from international instruments)). In comparative South African jurisdictions, comparative international social security systems and some South African social security dispute resolution systems hearings (where they are held) are in public (see Chapter Four para 3.1.3 on the fairness of Competition Tribunal Procedures; Chapter Four para 3.2.3 on the fairness of Competition Appeal Court procedures; Chapter Four para 4.3 Fairness of National Consumer Tribunal procedures; Chapter Five para 3.3.3 on fairness of AAT procedures; and Chapter Five para 4.2.3 Fairness of First-tier Tribunal procedures).

¹⁴⁹⁴ See Chapter Three para 4.5 on procedural guarantees to ensure a fair hearing in international instruments.

¹⁴⁹⁵ Some institutions are empowered to determine their own dispute resolution procedures. For example, in the UK, the Tribunals, Courts and Enforcement Act empowers the First-tier Tribunal to set their own rules of procedure, which enables its procedures to be flexible and adaptable in meeting the difficulties that parties face, especially if they are unrepresented (see Chapter Five para 4.2.3 on Fairness of First-tier Tribunal procedures).

¹⁴⁹⁶ Personal appearance and appropriate representation are some of the elements of the right to procedural fairness in terms of the Constitution (see Chapter Two para 3.3.3 on procedural fairness (including the requirement of a public hearing)). They are also guaranteed in many of the reviewed dispute resolution institutions or forums. As examples, personal appearance and/or appropriate representation are allowed in the CCMA (see Chapter Four para 2.1.3 on the fairness of CCMA procedures); in the Labour Court (see Chapter Four para 2.2.3 on the fairness of Labour Court procedures); in the Competition Tribunal (see Chapter Four para 3.1.3 on the fairness of Competition Tribunal procedures); in the National Consumer Tribunal (see Chapter Four para 4.3 on the fairness of National Consumer Tribunal procedures); in the AAT (see Chapter Five para 3.3.2 Fairness of AAT procedures); in the Road Accident Fund Appeal Tribunal (Chapter Six para 6.2.3 on the Fairness of Road Accident Fund Appeal Tribunal adjudication procedures)

¹⁴⁹⁷ International standards require the expeditious resolution of disputes. This aims to protect the parties against excessive delays in legal proceedings and to highlight the impact of delay on the effectiveness and credibility of justice (see the discussion in Chapter Three para 4.4 on expeditious (rapid) and simple proceedings). Dispute resolution institutions also seek to resolve disputes speedily. As examples, CCMA processes are designed to ensure that disputes are resolved quickly (see Chapter Four para 2.1.3 on the fairness of CCMA procedures); the Competition Tribunal is required to conduct its hearings as expeditiously as possible); the National Consumer Tribunal is required to conduct proceedings as expeditiously as possible (see Chapter Four para 4.3 on the fairness of National Consumer Tribunal procedures); the SSAT is required to act as expeditiously as possible (see Chapter Five para 3.2.2 Procedural fairness of the SSAT).

¹⁴⁹⁸ See Chapter Three para 3 on the protection of the right of access to justice in international instruments and para 4.5 on procedural guarantees to ensure a fair hearing). While it is free to bring a dispute to most South African social security and comparative dispute resolution institutions (see Chapters Four and Six), others such as the Appeal Board of the CMS charge a refundable fee (see Chapter Six para 8.2.1 on the accessibility of the CMS Appeal Board). In other cases such as in the High Court, claimants have to pay court and attorney fees (see Chapter Six para 9.1 on the accessibility of the High Court). In most international comparative social security systems, bringing a dispute is free of charge (such as in the German Social Courts (see Chapter Six para 6.2.1 on access to the German Social Courts) and the SSAT (see Chapter Five para 3.2.1 on the accessibility of the SSAT)).

¹⁴⁹⁹ See Chapter Two para 3.3.3 (procedural fairness (including the requirement of a public hearing)) on the right to free legal assistance in terms of the Constitution; and Chapter Three para 4.6 on international standards pertaining to the guarantee of representation and legal assistance. The provision of free legal assistance varies amongst the various jurisdictions. Most litigants in civil matters in South Africa (including social security claimants) do not have access to free legal assistance/ legal aid (see Chapter Two para 3.3.3 on procedural

opportunity to make representations (oral or written), adequate notice of any right of review or internal appeal (where applicable), adequate notice of the right to request reasons, and adequate reasons for decisions;¹⁵⁰¹ notification of decisions;¹⁵⁰² and provision of alternative dispute resolution avenues.¹⁵⁰³

2.9 Appointment of suitably-qualified persons as adjudicators

International standards require that only suitably-qualified persons should be appointed as members of (social security) dispute resolution institutions.¹⁵⁰⁴ The stating of minimum academic qualifications and relevant professional and other experience (including legal qualifications and experience) in the laws would enhance effectiveness. Minimum qualifications and experience requirements for adjudicators are stipulated in (some) of the statutes establishing dispute resolution institutions in comparative South African

fairness (including the requirement of a public hearing). However, free legal assistance is provided to social security claimants in Australia (see Chapter Five para 3.2.1 on the accessibility of the SSAT and para 3.3.1 on the accessibility of the AAT); Germany (see Chapter Five para 6.2.1 on the accessibility of the Social Courts).

¹⁵⁰⁰ See Chapter Three para 4.7 on international standards pertaining to the provision of effective (enforceable) remedies. The decisions of some of the tribunals or forums are deemed to be the judgment of a court, and they are afforded powers to enforce their decisions as is the case with courts. For example, relief by the Upper Tribunal has the same effect as the corresponding relief granted by the High Court on an application for judicial review, and is enforceable as if it were relief granted by the High Court on an application for judicial review (see Chapter Five para 4.3.3 on the scope of jurisdiction and powers of the Upper Tribunal). In addition, the Compensation Court is considered to have the status of a court at the level of the Magistrates Court. As a result, a ruling of the Court is enforced as a decision of a (Magistrates) Court (see Chapter Six para 3.2.2 Scope of jurisdiction and powers of the Compensation Court).

¹⁵⁰¹ Section 33(2) of the Constitution and sections 3(2)(b) and 5 of PAJA require that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons (see Chapter Two paras 5.1, 5.3.4 and 5.4).

¹⁵⁰² For example, as part of its commitment to ensure timely service to applicants and other parties to reviews, timeliness standards in the SSAT Service Charter include written notification of the SSAT's decision within 14 days of the decision (see Chapter Five para 3.3.3 on fairness of SSAT procedures). The quick resolution of disputes is one of the objectives for the establishment of the First-tier and Upper Tribunals in the UK. Therefore, as soon as reasonably practicable after making a decision, each Tribunal must provide to each party a decision notice stating the Tribunal's decision (see Chapter Five paras 4.2.3 on the fairness of First-tier Tribunal procedures and 4.3.3 on fairness of Upper Tribunal procedures).

¹⁵⁰³ In South Africa, the Competition Act also provides for the Competition Tribunal to carry out alternative dispute resolution processes (a pre-hearing conference) in furtherance of the objectives of the Act (see Chapter Four para 3.1.3 on the fairness of Competition Tribunal Procedures). In the UK, the First-tier and Upper Tribunals are permitted to bring to the attention of the parties the availability of any appropriate alternative procedure for the resolution of the dispute; and can facilitate the use of such an alternative procedure if it is the wish of the parties and the procedure is compatible with the Tribunal's overriding objective (see Chapter Five paras 4.2.3 and 4.3.3 the fairness of First-tier Tribunal and the Upper Tribunal procedures, respectively).

¹⁵⁰⁴ See, for example, the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa (1999) Section A, Article 4 which states that the sole criteria for appointment to judicial office should be the suitability of a candidate for such office by reason of integrity, appropriate training or learning and ability; and that no person should be appointed to judicial office unless they have the appropriate training or learning that enables them to adequately fulfil their functions.

jurisdictions,¹⁵⁰⁵ international comparative jurisdictions¹⁵⁰⁶ and South African social security systems.¹⁵⁰⁷

2.10 Granting dispute resolution institutions wide powers and extensive scope of jurisdiction

The Committee of Inquiry into a Comprehensive System of Social Security for South Africa recommended that a social security adjudication system that is established should deal conclusively with all social security claims. It should have the power to finally adjudicate all social security matters and should have the power to determine cases on the basis of law and fairness. Its jurisdiction should cover all social security claims emanating from the social security system.¹⁵⁰⁸

Institutions with wide powers and extensive scope of jurisdiction have been created in comparative South African jurisdictions and in social security systems in international comparative jurisdictions. Although circumscribed by statute, the scope of jurisdiction of some of the comparative South African dispute resolution institutions is fairly wide. A wide scope of persons can bring disputes to the institutions, and the institutions can deal with an extensive range of matters.¹⁵⁰⁹ These institutions enjoy extensive powers, such as the power to subpoena persons and also perform a fairly wide scope of functions (the use of terms such

¹⁵⁰⁵ In terms of the Competition Act (Section 28), the Chairperson and other members of the Competition Tribunal must have sufficient legal training and experience (they must have suitable qualifications and experience in economics, law, commerce, industry or public affairs; and be committed to the purposes and principles of the Act) (see Chapter Four para 3.1.4). The National Credit Act also states that the Tribunal must have sufficient persons with legal training and experience (suitable qualifications and experience in economics, law, commerce, industry or consumer affairs) (see Chapter Four para 4.4).

¹⁵⁰⁶ In terms of the Tribunals, Courts and Enforcement Act (Para 2 of Schedule 2) a person can only be appointed to be one of the members of the First-tier Tribunal if he or she has qualifications prescribed by order made by the Lord Chancellor with the concurrence of the Senior President of Tribunals. Upper Tribunal members are also appointed on the basis of their knowledge, experience or expertise relevant to the Tribunal's jurisdiction (see Chapter Five para 4). The AAT Act also stipulates that presidential and senior members of the AAT must have been enrolled as legal practitioners for at least five years; and must have knowledge or skills relevant to the duties of a member, such as accountancy, aviation, engineering, law, medicine, pharmacology, military affairs, public administration and taxation (see Chapter Five para 3.3.4).

¹⁵⁰⁷ As examples, the Regulations to the Social Assistance Act states minimum qualifications and experience requirements for the members of the ITSAA panel who are legal practitioners and medical practitioners. The Regulations to the Road Accident Fund Act also state minimum qualifications and experience requirements for the medical practitioners that make up the Appeal Tribunal. The Pension Funds Act also states minimum qualifications and experience requirements for a person to be appointed as an (Acting) Adjudicator (see Chapter Six).

¹⁵⁰⁸ Committee of Inquiry into a Comprehensive System of Social Security in South Africa: Transforming the Present – Protecting the Future (Draft Consolidated Report)(March 2002) 124 (see Chapter Six para 11).

¹⁵⁰⁹ See for example Chapter Four para 4.2 (scope of jurisdiction and powers of the National Consumer Tribunal) on the parties that can make an application to the National Consumer Tribunal.

as “any matter in the Act” ensures a wide interpretation their powers and functions).¹⁵¹⁰ The institutions provide a wide range of remedies, such as making an order which any court of law may make, providing interim relief and making cost orders. Some of the institutions can also reconsider their decisions.¹⁵¹¹ Institutions that are not courts of law are also empowered to enforce their decisions. The decisions of such institutions are often deemed to be the judgment of a court and are then enforced as such.

Social security dispute resolution institutions in international comparative jurisdictions also have wide powers and extensive functions. A wide scope of persons can bring disputes to the tribunals and courts. In addition, the scope of disputes covered by the institutions is wide, with limited circumscription. The institutions are also afforded wide powers in the resolution of disputes. Wide powers also enable them to provide an array of possible remedies.¹⁵¹²

2.11 Prevention of multiple dispute resolution institutions and avenues

In order to promote the effectiveness of a dispute resolution system, parties must be prevented from bringing multiple causes of action. This negates the objective of the establishment of a multi-tiered dispute resolution system with the aim of resolving disputes at the appropriate level.

A lower level dispute resolution institution is considered an “internal remedy” to be exhausted before approaching a higher level institution on further appeal or on review.¹⁵¹³ This principle, which is applied in comparative South African legal jurisdictions and international comparative social security dispute resolution systems,¹⁵¹⁴ is not the case with some South African social security institutions.¹⁵¹⁵

¹⁵¹⁰ See Chapter Four para 2.1.2 (scope of jurisdiction and powers of the CCMA) on the CCMA’s power to subpoena persons.

¹⁵¹¹ For example, the CCMA can vary or rescind a decision in case where an obvious material error has been made (see Chapter Four para 2.1.2 on the scope of jurisdiction and powers of the CCMA).

¹⁵¹² See Chapter 5 para 3.2.3 on the scope of jurisdiction and powers of the SSAT; Chapter Five para 3.3.2 on the scope of jurisdiction and powers of the AAT; Chapter Five para 4.2.2 on the scope of jurisdiction and powers of the First-tier Tribunal; Chapter Five para 4.3.2 on the scope of jurisdiction and powers of the Upper Tribunal; Chapter Five para 5.4.2 on the scope of jurisdiction and powers of the SSAA; Chapter Five para 6.2.2 on the scope of jurisdiction and powers of the German Social Courts.

¹⁵¹³ Section 7(2) of PAJA requires that any internal remedy provided in any other law must first be exhausted before a court is approached for the review of an administrative action.

¹⁵¹⁴ For example, the SSAT in Australia cannot review a decision made by an officer of Centrelink or of the Child Support Agency unless that decision has been reviewed by an Authorised Review Officer or Objections Officer (see Chapter Five para 3.2.2 on the scope of jurisdiction and powers of the SSAT). In addition, an

3. PROPOSED ADJUDICATIVE (AND INSTITUTIONAL) FRAMEWORK FOR EFFECTIVE SOCIAL SECURITY PROVISIONING

At present, the South African social security system consists of various institutions that are responsible for the administration of particular risks and for the resolution of disputes. In the absence of a new, uniform, social security administrative institution, the dispute resolution functions to be performed by an administrative institution must be allocated to each of the current institutions. This means that to ensure the most appropriate dispute resolution system, there must be properly functioning internal review or revision frameworks within the various institutions. In addition, a uniform, external appeal institution must be created to hear appeals emanating from the (reviewed or reconsidered) decisions on the basis of law and fairness. The proposed framework thus consists of internal review or revision frameworks and a wholly independent social security appeal institution.

However, it must be noted that these proposals will be affected by current reform initiatives relating to the development of a comprehensive social security system¹⁵¹⁶ and the enactment of the Superior Courts Bill.¹⁵¹⁷ The establishment of the National Social Security System will

application can only be made to the AAT for review of the decision of the SSAT if the decision has been reviewed by the SSAT; and the decision has been affirmed, varied or set aside by the SSAT. In addition, the AAT may only review a decision that has been reviewed by the SSAT (see Chapter Five para 3.3.2 on the scope of jurisdiction and powers of the AAT). In the UK, a person can only apply to the Upper Tribunal if they have been given leave to apply by the Tribunal whose decision they are challenging; or an application for leave to apply has been refused (see Chapter Five para 4.3.1 on the accessibility of the Upper Tribunal).

¹⁵¹⁵ The Pension Funds Act permits multiple causes of action and dispute resolution institutions, applicants to the Office of the Pension Funds Adjudicator can simultaneously institute a complaint in a civil court (High Court) (see Chapter Six para 7.2.2 on the scope of jurisdiction and powers of the Pension Funds Adjudicator).

¹⁵¹⁶ In the 2007 *State of the Nation address*, it was announced that the government plans to establish a National Social Security System (NSSS) in order to address SA's social security challenges (see Mbeki T *State of the Nation Address of the President of South Africa to the Joint Sitting of Parliament* (9 February 2007)). The NSSS will be developed on principles of equity, risks pooling, mandatory participation, administration efficiency and solidarity (see National Treasury *Social Security and Retirement Reform: Second Discussion Paper* (23 Feb 2007) para 27). It will be a multi-pillar system, consisting of social assistance grants (funded from general government revenue, with the means test threshold either removed or significantly increased, providing a safety net against poverty in old age, and providing basic support to the disabled, children and care-givers); mandatory participation in a national social security system, up to an agreed earnings threshold, providing basic retirement, unemployment, death and disability benefits; additional mandatory participation in private occupational or individual retirement funds (for individuals with earnings above the threshold, ensuring that individuals at all earnings levels make appropriate provision for insurance coverage and income replacement in retirement) and supplementary voluntary savings (see National Treasury, *Social Security and Retirement Reform: Second Discussion Paper* (23 Feb 2007) para 13).

¹⁵¹⁷ The Superior Courts Bill, 2011 [B 7 2011]. The Bill aims to rationalise, consolidate and amend the laws relating to the superior courts (Constitutional Court, the Supreme Court of Appeal and the High Courts) in a single Act of Parliament. It further makes provision for the administration of the judicial functions of all courts, including governance issues, by the Chief Justice as the head of the judiciary (section 2(1)(c) of the Bill).

streamline the administration of social security, since the administration of the different risks will be undertaken by a single institution. This implies that the review or reconsideration of decisions (currently undertaken by an array of institutions) will also be carried out by a single institution. In addition, the Superior Court Bill, once enacted, will ensure a single, integrated, accessible and affordable court system. It will also promote the independence and impartiality of the system, with court governance undertaken by the Chief Justice. This has the impact of facilitating the resolution of (social security) disputes that are brought before the superior courts.

3.1 Internal review or reconsideration of decisions by relevant institution

An effective and efficient dispute resolution system should include a framework for the review or reconsideration of a decision by a social security administrative institution. This will give the authority an opportunity to consider the correction of a decision by a trained senior review official. The review official should be able to vary or rescind the original decision where it is found to be incorrect and substitute it. The establishment of well-structured and properly-aligned internal review frameworks will lessen the workload of the appeal institutions and will also enhance decision-making by the institution.¹⁵¹⁸

3.1.1 Reconsideration of SAA decisions

The Social Assistance Act provides for the reconsideration of decisions by SASSA. A decision is reconsidered by a designated official who occupies a position that is higher in rank to that of the official or officials who made the original decision. However, there are no requirements that officials designated to handle applications for reconsideration are

The Bill is intended to give effect to item 16(6) of Schedule 6 to the Constitution, in terms of which all courts must be rationalised with the view to establishing a judicial system suited to the requirements of the Constitution. It is also aimed at promoting the achievement of a single, integrated, accessible and affordable court system, as well as establishing an integrated system of court governance, within a single judiciary, with the Chief Justice as the head of the judiciary. The Bill envisages that the Chief Justice will exercise responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.

The Bill further seeks to rationalise and strengthen the rule-making mechanism to improve the efficiency of the courts. This will enhance the role of the judiciary in making the rules for all courts and provide for a meaningful role by the Minister and Parliament in the processing and approval thereof, which are legislative measures geared to enhance access to justice.

¹⁵¹⁸ See Olivier M, Govindjee A & Nyenti M *Project to set up internal remedy units at district, regional and national offices at SASSA (Report prepared for the South African Social Security Agency (SASSA) ISLP (May 2009) 129.*

appropriately qualified to undertake reviews. It is therefore necessary that these officials are trained. It may also be necessary for officials, designated to undertake review functions, to do so on an ongoing and full-time basis.

The current timeframe of 90 days for the lodging of an application for reconsideration should be maintained. However, SASSA should be empowered to condone the late lodgement of applications for reconsideration. In addition, to promote the geographical and physical accessibility of the SASSA internal adjudication framework, reconsiderations should be conducted at the level of the SASSA District office.

If an applicant or beneficiary is unhappy with the outcome of the reconsideration, a right should be provided for the dispute to be referred to an official that is higher in rank and situated at regional level for reconsideration or to ITSAA (as a higher level of internal review). An applicant or beneficiary should be given an opportunity to be heard where the circumstances of the reconsideration permit. As is the case within the current ITSAA tribunal framework, the hearing should be done by a panel.¹⁵¹⁹

In light of the envisaged establishment of a uniform external social security appeal institution, a person who remains unhappy with the reconsidered decision of SASSA will have a right to lodge an appeal with the new uniform appeal institution. It is thus proposed, except if ITSAA is a higher level of internal review, that it should be disbanded.

3.1.2 Review of COIDA decisions

COIDA provides for the review of the decisions of the Compensation Commissioner (Director-General) and for the lodging of objections and appeals. The system is not properly aligned, as the Act limits the decisions of the Director-General that can be reviewed, although there is no such limitation regarding the disputes that can be objected to or appealed. In addition, the system is fragmented, as some decisions of the Compensation Fund are subject to review by the Director-General, while other decisions are subject to an objection or appeal to the Compensation Court (panel of a presiding officer assisted by assessors). The Compensation Court was thus considered as an external appeal forum for objections and

¹⁵¹⁹ Such as the inclusion of a medical practitioner and a member of civil society in the ITSAA panel when the Tribunal considers an appeal against a decision of SASSA.

appeals against the decision of the Compensation Commissioner. However, as was revealed, the Compensation Fund fails to meet the standards for an external adjudication institution.

The presiding officer, with the assistance of the assessors, should undertake the review of the decisions of the Compensation Fund. This implies that a person affected by a decision of the Director-General/Compensation Commissioner (or a trade union or employer's organisation of which the person was a member at the relevant time) may lodge an application for review of the decision with a Compensation Court.

The presiding officer and assessors should be sufficiently qualified to review the decisions of the Compensation Commissioner. The scope of jurisdiction of the Compensation Court should be wide, as they should be able to review any decision of the Director-General/Compensation Commissioner. Their powers must also be extensive, to be able to confirm, vary or set aside the original decision and substitute it.

The accessibility of the Compensation Court should be promoted. This can be achieved through its current practice of convening at any place determined by the Commissioner for the hearing of an objection. The current time limit of 180 days for the lodgement of objections and appeals should be applied to applications for review, as it provides a reasonable opportunity for prospective applicants to be able to apply for review. The Compensation Court should also have the power to condone late submission of applications.

The Compensation Court should be empowered to determine the procedure of a review (which should be as informal as possible). Parties should be given an opportunity to submit representations to the panel. Reasonable timeframes for the finalisation of a review application should be specified. The presiding officer should be empowered to confirm the decision in respect of which the objection was lodged or give such other decision as he may deem equitable after consultation with the assessors.

Parties must also be able to appeal the Court's decision to the proposed new uniform appeal institution. This will require the revocation of the right of a person who is affected by selected decisions of the Compensation Court to lodge an appeal with the High Court. Finally, COIDA must further be revised to abolish the power of Director-General to state a case for consideration by the High Court and the Supreme Court of Appeal.

3.1.3 Review of ODMWA decisions

To create a streamlined and uniform (internal and external) social security adjudication system, a framework for the review or reconsideration of ODMWA compensation claim decisions must be established. This may be done by extending the scope of jurisdiction of the Reviewing Authority.

The framework for the review of disputes relating to the certification of an occupational disease also needs to be reformed. The Reviewing Authority should be designated as the internal review or reconsideration forum, as it fails to meet the standards of an external appeal forum. In this case, a person who is unhappy with a decision of the Certification Committee and the Compensation Commissioner should lodge an application with the Medical Reviewing for the review or reconsideration of the decision. This may require the inclusion in the Reviewing Authority of persons with knowledge and experience in issues relating to the decisions of the Compensation Commissioner.

The dispute lodgement procedures and timeframes provided for lodgement of applications with the Reviewing Authority will still be applicable. However, multiple dispute lodgement mechanisms must be provided (such as by hand, post, fax or electronic mail). In addition, the Reviewing Authority should also have the power to condone applications which are submitted late, where good cause is shown. This will increase the accessibility of the ODMWA adjudication framework by enabling more people to lodge applications for reconsideration.

The Reviewing Authority should have the power to review any finding of the Certification Committee and the Compensation Commissioner. It should also be able to confirm, vary or rescind the decisions. As a higher authority for the review of ODMWA decisions, the Reviewing Authority should be able to make decisions on its own, not in a joint sitting with the Certification Authority. This will ensure the separation of the decision-making function (by the Certification Committee) and the internal review or reconsideration function.

The current review procedures should be maintained (such as personal appearance, representation and notification of review decisions). However, timeframes for the finalisation of reviews must be stipulated.

Geographical or physical accessibility of the Certification Committee and the Reviewing Authority must be facilitated. The certification of diseases and review of decisions should be undertaken in as many locations as practically possible (instead of the single Johannesburg location). The certification procedure must also be expedited.

A person who is aggrieved by a review decision of the Reviewing Authority should have the right to lodge an appeal with the envisaged new social security appeal institution. In addition, the power of the Compensation Commissioner for Occupational Diseases to state a special case for the ruling of the High Court on any question of law which arises in connection with any matter in which the Commissioner has given or is required to give a decision under the Act must be repealed.

3.1.4 Review of UIA decisions

The analysis of the institutional status and framework of both the Regional Appeals Committees and the National Appeals Committee indicates that they are both internal organs of the Department of labour.¹⁵²⁰ Therefore, the Unemployment Insurance Fund internal review or reconsideration framework must be reformed, with the relevant forum designated.

Since the Regional Appeals Committees of the (UIF) Board are more geographically or physically distributed around the Republic, they offer the most accessible option for persons unhappy with decisions of the Fund. In addition, members of the Regional Appeals Committees could be considered to be more senior in rank to the original decision-makers at the UIF. Suitably qualified or trained persons should thus be appointed to undertake review or reconsideration of UIF decisions. The Regional Appeals Committees would still have to undertake the same scope of jurisdiction that is currently in place in terms of the UIA.

In addition to submitting a Notice of Appeal Form (Form UI 13), either by hand or by registered post to the Regional Appeals Committee at the respective Labour Centres of the Department of Labour, aggrieved persons should also be able to lodge an application for review by fax and electronic mail. An appeal should be lodged within 90 days of the decision, although the Appeals Committee should permit a person to refer a dispute at any time after

¹⁵²⁰ See Chapter Six para 5 (Unemployment Insurance Act dispute resolution framework).

the time limit. The Regional Appeals Committees must also be empowered to decide disputes relating to a refusal to pay benefits due to the late submission of a claim for benefits to the UIF.

The Regional Appeals Committees should also conduct hearings for the determination of disputes. This will give the parties to the dispute an opportunity to appear in person and to participate in the adjudication process. The Regional Appeals Committee should also have a right to permit representation (where it deems it necessary) either by a lawyer or another representative such as a UIF, trade union or employers' organisation official. The UIF should appoint interpreters in each region to assist persons unable to participate in the proceedings in the language used. Timeframes for dispute resolution by the Regional Appeals Committees must be stated. The Committees must also be empowered to reconsider an original decision to correct any defects. The accessibility of Regional Appeals Committees should also be promoted by providing the Notice of Appeal Form (UI 13) in English and in the majority language of the region.

The National Appeals Committee of the UIF Board would thus cease undertaking dispute resolution functions. A person who is unhappy with the review or reconsideration decision of a Regional Appeals Committee would thus have the right to lodge an appeal directly with the envisaged uniform social security appeal institution.

3.1.5 Review of RAFA decisions

There is a need to establish mechanisms for the resolution of disputes relating to the payment of compensation for injuries or death resulting from a motor accident. This may require the development of guidelines on the payment of compensation for injuries or death resulting from a motor accident.¹⁵²¹

The Road Accident Fund Act provides a dispute resolution mechanism for disputes relating to assessments of motor vehicle accident injuries. However, no proper mechanism for the internal Road Accident Fund review or reconsideration of its decision has been established. This raises the prospect of either the creation of an internal framework for the Road Accident

¹⁵²¹ See, for example, Schedule 4 of the COIDA which provides guidelines on the manner of calculating compensation for occupational injuries and diseases.

Fund to review or reconsider its decisions; or designate the Appeal Tribunal appointed by the Registrar of HPCSA as the internal review forum for the Fund.

Proposals for the reform of the Road Accident Fund dispute resolution framework were made by the Road Accident Fund Commission in 2002.¹⁵²² The Commission held that where an adverse decision is made to a road accident claimant, the decision should be communicated to him or her without delay. Such notification should include a statement of the findings and of the reasons for the decision. It should also include information about the right to and the means of instituting an appeal, including time limits on application.¹⁵²³

The Commission proposed that the Road Accident Fund should establish its own internal review mechanism or body capable of monitoring decisions on benefits and initiating immediate reconsideration of such decisions where there is an indication or notification by a claimant of a dispute.¹⁵²⁴ The Commission further proposed a two-tiered (external) appeals system.¹⁵²⁵ However, in order to develop a speedy, streamlined and effective Road Accident adjudication system, this should be reduced to an internal review mechanism and an external appeal.

The Commission suggested that the internal review mechanism could include ongoing monitoring of decisions of the Road Accident Fund by more senior members of management, automatic referral of decisions under dispute to more senior line management and even the creation of an internal review body with the Road Accident Fund comprising senior members of management. This will ensure the reconsideration of erroneous or ill-advised decisions and could constitute an internal “quality control device”.¹⁵²⁶

The proposals of the Road Accident Commission have led to the reform of the motor vehicle accident compensation system, notably through the development of a new policy framework

¹⁵²² See Road Accident Fund Commission *Report to His Excellency The President of The Republic of South Africa* 2002.

¹⁵²³ *Ibid*, 780.

¹⁵²⁴ *Ibid*, XLIV.

¹⁵²⁵ *Ibid*, 782. The proposal consisted of a first stage appeal to a Benefits Review Panel and thereafter an appeal to a Benefits Appeal Tribunal.

¹⁵²⁶ *Ibid*, 782.

for the compensation of motor accident victims (including the resolution of disputes);¹⁵²⁷ and the amendment of the RAFA.¹⁵²⁸

It is therefore proposed that a benefits review panel comprising a senior member or senior members of management be set up within the Road Accident Fund to undertake internal review or reconsideration of decisions. Any person aggrieved by a decision of the Road Accident Fund will be entitled to appeal to a benefits review panel. Benefits review panels should be established on a regional basis, to promote accessibility for claimants. Senior management officials appointed as review officers should be people with expertise in road accident compensation and in the Road Accident Fund. Although reviews must be lodged within a specified period after the claimant has been notified of an adverse decision, the panel should have the power to extend the period when there are good reasons for so doing.

It may be necessary to have multi-member panels so that the desirable range of expertise and skills and social security issues is properly represented. One member should be legally qualified, while others should have skills or expertise in other disciplines relevant to the road accident insurance system (such as medicine, rehabilitation, employment and welfare).

As an initial adjudication process the review/reconsideration will deal with a large number of cases, it should provide accessible, speedy, informal and economical procedures. However, it should maintain an appropriate standard of procedural fairness. It should provide a reasonable opportunity for claimants to make representations (to put his or her case forward).¹⁵²⁹ The Panels should have the power to reverse, affirm or vary the decision under review, to substitute its own decision or to remit the matter to the administrative authority with or

¹⁵²⁷ See, for example, Department of Transport *Draft Policy on the restructuring of the Road Accident Fund as compulsory social insurance in relation to the comprehensive social security system* (GN 121 in GG 32940 of 12 February 2012) which seeks to transform the current structural problems of the compensation system for road users and to align a revised benefit scheme to the principles and objectives of the Constitution; and aims to expand the social security safety net within the constraints of limited resources, provide more appropriate social support and introduce measures to use public resources more economically and effectively.

¹⁵²⁸ The Road Accident Fund Amendment Act 19 of 2005 removed the limitation on passenger claims; removed the members of the same household exclusion; removed the passenger for reward on motorcycle exclusion; provides that general damages are only payable if a serious injury was sustained; requires medical expenses for emergency treatment to be paid according to the HPCSA Tariff; and limited the annual loss irrespective of the actual loss for loss of earnings and loss of support claims to R160 000.00 per annum (with the amount increased quarterly by inflation)). The Road Accident Fund (Transitional Provisions) Act 15 of 2012 provides for transitional measures in respect of certain categories of third parties whose claims were limited under the RAFA.

¹⁵²⁹ *Ibid*, 782.

without directions. The panel should have all the powers and discretions conferred on the Road Accident Fund.

Where an oral hearing is not necessary, the panel should review a decision on the basis of the material in the file and other documents before it. In cases of urgency, or where distance is a problem, telephone hearings may be employed. Hearings should be held in public. The Fund should provide interpreters to facilitate participation by claimants. Claimants should also be entitled to legal or other representation. Where a hearing is necessary, the Road Accident Fund should provide travel, accommodation and other assistance to claimants.¹⁵³⁰

Benefits Review Panels should give its decisions in writing within a few days of the hearing and to provide reasons. This will enable both the appellant and the road accident benefits scheme to assess the soundness of the decision and to decide whether to appeal further. It will also protect the appellant and the administrative authority against careless or arbitrary decisions.¹⁵³¹

3.1.6 Review of Medical Schemes Act decisions

Since one of the functions of the CMS is to investigate complaints and settle disputes in relation to the affairs of medical schemes as provided for in the Medical Schemes Act, it should be the designated internal dispute resolution forum. This implies that any person who may be aggrieved by any decision of a medical scheme or the Registrar should apply to the Council for a review of such decision.

As is currently the case with appeals to the Council, applications for reviews should be in the form of an affidavit directed to the Council. An application should be furnished to the Registrar not later than three months after the date on which the decision concerned was made, or such further period as the Council may, for good cause shown, allow.

The council should be able to determine whether a hearing is necessary or not. This will ensure that disputes that can be resolved through the consideration of documentary evidence are speedily resolved. Where a hearing is deemed necessary, the Council should determine

¹⁵³⁰ *Ibid*, 782-784.

¹⁵³¹ *Ibid*, 784.

the date, time and place for the hearing. This power will enable the Council to convene a hearing in different locations within the Republic, thereby facilitating the accessibility of the dispute resolution system. The Registrar must also inform the parties to a dispute, in writing, about the hearing not less than 14 days before such a hearing. The parties to the dispute are thus offered sufficient opportunity to prepare for the hearing.

Complainants may appear before the Council in person or through a representative to tender evidence or submit a written argument or explanation to the Council. The procedure at the hearing of a review application shall be determined by the Council. After hearing the application, the Council may confirm or vary the decision concerned, or rescind it and give such other decision as it may deem just. The decision of the Council must be in writing and copies must be given to the parties to the dispute.

A party who is unhappy with the decision of the Council can appeal such a decision to the envisaged uniform appeal institution.

3.1.7 Review of Pension Funds Act decisions

Considering the vast number of occupational and private pension funds, the Pension Funds Act does not specify how individual pension fund review procedures should be carried out. The Act leaves it to the funds to outline their internal dispute resolution mechanisms in their rules. It is also impossible to attempt setting out here how internal fund dispute resolution processes should work. However, it may be helpful to illustrate how some best practices in internal dispute resolution within the retirement industry. A good example of an appropriate internal dispute resolution within the retirement industry is the complaints resolution procedure of the Professional Provident Society of South Africa (PPS).¹⁵³² The PPS

¹⁵³² Established in 1941, the Professional Provident Society of South Africa (PPS) was initially registered as a paragraph 1(c) benefit fund (in terms of the Income Tax Act of 1962) conducting its core business under the ambit of pension fund business. However, PPS was effectively transformed into Professional Provident Society Limited (Limited by Guarantee) (“PPS Limited”) in September 2001, and Professional Provident Society Insurance Company (“PPS Insurance”), a wholly owned subsidiary of PPS Limited, providing the benefits offered by PPS; namely, Sickness, Partial and Permanent Incapacity Benefits, and Life Assurance Benefits as a registered Long-term Insurance Company. PPS has grown to provide for the sickness and disability needs of over 70% of South Africa’s graduate professionals. PPS is owned exclusively by its members and has more than 140 000 graduate professional policyholders. The retirement scheme run by PPS is the Professional Provident Society Retirement Annuity Fund (“PPS RA Fund”) – see PPS *Section 51 Manual for Professional Provident Society Limited (Limited by Guarantee) (“PPS Limited”)* accessed at <https://www.pps.co.za/portal/docs/Section%2051%20Manual.pdf> on 6th December 2011.

complaints resolution procedure aims to ensure that a proper process is followed by the PPS to resolve any complaint. The procedure outlines channels available to aggrieved persons in the resolution of disputes. Claimants are encouraged to use the Member Services Department as the first point of contact and resolution of a complaint. As required by the Pension Funds Act, claimants are expected to submit complaints in writing.¹⁵³³

Where a complaint is not satisfactorily resolved during interaction with the Member Services Department, a claimant may seek further assistance from the manager of the department. The manager acknowledges receipt of the complaint within 8 working hours of receipt thereof. The manager then endeavours to resolve the complaint and supplies an acceptable response within 5 working days from date of acknowledgement of the complaint. The manager's response constitutes PPS' final decision in respect of the complaint and set out comprehensive reasons for such decision.¹⁵³⁴

If the manager does not deal with the complaint satisfactorily or if the claimant does not agree with the final PPS decision, he/she has an opportunity to lodge an appeal with the Independent Internal Arbitrator of the PPS. The Independent Internal Arbitrator acknowledges receipt of the formal complaint in writing within 3 days of receipt thereof and requests all such further information from the claimant as is deemed necessary. The Independent Internal Arbitrator investigates the complaint by gathering all the relevant facts from whichever source deemed necessary. If he or she is unable to finalise the information gathering process and propose a resolution within 20 working days, he keeps the claimant updated regarding progress made in resolving the complaint. However, every effort is made to provide a response within 20 working days of receipt of the complaint, but not later than 6 weeks after receipt of the complaint, as far as it is within the power of the Independent Internal Arbitrator. If a claimant is not satisfied with the outcome, or if a solution has not been proposed within 6 weeks from receipt of the complaint, the complaint can then be referred to the Pension Funds Adjudicator.¹⁵³⁵

¹⁵³³ See PPS *Complaints Resolution Procedure* available at www.pps.co.za (accesses on 6th December 2011).

¹⁵³⁴ *Ibid.*

¹⁵³⁵ *Ibid.* See also section 30A(3) of the Pension Funds Act which states that if the complainant is not satisfied with the reply of the fund or the employer, or if the fund or the employer who participates in a fund fails to reply within 30 days after the receipt of the complaint, the complainant may lodge the complaint with the Office of the Pension Funds Adjudicator.

The Complaints Resolution Procedure of the PPS indicates that it applies a multi-tier internal dispute resolution system. This ensures that as many disputes as possible are resolved with the fund in an accessible, speedy and informal process. Only those disputes that are unresolved or unsatisfactorily resolved proceed to the Pension Funds Adjudicator. It thus provides a benchmark for the creation of an internal dispute resolution system in a pension fund.

However, due to the proposed creation of a uniform social security external dispute resolution framework, the role of the Pension Funds adjudicator (as the external dispute resolution institution for the occupational and private retirement industry) becomes redundant. It is thus proposed that once the uniform external dispute resolution framework is established, the Office of the Pension Funds Adjudicator should be abolished.

3.2 A uniform social security (external) appeals framework¹⁵³⁶

There are various options for establishing an appropriate social security adjudication framework. These include the creation of a uniform, independent and impartial administrative tribunal followed by appeal to the High Court; the establishment of a uniform social security tribunal, followed by review to a special court (with the status of the High Court); the creation of a new specialised court structure for social security matters; the utilisation of existing court structures (general or special court/ lower or higher court) followed by existing (special appeal) options; and the establishment of a new government institution or enabling an existing government institution to conduct social security appeals.

¹⁵³⁶ Professors Marius Olivier and Avinash Govindjee contributed in the development of these proposals during a research project undertaken for the Department of Social Development on “Developing a policy framework for the South African social security adjudication system”. However, this thesis predates the research project, although the period of the research project (March-December 2011) fell within the period of the thesis (January 2010-April 2012). Before the commencement of the project for the Department, substantial research towards the thesis had been carried out and proposals developed before the commencement of the research project. As a result, the candidate brought knowledge to the project, which the project reports (draft and final reports) and the policy (draft and final policy) drew significantly from - see for example M Olivier, A Govindjee & M Nyenti *Developing a Policy Framework for the South African Social Security Adjudication System: First (Research) Report* (Report prepared for the Department of Social Development, South Africa (May 2011)) and M Olivier, A Govindjee & M Nyenti *Developing a Policy Framework for the South African Social Security Adjudication System: Policy* (Report prepared for the Department of Social Development, South Africa (December 2011)). However, the thesis also benefited from the work of the research project, as the research and initial proposals were debated during extensive discussions over ten months with Professors Olivier and Govindjee.

The utilisation of the existing courts or the establishment of a new dedicated court raises serious questions regarding accessibility. Courts are, for a number of reasons, generally less accessible than tribunals. Court processes are usually formal in nature and ordinary people struggle to give a proper account of their case before Magistrates and Judges without the assistance of legal representatives, which often results in a cost implication for the people concerned. The people who, following this option, will be asked to take their appeals directly to a court come, in most cases, from the ranks of the poor, alternatively they have experienced an injury or illness, road accident or have fallen into unemployment and seek some form of compensation or other assistance. The new system must make social security adjudication as accessible as possible for these people and, following such an approach, fails to achieve this end. In addition, if any one of these options is implemented, it means that there will be a further appeal to the High Court or to the new dedicated court (with the status of the High Court) instead of an application for judicial review.

3.2.1 Creation of a uniform, independent and impartial administrative tribunal followed by appeal to the High Court

The first option is to create a uniform, independent and impartial administrative tribunal. The Tribunal will thus serve as the new highest level of non-judicial appeal in social security matters. This means that all appeals against administrative conduct in terms of the SAA, COIDA, ODMWA, UIA, RAFA, the Medical Schemes Act and the Pension Funds Act will proceed to the Tribunal before the High Court is approached. This option appears to be the most appropriate (external) appeal option in developing an adjudicative and institutional framework for effective and efficient social security provisioning in South Africa.

This option is considered the most appropriate option in terms of the constitutional requirements of realising the right of access to courts. It is also aligned with the international standards framework applicable (for example, International Labour Organisation, United Nations and other human rights instruments) as well as with national and international best practice. In addition to constitutional and administrative law considerations, and the national and international comparative standards, various other legal and policy considerations inform the choice of a tribunal as the preferred option. As the most appropriate option considered, the key characteristics of this option will be discussed in detail.

The Tribunal should enjoy a high status as the overarching appeals tribunal for social security adjudication in South Africa. It should be listed as a national public entity under Part A of Schedule 3 of the PFMA. The Tribunal will have the status of an “organ of state”. The basic values and principles governing public administration (contained in chapter 10 of the Constitution) will apply to the Tribunal.

In addition to being constitutionally compliant and enhancing access to social justice, the proposed tribunal must be specifically aligned with the applicable international standards framework. For example, the International Labour Organisation recommends dispute resolution procedures designed to ensure simple and rapid social security dispute adjudication.

There should be a specific, new statute dedicated to explaining the following details of the Tribunal. There is also a need to ensure that provisions, contained in existing legislation, are aligned with the existence of a new, designated tribunal. In particular, the legal framework should clearly indicate that all social security decisions which affect social security applicants, beneficiaries or dependants of applicants or beneficiaries may be appealable to the Tribunal, and not to another body or to the courts.

3.2.1.1 Accessibility of the Tribunal

The proposed Tribunal deliberately bears the characteristics of an accessible, flexible, inexpensive and efficient dispute resolution forum. It is explicitly suggested that no fees be charged to social security applicants, beneficiaries or dependants of applicants and beneficiaries who seek to exercise their right to access the Tribunal in order to appeal against the decision of a social security body.

(a) Geographical/physical location

The Tribunal must have a proper national presence. The President of the country, after consulting the relevant Minister,¹⁵³⁷ must determine the location of the Tribunal’s head office. The Tribunal must maintain at least one office in each province of the Republic, and

¹⁵³⁷ The relevant Minister should preferably be the Minister of Justice and Constitutional Development, so as to ensure the independence and impartiality of the Tribunal.

as many local offices as is considered necessary. These are also matters to be determined by the President of the country, after consultation with the relevant Minister. Provision should be made for the Tribunal to travel “on circuit” to outlying areas in a region in order to ensure better access to justice for people likely to require its services.

The Tribunal should be sufficiently capacitated to fulfil its appeal functions across the country. The President of the Tribunal will be able to delegate any of the functions of that office to regional heads of the Tribunal. This will ensure the effective decentralisation of authority. A dispute should generally be heard in the region in which the cause of action arises, unless the president or deputy president of the Tribunal decides otherwise.

The Tribunal should be physically located in its own premises in all regions of the country and have / lease its own buildings and offices from which it functions.

(b) Required documentation and forms

A series of forms and precedents must be developed by the Tribunal, including a standard appeal form for the ordinary referral of disputes to the Tribunal.

The required documentation and forms must be designed to ensure a seamless, streamlined and simplified progression of information between the pursuit of internal remedies and adjudication before the Tribunal.

(c) Claim lodgement time periods and prescription

Appeals to the Tribunal would already have been the subject of (streamlined and simplified) internal reconsideration and remedies, which would have taken a period of time to finalise. A 60 day period of time is recommended for the lodging of an appeal to the Tribunal. It should be possible for the Tribunal to condone a late referral where a good explanation has been provided for the failure to refer the dispute timeously.

(d) Disputes resolution timeframes

The Tribunal should complete its hearing of the appeal as expeditiously as possible, given that it has wide discretion to deal with the appeal in a manner the appointed adjudicator considers to be most appropriate in the circumstances. Adjudicators should issue a signed appeal decision, with brief reasons, within 14 days of the conclusion of the appeal hearing. The President of the Tribunal, or the regional head, should be empowered to grant an extension of the time period for the finalisation of an appeal decision where the adjudicator demonstrates good reasons for an extension.

A maximum period of six weeks should be allowed for an applicant to review the decision of the Tribunal to the High Court. This period will commence from the date that the Tribunal award is served on the affected party.

(e) Languages and related issues (including interpretation)

The Tribunal should introduce a language policy in order to ensure that various constitutional rights are not unjustifiably limited by the Tribunal's use of language. The Tribunal's decision should be issued in English.

The Tribunal should have at its disposal the services of interpreters who are fluent in at least all of the official languages of the country. Should interpretation not be available in a non-official language of preference, the appellant may be made responsible for securing and paying for the required interpretation services.

The Tribunal and its staff should be properly geared towards assisting users of the new system. Staff should be properly sensitised towards helping appellants who are likely to be drawn from the ranks of the most vulnerable members of South African society.

3.2.1.2 Scope of jurisdiction and powers of the Tribunal

(a) Jurisdiction of the Tribunal

The Tribunal must have jurisdiction throughout the Republic as a designated social security appeals body. Its jurisdiction should be wide-ranging and it should not be possible to easily bypass the Tribunal and proceed directly to court in cases where the Tribunal has jurisdiction over a dispute. Legislation should ensure that an appeal to the Tribunal is a necessary internal or domestic remedy (in relation to the courts), which must be exhausted before any court intervention. Jurisdiction should, however, be limited to causes of action contemplated by legislation and directly related to the appeal against an unsatisfactory underlying decision of a public social security body. The person who appeals to the Tribunal should always be an applicant, beneficiary or a dependant of an applicant or beneficiary who is dissatisfied with any decision taken by a public social security institution in terms of legislation.

Class actions should be excluded. Disputes where the cause of action is not based on an appeal against an underlying social security decision should also not be permitted. For example, disputes against service providers, contractual or delictual disputes and criminal offences will be excluded from the material scope of jurisdiction. These matters should continue to be dealt with directly by the courts.

(b) Powers of the Tribunal

The Tribunal must have a wide range of powers at its disposal. This would include the independent discretion to confirm, vary or set aside the underlying administrative decision. In cases where an underlying social security decision is set aside, the adjudicator may make a final and binding ruling on the matter, without the need for the case being sent back to the social security body concerned. Tribunal decisions must be considered to be “final and binding”, unless set aside by the High Court on review.

Any decision made by the Tribunal may be accompanied by a costs order where this is warranted. Adjudicators may also make an order regarding the disclosure of relevant documents in appropriate circumstances.

The Tribunal must compile and publish information and statistics about its activities. It may conduct and publish research into matters relevant to its function. The Tribunal may advise a party to a dispute about the procedure to be followed in appealing to the Tribunal. A party may be assisted by the staff of the Tribunal to obtain legal advice, assistance or representation. Stakeholders may be given advice or training relating to the primary objects and functions of the Tribunal.

The Tribunal may make rules to regulate its proceedings and may publish guidelines regarding any relevant matter.

The effective decentralisation of authority to designated regions will accelerate the enforceability of national decisions and facilitate a national roll-out of the chosen strategy. A decision of the Tribunal may be served, executed and enforced as if it were an order of the High Court. An appeal decision that orders the payment of an amount of money could be executed by virtue of a tribunal-issued warrant of execution, or by way of the standard warrant of execution prescribed in the Rules for the Conduct of Proceedings in the High Court.

(c) Remedies provided by the Tribunal

The effectiveness of the Tribunal's remedial powers is safeguarded by the range of remedies, powers and functions at the disposal of adjudicators, as discussed above. Costs should be limited to cases where legal representatives have been engaged by the party appealing against the decision of a social security body. The Tribunal should be hesitant to award costs against unsuccessful appellants. However, in cases of frivolous and vexatious applications for appeal an adverse costs order might be issued in order to deter the launching of unnecessary appeals.

The Tribunal should also be empowered to make a costs order *de bonis propriis*, in order to deter legal representatives from adopting a money-making approach to the Tribunal. The President of the Tribunal should appoint taxing officers to perform the functions of a taxing officer in terms of the Rules of the Tribunal. Any bill of costs should be taxed in the same manner as cases falling within Schedule B of the prescribed Magistrates' Court tariff (in terms of the Magistrates' Courts Act).

The Tribunal will also be permitted to make an order of contempt of the Tribunal in limited cases, subject to the confirmation of the High Court.

3.2.1.3 Tribunal adjudication procedures

The core work of the Tribunal is to be conducted by legally qualified adjudicators. Given the nature of some of the disputes likely to come before the Tribunal, it is also necessary for assessors to be part of the new structure.

(a) Adjudication procedures (including consideration of evidence)

A measure of flexibility is granted to adjudicators in deciding social security appeals. This is consistent with international standards and with the status of the Tribunal as an administrative body tasked with expeditiously determining a large number of disputes on appeal. Adjudicators should be able to conduct the appeal hearing in a manner considered appropriate in order to determine the dispute fairly and quickly. The merits of the dispute must be evaluated properly, but with the minimum of legal formalities.

Parties are entitled to present evidence, including new evidence which was unavailable or not presented at the time that the public social security institution dealt with the matter. Parties or their representatives may call witnesses and address concluding arguments. Witnesses may be subpoenaed in order to secure their attendance for purposes of testifying before the Tribunal or for purposes of obtaining relevant documentary evidence. Subpoenaed witnesses will be entitled to appropriate witness fees. Failure to comply with the terms of an issued subpoena may result in a finding of contempt of the Tribunal.

Once a social security applicant, beneficiary or dependant of an applicant or beneficiary has, on the face of their application, demonstrated compliance with the statutorily established criteria for benefits, the onus should shift to the social security institution to justify why the person is not entitled to the benefits in question.

The Tribunal will be constituted by either a single adjudicator, or by a panel of three adjudicators (for more complex cases), with the assistance of an assessor where required. Adjudicators are permitted to direct the filing of statements within a set period of time,

setting out the material facts upon which the applicant relies and the legal issues arising. The President of the Tribunal, or a regional head, might also convene a “pre-hearing conference” in certain, exceptional situations where further clarity is necessary.

The admissibility of innovative evidentiary techniques, such as the presentation of video-evidence, requires consideration, given the possibility that a number of appellants may be physically unable to access the Tribunal.

(b) Appearance and representation (including legal aid)

The basic requirements of administrative justice and natural justice principles ensure that parties appearing before the Tribunal will have a proper opportunity to argue the issues in dispute. Parties to the dispute are entitled to be present in person. The parties enjoy equal access to evidence, may present evidence, call witnesses and address concluding arguments.

Legal representation should be permitted, but regulated. Unless agreement was obtained regarding legal representation, an applicant or beneficiary who required legal representation would have to apply for this. The presiding officer would be obliged to grant legal representation, unless there were factors which made legal representation unnecessary. In this case, the presiding officer would furnish reasons for rejecting the application. The State should take steps to ensure that appropriate legal assistance is readily available for those who qualify for this, thereby enhancing the sense of meaningful access to justice for vulnerable members of society.

Parties who fail to attend proceedings before the Tribunal will not be penalised by having their disputes dismissed – the Tribunal will still make a decision on the papers before them in such instances, thereby restricting the likely number of rescission applications.

(c) Alternative dispute resolution avenues

No alternative dispute resolution processes are foreseen, other than a pre-appeal settlement being concluded between the parties. Pre-trial processes include the possibility of the filing of statements and a pre-trial conference. Only in highly exceptional cases, and upon the specific

request of both parties, will an adjudicator facilitate some form of mediation, conciliation or settlement of a dispute.

(d) Notification of decisions

A decision of a single adjudicator of the Tribunal hearing a matter alone, or a majority of the adjudicators in any other case, will be considered to be the decision of the Tribunal. The decision must be in writing, accompanied by proper reasons and signed.

Adjudicators should issue a signed appeal decision, with brief reasons, within 14 days of the conclusion of the appeal hearing. The Tribunal must serve a copy of that appeal decision on each party to the dispute or their duly appointed representative. Appellants should be notified using their preferred method of communication as indicated on the referral form. The social security body against whom the appellant has appealed must also be informed of the outcome of the appeal. It is suggested that a proper system of notification be developed in this regard. Notification could also be duplicated to the state attorney in cases where a finding adverse to the social security body has been made.

The President of the Tribunal, or the regional head, should be empowered to grant an extension of the time period for the finalisation of an appeal decision where the adjudicator demonstrates good reasons for an extension.

The Tribunal decision will only be filed with the reviewing court upon receipt of an application for review.

All decisions of the Tribunal should be published on a tribunal website.

(e) Reconsideration of decision

Any adjudicator who has issued an appeal decision, or another adjudicator appointed by the regional head of the Tribunal for this purpose, may vary or rescind an appeal decision either of their own accord, or in response to an application for variation or rescission. This would be likely in cases where there is an ambiguity or an obvious error or omission in the appeal decision.

3.2.1.4 Expertise and independence of the Tribunal

(a) Appointment of Tribunal adjudicators

The Tribunal's core functions will be carried out by appointed regional heads and adjudicators. The Tribunal must represent a broad cross-section of the population. It must comprise sufficient persons with legal training and experience to deal with a wide range of potentially complex disputes on appeal. As many competent persons as is considered necessary should be appointed across the country as adjudicators to perform the required functions. The number of adjudicators appointed will also depend upon the number of cases being referred to the Tribunal in the various parts of the country.

Given the nature of some of the disputes which are likely to come before the Tribunal, it is also necessary for assessors to be part of the structure being created. A list of approved, suitably qualified assessors should exist for each region. The role of assessors shall be limited to providing advice to the adjudicator(s) appointed to hear the appeal. Adjudicators should be able to apply to the regional head for the aid of an assessor and the regional head will draw from the list of approved assessors depending upon the specific expertise sought. Assessors would not be able to cast a vote, or have any decision-making powers, in order to influence the Tribunal's final decision on the matter.

The President of the country must appoint the President and Deputy President of the Tribunal, on the advice of the relevant Minister. The Minister may appoint the adjudicators and assessors, perhaps on the recommendation of the President of the Tribunal and with due consideration of inputs received from labour and employer representatives.

The President of the Tribunal should be empowered to appoint suitably qualified adjudicators as Regional Heads for each of the regions identified. When making all appointments, due regard should be had to the need to constitute a tribunal that is independent, competent and representative in respect of race, gender and the appointment of disabled people.

(b) Determination of conditions of service of Tribunal adjudicators

The relevant Minister, on the recommendation of the President of the Tribunal, would be responsible for determining the conditions of service and remuneration of regional heads, adjudicators and assessors. The President of the country should determine these matters for the President and Deputy President of the Tribunal, after consultation with the relevant Minister and the Minister of Finance. Adjudicators and assessors would be expected to go on circuit within their regions when the need arises.

Each adjudicator should be a citizen of South Africa, ordinarily resident in the country. It is important that tribunal members' salary, allowances and benefits may not be reduced during their term of office. Adjudicators should be appointed on a full-time basis for a three year (fixed-term) period. This period may be renewed, depending upon the adjudicator's performance. The President, Deputy President and regional heads of the Tribunal may be appointed for a renewable period of five years.

(c) Qualifications of Tribunal adjudicators

Given the strong legal nature of the matters to be determined by the Tribunal, and considering the fact that the process is an appeal, it is recommended that all adjudicators require the Bachelor of Laws (LLB) degree prior to appointment, coupled with five years' practical experience post-LLB. Certain occurrences should disqualify a person from appointment, for example if the prospective adjudicator is an unrehabilitated insolvent or has been convicted of a serious offence.

Qualifications criteria for the position of President and Deputy President of the Tribunal should be increased in order to demand ten years' practical work experience post-LLB, coupled with relevant managerial and financial experience. The latter requirements are particularly important, given the range of managerial functions and finance-related obligations which are the responsibility of the Tribunal's leadership.

Specific, tailor-made training (perhaps via an informal / internal training institute) would be important for adjudicators.

(d) Discipline and termination of service of adjudicators of the Tribunal

The President of the Tribunal may, on one month's written notice addressed to the Minister, resign from the Tribunal completely or simply resign from his or her position as President. Any other adjudicator or assessor may resign by giving at least one month's written notice to the Tribunal President.

The President of the country may, on the recommendation of the Minister, remove the Tribunal President for serious misconduct, permanent incapacity or for engaging in any activity that may undermine the integrity of the Tribunal. The relevant Minister may do likewise with respect to adjudicators and assessors.

(e) Funding of the Tribunal

The Tribunal must be financed and provided with working capital from money appropriated by Parliament; any fees payable in terms of relevant legislation; income derived from the investment and deposit of surplus money and any other money which accrues lawfully from any source. No fees should be charged to appellants.

The Tribunal President may, on behalf of the Tribunal, invest or deposit any money that is not immediately required for tribunal contingencies or to meet current expenditures.

(f) Human resource and organisational structure of the Tribunal

The Tribunal will be headed by a President. A Deputy President and regional heads will also be appointed. Adjudicators and assessors will be appointed to conduct the main business of the Tribunal.

The Tribunal President should be permitted to appoint other (administrative) staff, or contract with other persons, to assist the Tribunal in carrying out its functions, including a suitable tribunal secretariat. The remuneration, allowances, benefits and other terms and conditions of appointment of a member of staff may be determined by the Tribunal President, in consultation with the relevant Minister and the Minister of Finance.

(g) Managerial framework and administrative support

The Tribunal should be headed by a President. This person should be highly skilled and experienced in social security dispute resolution. The President will manage and direct the activities of the Tribunal and supervise the Tribunal's staff.

A Deputy President should also be appointed to assist the President and to perform the functions of the President whenever that office is vacant, or when the President is for some other reason temporarily unable to perform his / her functions. These office bearers should be stationed at the chosen "head office" of the Tribunal.

Each region of the country will be headed by a regional head, who is subordinate in status to the President and Deputy President of the Tribunal, and who will report to the Tribunal President. This is important in order to ensure the effective decentralisation of authority, enforcement of head office decisions and a national roll-out of the chosen strategy.

The administrative staff of the Tribunal could fall under the authority of a Registrar, who would report directly to the Tribunal President. Regional registrars could also be appointed.

(h) Governance, oversight and supervision

At least once every five years, the relevant Minister must conduct an audit review of the exercise of the function and powers of the Tribunal. As soon as is practicable after receiving a report of an audit review, the Minister must send a copy of the audit report / annual report to the Premier of each province and table it in Parliament.

An adjudicator will be prohibited from representing any person before the Tribunal. If, during a hearing, it appears that there is a conflict of interest, the adjudicator must immediately and fully disclose the fact and nature of that interest to the regional head and withdraw from any further involvement in that hearing.

(i) Accountability and reporting

The Tribunal must comply with generally accepted standards of accounting practice, principles and procedures. The Tribunal must report to the Minister regarding its activities on an annual basis. This is required by the PFMA. As soon as is practicable after the end of each financial year, the Tribunal must provide the relevant Minister with a report regarding its activities and financial position.

As soon as is practicable after receiving a report of an audit review, or after receiving the annual report from the Tribunal, the relevant Minister must send a copy of the audit report / annual report to the Premier of each province and table it in Parliament.

It is particularly important that both the President and Deputy President of the Tribunal possess suitable managerial experience and general financial knowledge to enable these obligations to be carried out successfully.

3.2.1.5 External dispute resolution avenues

The Tribunal, reasonably and justifiably, limits a person's right to approach a court to adjudicate a social security-related dispute. The High Court retains the power to review tribunal decisions in terms of PAJA. In exceptional cases, it might be possible to approach the High Court directly for special relief, such as the granting of an interdict or in class action disputes. Appeals against decisions of the High Court can be directed to the Supreme Court of Appeal and the Constitutional Court.

3.2.2. Establishment of a uniform social security tribunal, followed by review to a special court (with the status of the High Court)

Another option that was considered is the establishment of a uniform, independent and impartial administrative tribunal to conduct appeals as well as a special court, with the status of the High Court, to undertake judicial review of the decisions of the Tribunal. This tribunal should serve as the new highest level of non-judicial appeal, meaning that all appeals against administrative action in the form of benefits-related decisions by a social security institution

in terms of the UIA / COIDA / ODMWA / RAFA and the SAA should proceed to the Tribunal before the special court with the status of the High Court is approached.

In terms of this option, a special court of the status of a High Court is earmarked as the body responsible for judicial review of the social security tribunal's decisions. Special courts, such as the Labour Court, Labour Appeal Court and Competition Appeal Court serve a useful function in instances where the disputes in question require detailed knowledge of a specialised branch of law. In such cases, judges of the High Court, while being general legal experts, are not considered to be the most suitable presiding officers for the disputes in question. Specially trained judges (with knowledge of the particular legal discipline concerned) are appointed to preside over matters in the special court, although there is a great deal of overlap between the manner in which they function, their conditions of appointment, status and the like.

One of the problems which result from the creation of specialised courts with the status of a High Court is the cost concerned with setting up an independent court structure. While it is true that the creation of a specialised court structure for social security matters may potentially result in excellent decisions being made by appointed members of the judiciary who have special expertise in social security law, there is a serious risk that cost and other practical constraints may result in this option proving to be unsustainable. This caution must be read together with existing South African government policy which envisages the integration of specialist courts into the court system (an example of this is the uncertainty regarding the Superior Courts Bill, which contemplates the collapsing of the Labour Court within the ordinary structures of the High Court).

The possibility of expanding the jurisdiction of the Labour Court (which already exists as a special court of the status of the High Court) to hear social security appeals has been given serious consideration. However, the Labour Court is not experienced in dealing with social security matters. It is not particularly well-placed, at least in comparison with the High Court, to deal with the review of an administrative decision taken by a new social security tribunal. Matters such as class actions, emanating from social security disputes, constitute foreign territory for a court such as the Labour Court, and such matters proceed much more naturally to the High Court. When considering the present involvement of the Labour Court in social security matters, it becomes clear that its current jurisdiction is very limited (being restricted

to matters directly related to the employment relationship) and that it would require substantial legislative expansion for the Labour Court to be tasked with the review of the complete range of appeal decisions expected from the Tribunal. Significantly, The Labour Court also has a limited presence in the country and is concentrated only in a few centres.

It may also be added that courts such as the Labour Court, Labour Appeal Court and Competition Appeal Court have a “limited jurisdiction” in the sense that lower-level bodies (such as the CCMA or the Competition Commission or Competition Tribunal) would have dealt with a range of matters which otherwise may have proceeded directly to these courts. The High Court inherently enjoys a comprehensive jurisdiction to deal with a range of potential disputes or preliminary matters which may arise in this area. This has the potential of creating confusion regarding the jurisdiction of both the High Court and of the newly-created special court with the status of a High Court on these matters (an example is the uncertainty on the jurisdiction of the High Court in employment and labour relations disputes, where conflicting Constitutional Court rulings on the matter have left the jurisdiction issue unresolved).

3.2.3 Creation of a new specialised court structure for social security matters

This option involves two sub-components, both of which were given consideration. In the first place, there is the potential for creating a uniform special court (equivalent in status either to a lower or higher court) followed by appeal via the ordinary court structure. Alternatively, it is possible to create a new, uniform special court followed by appeal to a special appeal court.

In this option the new body to be created is a court rather than a tribunal. The consequences of this differentiation are as follows:

- The decisions of the new court will not amount to an “administrative decision” and would not be subject to judicial review in terms of PAJA, but would be subject to appeal in terms of the court structure.
- The new court would form part of the judiciary, and would accordingly be excluded from the definition of an organ of state by being considered to be a national public

entity and the like. This has significant implications for the accountability, reporting structure, governance, leadership and legal construct of the new court.

- As a part of the judiciary, the new court would be independent and subject only to the Constitution and the law. No person would be permitted, in general, to interfere with the functioning of such a court, although higher courts will always exercise the right to overturn the decisions of lower courts through their judgments on appeal. The higher courts exercise a supervisory function over lower courts and the accepted principles of “judicial precedent” forces lower courts to follow the decisions of higher courts, even where they may disagree with that higher court’s decision.

While a number of these principles have favourable implications, from a practical perspective it may be particularly costly to roll-out a new sub-court structure across the country to hear social security disputes. The formal processes associated with court action might also not be particularly suitable to social security decision-making. In addition to the cost of creating such a court sub-system, the costs associated with litigating before courts in general must also be factored in. Both the sub-options in question are unlikely to result in the speedy resolution of disputes, given the backlogs generally associated with court processes. This option only, and in exceptional cases, operates in a few countries in the world, such as Germany. However, this option may not be possible due to the existing government policy which envisages the integration of specialist courts into the court system.

3.2.4 Utilisation of existing court structures (general or special court/ lower or higher court) followed by existing (special appeal) options

This option foresees the use of existing lower courts (such as the Magistrates’ Courts) or higher courts (either the High Court itself, or perhaps the Labour Court, already dealt with above) as the body to which social security appeals should be brought. Again, this option differs from the preferred option in that the use of a court replaces the preferred recourse to an independent and impartial tribunal. This option differs from the previous option discussed in that it is the existing court structure is utilised, rather than proposing the creation of a partially / completely new court system. Accordingly, this option attempts to address one of the most significant weaknesses of the previous option, namely the actual *cost* associated with establishing new courts in South Africa.

Unfortunately, while it may appear to be cost-effective to rely on the existing court structure (the Magistrates' Courts, High Court or Labour Court), the major problem not addressed by this option is the serious backlog and lack of capacity generally associated with the current court system, apart from the appropriateness of the court system in South Africa (as discussed above). The Magistrates' Courts and High Courts are generally considered to already be overloaded, and one of the reasons for proposing the creation of a new tribunal (instead of a court) is precisely in order to alleviate the existing burden on the courts. As indicated previously, utilising courts to adjudicate and determine social security disputes on an appeal basis (against the decision of a social security body) is unlikely to be expeditious or cost-effective.

Perhaps more importantly, as discussed above, issues of the inaccessibility of the courts (due to the formality of their procedures and the length of time it will take to achieve justice due to multiple appeals) make this option inappropriate.

3.2.5 Establishment of a new government institution or enabling an existing government institution to conduct social security appeals

This option involves consideration of the merits of situating a new social security appeals body within government. Such an option will be similar to the manner in which the Independent Tribunal for Social Assistance Appeals (ITSAA) is presently located within the Department of Social Development as an organisational component. Expanding the Independent Tribunal for Social Assistance Appeals to permit it to deal with all social security appeals is also contemplated as part of this option.

The possible benefits of such an approach would be some cost-efficiency (at least in the sense that existing support and infrastructure could be built upon when creating the appeals institution). It will also likely ensure a sense of governmental control over the new institution. This perceived benefit of government control could, however, also be the biggest cause for concern regarding this option. By locating the new social security appeals body as an internal component of government, this institution is not likely to be characterised as being "independent" of government. For example, appellants who must travel to an existing government department to lodge an appeal against a national public entity may perceive an

unfavourable decision on appeal as being due to institutional bias on the part of the new body.

Even in the absence of such a perception, it is expected that this option would carry with it the burden of continued wide jurisdiction of the High Court. Put simply, the new (internally located) social security appeals body would not constitute an adequate replacement for access to justice or an independent tribunal (as provided for in section 34 of the Constitution). Therefore, dissatisfied appellants may be entitled to approach the High Court on a wide range of matters. There would, in other words, be very little argument (with this option) to suggest a restricted role for the courts and a major risk would be that the courts would continue to be burdened with numerous social security-related cases – either on an appeal or review basis.

Section 34 of the Constitution states that “everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”. There is some authority to suggest that a construct which results in social security appeals being carried out by a government body would leave the door open for people who are dissatisfied to approach the High Court to decide their social security disputes in a manner akin to a full appeal. Social security appellants could argue for wide recourse to the High Court in social security disputes because the government body decision would not be considered to be a decision made by an “independent and impartial tribunal or forum”. In addition, it could be argued that section 169(b) of the Constitution states that the High Court may *decide* any non-constitutional matter not assigned to another court by an Act of Parliament.

There would appear to be little point in pursuing this option, as the consequence will be little more than what is already the status quo in the country. Apart from, perhaps, consolidating the highest level of internal social security appeals under a single body, the broad possibilities for proceeding to court imply that this body’s decisions would not serve as “final and binding” and the potential for judicial involvement is great.

An option such as this that has the effect of forcing large numbers of people to seek redress in the high court will not promote the right of access to justice. This is because of the many challenges faced by social security (and other) litigants in the present court system (such as costs, delays etc).

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