

**Explanatory statement – SSAT Child Support Review General Directions 2012
*Child Support (Registration and Collection) Act 1988***

Directions by the Principal Member of the Social Security Appeals Tribunal (SSAT)

Paragraph 103ZA(1)(a) of the *Child Support (Registration and Collection) Act 1988* (“the Act”) permits the Principal Member to give general directions as to the procedure to be followed by the SSAT in connection with the review of decisions under Part VIIA of the Act. A general direction must not be inconsistent with any provision of the Act (or the *Child Support (Assessment) Act 1989*), and is a legislative instrument.

The *SSAT Child Support Review Directions 2009* (“2009 Directions”) were made in exercise of the power conferred on the SSAT Executive Director (which office was subsequently amended to “SSAT Principal Member”). The 2009 Directions require amendment on commencement of Schedule 3 to the *Social Security and Other Legislation Amendment (Further 2012 Budget and Other Measures) Act 2012* which significantly amends Part VIIA of the Act.

Accordingly, the *SSAT Child Support Review General Directions 2012* commence on the day after the commencement of Schedule 3 of the *Social Security and Other Legislation Amendment (Further 2012 Budget and Other Measures) Act 2012* (“the amending Act”), and revoke the 2009 Directions.

New section 88(2) of the Act requires that the Principal Member pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick in performing or exercising his or her functions under the Act.

The *SSAT Child Support Review General Directions 2012* give effect to that objective (and the other amendments to Part VIIA of the Act) by:

- prescription (wherever feasible) of procedures to be followed by the SSAT in connection with a review to ensure consistency in procedure;
- public notification of procedures to be followed by the SSAT in connection with a review so that a person considering applying to the SSAT for review knows what will be required of him or her;
- public notification of procedures to be followed by the SSAT in connection with a review so that any other party to a review knows what will be required of him or her;
- direction as to hearing arrangements when there is a family violence order;
- direction as to the procedure where a party wishes to have another person make submissions on his or her behalf;
- directions as to procedure when permission is granted for a party to have another person make submission on his or her behalf;
- public notification that the Principal Member has delegated certain statutory powers to the member who presides at the hearing of a particular review;
- prescription of information which may be obliterated by a party in documents to be given by him or her to the SSAT or by the SSAT in documents to be given to the parties;

- proscription on the hearing of a review being conducted in an adversarial manner;
- directions as to the making of orders to protect a party's privacy;
- notification to parties that the SSAT is authorised to hear an application for review without oral submissions from a party in certain circumstances; and
- directions as to the making of an application for an extension of time (in which to seek review), or for an adjournment of a directions hearing or hearing of the review, or for reinstatement of an application for review (which has been dismissed).

Commencement: The Directions commence the day after commencement of Schedule 3 to the amending Act.

Consultation: None. The instrument is largely machinery in nature and will not substantially affect or alter reviews by the SSAT. The instrument is required as a matter of urgency because the current instrument becomes inconsistent with some of the provisions of the Act on commencement of Schedule 3 to the amending Act.

Notes on sections of the Directions:

Division 1 deals with preliminary matters.

Section 1

Section 1 specifies the name of the directions as the *SSAT Child Support Review General Directions 2012* (“the Directions”).

Section 2

This section specifies that the Directions commence on the day after the commencement of Schedule 3 to the *Social Security and Other Legislation Amendment (Further 2012 Budget and Other Measures) Act 2012*, and revokes the 2009 Directions on that date.

Section 3

Section 3 defines terms used in the Directions. Where necessary to explain an aspect of the Directions, reference will be made to a definition.

As some Subdivisions of Part VIIA of the Act do not apply to the Registrar and some of the Directions are directed only to the party liable to pay child support and the party to whom the child support is payable, the term “party” is defined to mean a person or persons listed in subsection 101(1) of the Act, other than the Registrar.

Section 4

This section states that the Directions apply to a review by the SSAT.

The term “review” is defined in section 3 to mean “a review of a decision under Part VIIA of the Act”, and the term “Act” is defined to mean the *Child Support (Registration and Collection) Act 1988*.

Division 2 deals with an extension of time in which to apply for review.

Section 5

Section 91 of the Act requires that an application asking the Principal Member to consider an application for review despite the ending of the period, for applying for review by the SSAT, be in writing and state the reasons for the person’s failure to apply for review within the period prescribed by section 90.

Subsection 5(1) of the Directions directs the SSAT not to register an application for an extension of time which does not state in writing the reasons for failure to apply for review within the time prescribed by the Act, and therefore does not comply with the Act.

Subsection 5(2) directs an applicant for an extension of time to include with the extension application any submissions and a copy of any document which he or she wishes the Principal Member to take into account in deciding the extension application. In this way, the application can be finalised more quickly and more efficiently by the Principal Member (or a delegate of the Principal Member).

Subsection 5(3) directs what documents the SSAT must ask the Child Support Registrar to send to the Principal Member. Paragraph 93(aa) of the Act requires the Registrar to send, on request of the Principal Member, the documents specified in paragraph 5(3)(a) of the Directions. It is the practice of the SSAT to ask for, and the Registrar to provide, a copy of documents of

communication with the extension applicant after the making of the decision as those documents are likely to contain information relevant to issues to be considered in deciding the extension application. For example, on occasion, such documents have contained what the SSAT considered to be a written application for review by the SSAT made within the period specified in the Act (but not sent to the SSAT).

Subsections 5(4) and (5) respectively direct that notice of an extension application not be given to any other person. The direction reflects the scheme of section 92 of the Act under which only the extension applicant is advised of the decision and given any right of review of the decision. The extension application will be decided on the papers unless it would be inconsistent with the requirement in the Act that the Principal Member pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick in the exercise of his or her functions and powers under the Act.

Division 3 deals with the application for review.

Section 6

Section 94 of the Act permits a person to make either a written or oral application for review.

Subsection 6(1) of the Directions directs the attention of a person wishing to make a written application for review to the form developed by the SSAT for that purpose and to the fact that the form can be printed from the SSAT's internet site.

Subsection 6(2) permits a written application for review to be made by electronic means. Such means are currently confined to sending an application for review as an attachment to an email to the SSAT. This subsection will permit online lodgement when the SSAT develops a facility for the electronic completion of an application.

Section 7

Paragraphs 94(1)(b) and (c) of the Act permit an oral application for review to be made in person or by telephone to an office of the SSAT, and subsection 94(2) requires the person to whom it is made to make a written record of the details of the oral application and the day on which it was made. As a result of subsection 94(3) of the Act, that written record is treated as if it were a written application.

Subsection 7(1) of the Directions specifies the details which must be recorded by (staff of) the SSAT to whom the oral application is made. The SSAT needs to know the name and contact details of the person making an oral application, and the decision of the Registrar which the person wants the SSAT to review. The date of that decision and the date on which the person received notification of it will enable the SSAT to tell the person of the need to make a written extension application where it is evident that the period prescribed in section 90 of the Act has expired.

Subsection 7(2) directs the SSAT (staff) not to register an application for review without all of the details specified in paragraphs 7(1)(a) to (f): namely, the applicant's name, residential and postal addresses, telephone number during the SSAT's business hours, the decision of the Registrar of which review is sought, and the date of that decision.

Subsection 7(3) directs the SSAT (staff) not to register an application for review requiring an extension of time unless the extension of time has been granted. To decide whether an extension application is necessary, the SSAT will apply regulation 14 of the *Child Support (Registration and Collection) Regulations 1988* along with section 28A of the *Acts Interpretation Act 1901*, section 14A of the *Electronic Transactions Act 1999* and sections 160 and 163 of the *Evidence Act 1995* as appropriate. If the extension application is granted, subsection 92(6) of

the Act operates so that the application for review is taken to have been “duly made”. The application for review will then be registered.

Where an extension of time is not necessary, subsection 7(4) of the Directions directs the SSAT (staff) to ask the person making the oral application all of the other questions on the application for review form and to record the answers. The form asks questions about matters such as the existence of a family violence order, any wish to have another person make submissions to the SSAT on the applicant’s behalf, any preference for making oral submissions in person or by telephone to the SSAT, any need for an interpreter or disability-related hearing need. The purpose of the questions is to assist the SSAT in making appropriate arrangements for the hearing and doing so at the time of registration avoids the need for the SSAT to later write to an applicant to ask those questions.

Section 8

Subsection 89(1) of the Act permits a person to apply to the SSAT for review only if the decision is set out in an item in the table within that subsection and the person is set out in that item. However, the SSAT receives telephone calls from persons wanting to make an oral application for review on behalf of another person.

Subsections 8(1) and (2) of the Directions requires the SSAT (staff) to refuse to register an application for review which is not made by the person on whom the Act confers the right to make an application for review unless the person satisfies the SSAT that he or she is a lawyer instructed by the person to make the application; or the holder of a power of attorney authorising the commencement of legal proceedings; or an appointed guardian of the person; or the executor or administrator of the person’s estate. The expression “lawyer” is defined in section 3 to mean “a person who has been admitted to practice law in an Australian jurisdiction and who holds a current practising certificate”.

Subsection 8(3) stipulates that a person (other than a lawyer) listed in subsection 8(2) is a party for the purpose of the Directions. It will be that person who must comply with the Directions to a “party”.

Section 9

Prior to commencement of the amending Act, directions were made by the Principal Member under subsection 96(2) of the Act and sent to each person entitled to receive from the Registrar a copy of the statement and documents which the Registrar was required to send to the Principal Member. In order to protect the privacy of the parties, those directions prohibited the disclosure of information in that statement and those documents except to the persons, for the purposes, specified therein. An order was also made under subsection 103Q(1) of the Act at the hearing of the review, by the presiding member as delegate of the Principal Member, directing persons present not to disclose information obtained in the course of the hearing.

The repeal of subsections 96(1) and 103Q(1) and insertion of section 103ZAA(1) by the amending Act enables the Principal Member to make an order which is not limited to the information in the statement or documents given to the party by the Registrar or information obtained at the hearing of the review. Orders will be made by the Principal Member under subsection 103ZAA(1) to cover the entirety of the review process. Section 9 of the Directions directs that such a non-disclosure order is sent to a party at the earliest opportunity.

Division 4 deals with documents to be given to the SSAT.

Section 10

Section 103 of the Act empowers the Principal Member to convene a directions hearing and lists the kinds of directions that may be made at a directions hearing.

Paragraph 103ZA(1)(b) of the Act empowers the Principal Member to give directions about the procedure to be followed in a particular review. These powers have been delegated (under clause 20 of Schedule 3 of the *Social Security (Administration) Act 1999*) to the Deputy Principal Members and to the member who will preside at the hearing of the review.

Section 103ZA(4) of the Act enables the presiding member to give directions as to the procedure to be followed on the hearing of the review provided that the direction is not inconsistent with any provision of the Act, the *Child Support (Assessment) Act 1989* or directions made by the Principal Member under subsection 103ZA(1) of the Act.

Directions can be made by a delegate under paragraph 103ZA(1)(b) and by a presiding member under subsection 103ZA(4) without holding a directions hearing.

Subsection 10(1) of the Directions directs a party to give the SSAT evidence and information specified in any directions given under paragraph 103ZA(1)(b), subsection 103(2) or subsection 103ZA(4) by the date specified in those directions. If no direction has been made, the subsection will alert a party to the need to comply with the timeframe if a specific direction is later made in the particular review. A consequence of not complying with the timeframe is dealt with in subsection 10(8).

Subsection 10(2) prescribes what information a party can obliterate in a document to be given to the SSAT but permits the presiding member to direct otherwise. The reason for not permitting a party to obliterate all of a bank account number is that the SSAT often needs to be able to trace transactions through accounts which cannot be done without sufficient evidence to link the account and the transactions. The reason for permitting a presiding member to decide otherwise is that an issue could arise to which proper consideration could not be given by the SSAT unless it is given an un-redacted copy of the document.

For a similar reason, subsection 10(3) prohibits a party obliterating any other information in a document to be given to the SSAT without the permission of the presiding member.

Subsection 10(4) requires a party to give any written submissions to the SSAT by the date specified in any directions given to the party. Like subsection 10(1), the purpose of the subsection is to alert a party or remind a party (as the case may be) of the need to comply with a direction.

Where directions have not been made in the particular review, subsection 10(5) specifies how many days in advance of the hearing any evidence, information or written submissions must be given to the SSAT so that the SSAT can give a copy to the other parties before the hearing. If a party resides overseas, a period of 28 days instead of 14 days is stipulated.

Subsection 10(6) directs the Registrar to make any written submissions (which the Registrar has a right to make under subsection 103F(1) of the Act) to the SSAT in the timeframes specified in subsection 10(5).

Subsection 103F(2) of the Act relevantly allows the Registrar to request the permission of the Principal Member to make written submissions to the SSAT, and subsection 103F(4) allows the Principal Member to order the Registrar to make written submissions. Subsection 10(7) requires the Registrar to give the SSAT the written submissions within the time specified in the grant of the request or the order.

A consequence of a party or the Registrar (as the case may be) not complying with any of the preceding subsections is dealt with in subsection 10(8). That subsection permits a document not given in accordance with subsections (1) to (7) to be considered only with the permission of the presiding member.

Section 11

The purpose of subsections 11(1) and 11(3) is to require a party who has obtained, or obtains, a family violence order against another party to the review to promptly give a copy of the order to the SSAT so that appropriate arrangements are made for the hearing (see subsection 21(3)). Similar requirements were contained in the *2009 Directions*.

Subsection 11(2) recognises that there may be no current family violence order because details of the whereabouts of a party are not known to the other party due to a history of family violence, and requires a party in that position to tell the SSAT so that information about the party's whereabouts is not disclosed in the review process.

The note to the subsection points out that subsection 21(3) of the Directions prescribes how a party, against whom another party has a current family violence order, must make any oral submissions to the SSAT.

Section 12

This section requires a party to complete and return within 14 days a "Statement of financial circumstances" form given to the party by the SSAT. This requirement was contained in the 2009 Directions.

Section 13

Subsections 103C(2) and (2A) of the Act respectively require the permission of the Principal Member for a party to have another person make submissions on his or her behalf, and the Principal Member to have regard to the wishes of the parties and the need to protect their privacy in deciding whether to grant permission.

To ensure that the requirements of the Act are met, section 13 prescribes what a party and the SSAT must do if the party wishes to have another person make submissions to the SSAT.

Subsection 13(1) requires that the request for the permission of the Principal Member be made in writing at least 21 days before the date on which the submissions are to be made. Subsection (2) specifies the information which must be provided in the request. Subsection (3) requires the SSAT to notify the other party of the request and ask whether that party has any objection to the request being granted.

To assist a party in deciding whether to have another person make submissions on his or her behalf, subsection 13(4) stipulates that a party and a representative will not both be permitted to make submissions. The reasons for not permitting both a party and a representative to make submissions are to aid clarity as to the party's case, efficiency of the hearing and fairness (or perceived fairness) of a hearing where the other party is not represented.

Although both a party and a representative will not be permitted to make oral submissions at the hearing, the SSAT may need to take evidence from the party. Subsection 13(5) tells a party this and that a notice can be issued under paragraph 103K(1)(b) of the Act to require him or her to answer questions at the hearing.

Subsection 103P(1) of the Act requires the hearing of the review to be in private. Section 103ZAA permits the Principal Member to make an order directing a person not to disclose information specified in the order (except as permitted by the order). Section 103ZAC permits the Principal Member to make a non-disclosure order against the recipient of information pursuant to an order under section 103ZAA. Subsection 13(6) of the Directions requires a delegate of the Principal Member to exercise the power under sections 103ZAA and 103ZAC to make orders directed to a representative. Under those orders, a representative will be prohibited from disclosing personal information about any person obtained through access to the

documents given to the party by the Registrar or by the SSAT for the purpose of making submissions to the SSAT, or through presence at the hearing.

The note to section 13 points out the sections of the Act which contain the matters which the Principal Member (or delegate) must take into account in deciding whether to grant permission for a representative. The note also directs attention to subsection 8(3) which specifies circumstances in which a representative is treated as a party for the purpose of the Directions, and to other sections of the Directions which prescribe procedure where there is a representative.

Division 5 deals with disclosure of information by the SSAT.

Section 14

Section 14(1) requires the SSAT to give a copy of a relevant document or the relevant part of a document to the Registrar and other party. A party sometimes includes irrelevant (even vexatious or offensive matter) in a document. For that reason, the obligation in the subsection does not extend to matter that is not relevant to the review.

Subsection 14(2) clarifies that the requirement in subsection (1) does not apply if a party has notified the SSAT that he or she does not wish to receive any documents or correspondence in relation to the review. This has occurred occasionally where there is a history of family violence.

Subsection 14(3) prescribes when and how any application by a party for the SSAT to withhold information from the other party must be made. The application can be made orally at a directions hearing or, in writing, at or before the time when the document containing the information is given to the SSAT.

Subsection 14(4) directs that a party's request to withhold information be refused if withholding the information from the other party could adversely affect the fairness of the review.

It is often convenient for parties to receive documents from the SSAT by email and section 33 of the Directions allows a party to elect to receive documents in that way. However, subsection 14(5) requires the consent of both parties to the SSAT electronically giving a party a document, which was given to the SSAT by the other party, if the document contains personal information about the latter.

The note to section 14 draws the reader's attention to subsection 10(2) of the Directions which prescribes what a party can obliterate in a document and to section 33 which requires the party to make a written election to receive notifications or material from the SSAT by electronic means.

Section 15

The Principal Member has powers to obtain information or a document under sections 103J, 103K, and 103L of the Act. Where those powers are exercised, subsection 15(1) requires the SSAT to give the parties a copy of a document obtained if that document is to be considered in the review. This subsection does not apply to the Registrar because information and documents are usually obtained through the Registrar (by the exercise of the powers conferred by sections 103J or 103L of the Act) so that the Registrar already has a copy of the documents.

Subsection 15(2) requires the SSAT to give the Registrar a copy of a document obtained under section 103K of the Act if that document is to be considered in the review. As a section 103K notice is addressed to a person other than the Registrar, the Registrar would not otherwise have a copy of the document.

Subsection 15(3) prohibits the obliteration of information in a copy of a document to be given to the parties unless the Principal Member, a Deputy Principal Member or the presiding member directs otherwise. However, the subsection is made subject to subsection (4) which specifies the information to be obliterated by the SSAT before a document obtained by the SSAT is given to a party. The information is the same kind of information which a party may obliterate from a document which he or she gives the SSAT. Additionally, where a party has advised the SSAT that his or her whereabouts are unknown to the other party due to a history of family violence, the SSAT will obliterate information which would disclose the location of the party.

In the unlikely event that any of the information obliterated under subsection (4) becomes relevant to an issue being considered in the review, the member or members constituting the SSAT for the review would have access to the document as obtained by the SSAT. The Principal Member (or delegate) can exercise the power under paragraph 103ZA(1)(b) of the Act to direct that a copy of the un-redacted document be given to a party.

Section 16

For privacy reasons, subsection 16(1) directs the SSAT not to send a copy of documents to a representative who is not a lawyer without the permission of the Principal Member or a Deputy Principal Member. Subsection 16(2) permits a party to give his or her representative access, for the purposes of the review, to the documents from the Registrar or the SSAT.

Section 17

Subsection 3(2) of the Act expresses Parliament's intention that the Act be construed and administered to the greatest extent consistent with the attainment of its objects, to limit interferences with the privacy of persons.

Paragraph 16(2)(b) of the Act (read with subsections 16(1) and (2A)) prohibits a member of the SSAT from directly or indirectly communicating to a person any information concerning another person obtained by the member in the course of, or because of his or her duties under the Act unless the information is communicated in the performance of those duties.

Under section 38 of the *Freedom of Information Act 1982* ("FOI Act"), a document is exempt from disclosure if its disclosure is prohibited by paragraph 16(2)(b) of the Act.

Subsection 88(1) of the Act requires the SSAT, in carrying out its functions under the Act, to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

The SSAT is impeded in the attainment of that objective by the diversion of its resources to respond to those parties who seek documents of a kind listed in section 17 of the Directions.

Subsection 17(1) directs the SSAT not to give a party a copy of members' notes or of communications between members in relation to the review, or between members and staff in relation to the review. Notes made by a member of the SSAT in performing his or her quasi-judicial role are the member's personal property and not documents of an "agency" (as defined in the FOI Act). Communications between SSAT members in relation to the review are part of the adjudicative process. (The Act confers a right of appeal against the SSAT's decision on the review). Communications between staff of the SSAT and a member in relation to the review are also part of the adjudicative process (for example, research, opinion or advice on a legal issue).

In relation to the prohibition in subsection 17(2) on giving a party access to certain documents after the SSAT has completed its review, the party will have been given a copy of such documents in the course of the review. Sections 14, 15 and 30 of the Directions require the SSAT to give a party a copy of a document which will be considered by the SSAT in the review. The reason for those Directions is to afford a fair mechanism of review to the parties.

However, after the SSAT has completed its review, the SSAT no longer has any duties or functions to perform under the Act. Accordingly, to protect the privacy of the other party, subsection 17(2) of the Directions directs the SSAT not to give a party access to a document containing personal information about another person if the party seeking access did not give the particular document to the SSAT.

Section 17 of the Directions is intended to be a direction within paragraph 46(b) of the FOI Act.

Section 18

Subsection 16(3A) of the Act permits a member of the SSAT to communicate “protected information” (as that expression is defined in subsection 16(1) of the Act) to a person if the information concerns a threat to the life, health or welfare of a person and either the member believes on reasonable grounds that the communication is necessary to prevent or lessen the threat, or there is reason to suspect that the threat may afford evidence that an offence may be, or has been, committed against a person and the member communicates the information for the purpose of preventing, investigating or prosecuting such an offence.

Subsection 18(1) requires a member to communicate the protected information through the Principal Member or a Deputy Principal Member. However, subsection (1) is subject to subsection (2) which allows a member to communicate protected information directly to a law enforcement authority if there is an immediate threat to the life of a person.

Division 6 deals with directions hearings.

Section 19

Section 103 of the Act confers power on the Principal Member to convene a directions hearing if the Principal Member considers that it would assist in the conduct and consideration of the review to do so. The Principal Member has delegated the power to convene a directions hearing to some members of the SSAT. Section 88(2) of the Act requires the Principal Member to pursue the objective of provision by the SSAT of a mechanism of review that is fair, just, economical, informal and quick in the exercise of his or her functions and powers under the Act.

The Principal Member considers that a directions hearing is likely to assist in the conduct and consideration of a review involving an application for a departure determination under Part 6A of the *Child Support (Assessment) Act 1989* but less likely to assist in the conduct and consideration of other reviews. A directions hearing extends the time from lodgement of an application for review until completion of the review.

For those reasons, if the review does not involve an application under Part 6A of the *Child Support (Assessment) Act 1989*, subsection 19(1) of the Directions requires the permission of the Principal Member or a Deputy Principal Member for the convening of a directions hearing.

Subsection 19(2) directs that a directions hearing be convened by the member who has been designated (under section 103M of the Act) to preside at the hearing of the review.

Subsection 19(3) continues the requirement in the 2009 Directions that a directions hearing (previously called a pre-hearing conference) be held by telephone.

Subsection 19(4) requires a party to be given at least 7 days notice of the day and time of a directions hearing unless the parties agree to a shorter notice period. This might occur, for example, where the directions hearing has been adjourned at the request of a party.

Subsection 19(5) requires a party to participate in the directions hearing.

Section 20

Subsection 20(1) requires the SSAT to electronically record a directions hearing. The reason for recording a directions hearing is that what was said could be relevant to consideration by the Principal Member as to whether to make a direction under subsection 101(5) of the Act, or to a question of law raised on an appeal brought under section 110B of the Act. However, unlike a court which conducts public hearings, the SSAT does not use a recording service to record its hearings but relies on the presiding member to activate the recording equipment.

It is not the intention of this subsection that a failure for any reason to record a directions hearing have any consequences for the validity of directions given at the hearing or for the validity of the SSAT's decision in the particular review.

Subsections 20(2) and (3) respectively prohibit a party from recording a directions hearing and prohibit the SSAT giving the recording to a party. Should something said at a directions hearing be relevant to an appeal against the decision of the SSAT on the review, a party is able to obtain a transcript (at his or her own expense) through Auscript. The term "Auscript" is defined in section 3 to mean "Auscript Australasia Pty Limited".

Division 7 deals with the hearing of the review.

Section 21

Under subsection 103C(3) of the Act, the Principal Member may determine that submissions to the SSAT by a party or a party's representative are to be made to the SSAT by telephone or by means of other electronic communications equipment.

Subsections 21(1) and (2) of the Directions respectively provide for a party to ask for permission to make oral submissions to the SSAT by telephone, and for permission to be given unless it would impede proper consideration of the review, or adversely affect the efficiency or privacy of the hearing. An example of when the making of oral submissions by telephone might adversely affect the efficiency and effectiveness of a hearing would be a review in which there are financial statements and records for companies before the SSAT and the SSAT needs to question the party about items in those documents. A person making oral submissions by telephone from a noisy place or a place where he or she would be overheard would adversely affect both the hearing itself and the privacy of the hearing.

Subsection 21(3) requires that a party against whom there is a current family violence order make oral submissions by telephone unless permission has been given for the party protected by the family violence order to make submissions by such means. For example, the party protected by the family violence order may have sought permission to make oral submissions by telephone.

Section 22

Subsection 103C(5) of the Act permits the Principal Member to give directions in relation to the use of an interpreter in connection with the hearing of the review.

Subsections 22(1) and (3) of the Directions respectively notify a party that a relative or friend will not be permitted to interpret at a directions hearing or hearing, and require the SSAT to arrange for an interpreter accredited in the relevant language or recognised in the relevant language if accreditation is not available. The reason for not permitting a relative or friend to do so is that he or she might not accurately translate the SSAT's questions and the person's answers. The risk of embellishment or mistranslation is reduced by the use of an independent interpreter accredited in the relevant language.

Subsection 22(2) requires a party who needs the services of an interpreter to tell the SSAT within 14 days of making, or being notified of, the application for review. Such notice is

necessary as the services of accredited interpreters cannot be obtained by the SSAT on short notice.

Paragraph 103ZAA(1)(a) of the Act permits the Principal Member to make an order directing a person not to disclose information specified in the order.

Subsection 22(4) of the Directions requires the member, who convenes the directions hearing and presides at the hearing, to make an order directing the interpreter not to disclose personal information obtained by him or her in the course of the directions hearing or hearing (as the case may be). The reason why such an order is to be made is that (unlike a hearing in a court) the hearing by the SSAT is a private hearing and the interpreter may be unaware of the confidentiality of information about the parties which he or she translates in the directions hearing or hearing.

Section 23

Section 103P of the Act stipulates that the hearing of a review must be in private and permits the Principal Member to give directions as to the persons who may be present having regard to the wishes of the parties and the need to protect their privacy. This section is part of Subdivision E of Part VIIA of the Act. Subdivision E applies to the Registrar.

To enable the wishes of the parties to be ascertained, subsection 23(1) of the Directions requires a party who wishes a person (other than an interpreter or representative who are covered by other sections of the Directions) to be present at the hearing to notify the SSAT at least 14 days before the hearing. As fairness requires that an interpreter be provided for a party who is not proficient in English, the SSAT will provide an interpreter irrespective of the wishes of the other party. If permission has been given by the Principal Member (or delegate) for a representative to make oral submissions, it is not necessary for a party to give notification under this section of the Directions.

The Act confers on the parties the right to make written and oral submissions to the SSAT but does not confer a right to call witnesses. Subsections 23(2) and (3) of the Directions respectively require a party who wishes to have a person give evidence to the SSAT to notify the SSAT in writing of the matters about which he or she wants the party to give evidence, and the SSAT to advise the Registrar and the other party of that notification. Such notification avoids the possibility of the other party being taken by surprise at the hearing.

Subsections 23(4) and (6) respectively stipulate that the presiding member will decide whether the SSAT will take evidence from the person, and who may be present at the hearing.

The purpose of subsection 23(5) is to notify parties that a representative will not usually be permitted to give evidence. A party who requests that another person make submissions on his or her behalf should be aware that if the request is granted, it is unlikely that the same person will be permitted to be a witness at the hearing. The reason for this is that a representative is present for the entire hearing whereas the SSAT permits a witness to be present only to give evidence to avoid the risk of that evidence being tainted by other evidence given in the hearing.

Subsection 23(7) requires the presiding member to exercise the Principal Member's power to make an order directing a person who is present at the hearing not to disclose personal information obtained by him or her in the course of the hearing. The purpose of the requirement is to protect the privacy of the hearing.

Section 24

Section 103H of the Act prohibits a child of a party from giving evidence for the purposes of a review. The Explanatory Memorandum to the *Child Support Legislation Amendment (Reform of the Child Support Scheme – New Formula and Other Measures) Bill 2006* said that section

103H was “to protect children from being pressured to support a particular parent’s or carer’s position for child support purposes, which would be damaging to the child’s continuing relationship with both parents and/or their carers”. However, section 103H does not prevent the child being present if the child does not give evidence.

Section 24 of the Directions prohibits a “child” (defined in subsection 3 to mean a person under the age of 18 years who is not a party) from being present during the hearing. The prohibition protects the relationship described above but also ensures that there is no disruption of the hearing or distraction of a party during the hearing.

Section 25

Section 103G of the Act empowers the SSAT to take evidence on oath or affirmation for the purposes of the review.

Subsections 25(1) and (5) respectively require a party to be asked to take an oath or make an affirmation at the commencement of the hearing, and a person attending to answer questions pursuant to a notice issued under paragraph 103K(1)(b) to be asked to take an oath or make an affirmation before answering questions. Neither subsection prevents the SSAT from taking evidence from a party, or questioning the person to whom the paragraph 103K(1)(b) notice was given, if the party or person (as the case may be) refuses to take an oath or make an affirmation.

Subsection 25(2) requires a witness to take an oath or make an affirmation prior to giving evidence at the hearing.

Where evidence is being given by telephone or other electronic communication means, subsection 25(3) directs that the person may only make an affirmation. The reason for this is that, in the case of telephone, the SSAT cannot see whether an oath is made on a sacred text. In the case of a video-conference from premises rented for the purpose, sacred texts might not be available.

Subsection 25(4) directs that a witness not be present at a hearing before or after giving his or her evidence. The direction is intended to ensure the privacy of the hearing and to avoid the possibility of the witness’ evidence being tainted by anything heard prior to giving evidence.

Section 26

Section 103N of the Act stipulates that, in reviewing a decision, the SSAT is not bound by legal technicalities, legal forms or rules of evidence; is to act as speedily as proper consideration of the review allows; and may inform itself on any matter relevant to a review in any manner it considers appropriate.

In conducting a hearing, the SSAT must pursue the objective, in subsection 88(1) of the Act, of providing a mechanism of review that is fair, just, economical, informal and quick.

Subsection 26(1) directs that the hearing be conducted in an inquisitorial manner. This means that the member or members constituting the SSAT for the hearing will ask questions of the parties. Subsections 26(2) and (3) respectively direct that a party or representative not be permitted to ask questions of another party but that a party or representative may ask the SSAT to put a particular question to the party. These directions give effect to sections 103N and 88 of the Act.

Section 27

Subsection 27(1) reflects the SSAT’s practice of electronically recording the hearing. As with subsection 20(1), a record of what was said (and how it was said) by persons present at a hearing might be relevant in the event of an appeal against the SSAT’s decision. It is not the

intention of the subsection that a failure for any reason to record the hearing affect the validity of the SSAT's decision.

To protect the privacy of the hearing, subsections 27(2) and (3) respectively prohibit a party, representative or any other person present at a hearing from recording any part of the hearing, and the SSAT from giving a copy of its recording to a party, representative or any other person.

Where a party appeals against the decision of the SSAT, subsection 27(4) permits the SSAT to give a copy of the recording to Auscript for preparation of a transcript at the party's expense.

A decision of the SSAT on the percentage of care which a party has of the child may be reviewed by the Administrative Appeals Tribunal ("the AAT"). The AAT conducts a fresh hearing. However, subsection 27(5) of the Directions permits a party to obtain (at his or her own expense) a transcript of the hearing by the SSAT for the purposes of the review by the AAT.

The note to section 27 points out that subsection 16(5) of the Act prevents a member of the SSAT (or a person working at the SSAT) from being required to communicate "protected information" or produce a "protected document" (as those expressions are defined in subsection 16(1)) to a court except where it is necessary to do so for the purposes of the Act.

Section 28

Section 103R confers power on the SSAT to adjourn the hearing of a review.

Subsection 28(1) of the Directions prescribes the procedure for the making of a request for an adjournment.

Subsection 28(2) directs that a request to adjourn a directions hearing is to be referred to the Principal Member, Deputy Principal Member or presiding member (to whom the Principal Member has delegated the power to convene a directions hearing).

Subsection 28(3) directs that a request to adjourn the hearing is to be referred to the presiding member (who will decide whether to grant or refuse the adjournment).

If a request for an adjournment is not made prior to the date of the directions hearing or hearing (as the case may be), subsection 28(4) requires that the request be made at the directions hearing or hearing.

Section 29

Section 103E of the Act empowers the Principal Member to authorise the SSAT to hear an application without oral submissions from a party or representative who was to make those submissions by telephone or means of other electronic communication equipment but who cannot be contacted by the presiding member on the day fixed for the hearing; or from a party or representative who does not attend the hearing at the time fixed for the hearing.

Where it is the applicant (or the applicant's representative) who cannot be contacted on the day of the hearing or fails to attend the hearing, the other party may not wish the review to proceed. Subsection 100(1) of the Act enables the Principal Member to dismiss the application for review.

Section 29(1) authorises the SSAT to hear an application for review without oral submissions from a party or representative if that party/representative cannot be contacted by telephone within 30 minutes of the time fixed for the hearing or does not attend the hearing at the time fixed for the hearing (as the case may be); and the other party does not consent to the application for review being dismissed.

Subsection 103E(5) of the Act permits the Principal Member to revoke the authorisation, for the SSAT to hear the review without oral submissions from the party or representative, if the hearing has not been completed.

Subsection 29(2) of the Directions revokes the authorisation given under subsection (1) if the party or representative contacts the SSAT or attends at the SSAT for the purpose of making oral submissions before the hearing is completed, and requires the SSAT to permit the party or representative to make oral submissions.

If the party or representative contacts the SSAT or attends at the SSAT for the purpose of requesting an adjournment of the hearing before the hearing is completed, subsection 29(3) of the Directions enables the presiding member (as delegate of the Principal Member) to revoke the authorisation and fix another time for the party or representative to make oral submissions.

If the adjournment is granted by the presiding member, subsection 29(4) permits the party to obtain a transcript of the recording of that part of the hearing for which he or she was not present for the purpose of making oral submissions at the resumed hearing.

In accordance with subsection 103E(5) of the Act, subsection 29(5) of the Directions precludes revocation of the authorisation (for the SSAT to hear the review without oral submissions from the party or representative) if the hearing has been completed.

Section 30

This section deals with material received after the hearing. Subsection 30(1) directs that the presiding member must decide whether information or submissions received after the hearing will be taken into account by the SSAT in making its decision on the review.

If the material is to be taken into account, subsection 30(2) requires that the parties be given an opportunity to make a written response to the material. However, subsection 30(3) clarifies that this requirement does not apply to the party who gave the material to the SSAT.

Subsection 30(4) directs that an opportunity is not to be given to a party to reply to another party's response to the material unless there are exceptional circumstances.

Division 8 deals with reinstatement of an application

Section 31

Subsections 100(4) and 100A(4) of the Act allow the Principal Member to reinstate an application which has been dismissed for reasons other than that the application was frivolous or vexatious, or all of the parties had been removed from the hearing. A request for reinstatement must be made within 28 days after receiving notification of the dismissal of the application or within such longer period as the Principal Member allows in special circumstances.

Section 31 of the Directions prescribes the procedures for making and deciding a request for reinstatement. Subsection 31(1) directs that the request include a written statement of the grounds for seeking reinstatement. Subsection 31(2) directs that a request made more than 28 days after receipt of notification of the dismissal of the application for review include a written statement of the reasons for the delay in making the request.

Subsection 31(3) directs the SSAT to notify the other party of the reinstatement request and that any submissions in opposition to the request must be made within 14 days.

Subsection 31(4) directs that the reinstatement request be decided on the papers unless it would be inconsistent with subsection 88(2) of the Act to do so in a particular case.

Division 9 deals with communication with the SSAT.

Section 32

Subsection 32(1) prohibits a party from attempting to communicate with a member of the SSAT in relation to the review outside of a directions hearing or hearing.

Subsection 32(2) requires a party to put in writing and deliver to the SSAT any information which he or she wishes the SSAT to take into account in the review.

Subsection 32(3) allows the information to be delivered by hand, post, facsimile transmission or email to the address on correspondence from the SSAT. In this way, a party will send the information to the registry of the SSAT dealing with the review.

Subsection 32(4) requires that the review number be quoted in all communications with the SSAT. This enables the SSAT to more easily connect the communication with the relevant review.

Section 33

The section is concerned with the means by which the SSAT sends notices and other material to the parties.

Subsection 33(1) reflects the current practice whereby the SSAT gives notification or material to the Registrar by electronic means.

Subsection 33(2) enables a party to elect to receive notification and material from the SSAT by electronic means.

Subsection 33(3) states when the party will be taken to have received the notification and material from the SSAT: namely, when the electronic communication became capable of being retrieved by the addressee. This is consistent with section 14A of the *Electronic Transactions Act 1999*.

Subsection 33(4) permits a party to revoke an election to receive notifications and material from the SSAT electronically at any time by giving written notice of the revocation to the SSAT.

Subsection 33(5) provides that the revocation of the election takes effect from the date on which it is received by the SSAT.

The note to section 33 draws attention to subsection 14(5) which effectively prohibits a document given to the SSAT by a party, containing personal information about that party, from being given by the SSAT to the other party by electronic means without the consent of both parties.

Section 34

The written notice of a decision of the SSAT required by paragraph 103X(3)(b) of the Act must set out the reasons for the decision, the findings on any material questions of fact, and refer to the evidence or other material on which the findings of fact are based.

Subsection 34(1) makes clear that where the SSAT has given a party the statement of reasons described in section 103X of the Act, the SSAT will not give the party any further explanation of the SSAT's decision. The SSAT will give further reasons for its decision only if ordered to do so by a court.

Section 103Y of the Act is the statutory equivalent of the “slip rule”. It allows the presiding member to correct an obvious error in the SSAT’s decision or the written reasons for the decision. Examples of obvious errors given in that section are an obvious clerical or typographical error in the text of the decision or statement, or an inconsistency between the decision and the statement.

Subsection 34(2) requires that a request by the Registrar or a party for the correction of an obvious error in the text of a decision or statement of reasons must be made to the SSAT in writing.

Subsection 34(3) requires the request to be referred to the presiding member for decision.

Subsection 34(4) states that the SSAT will not answer any questions in relation to its decision or conduct of the review. The subsection reflects the immunity and protection conferred on a member of the SSAT by clauses 21(1) and 21(1A) of Schedule 3 to the *Social Security (Administration) Act 1999*. The note to section 34 draws attention to those provisions.

Division 10 deals with production of documents by the SSAT.

Section 35

Occasionally, a subpoena is issued to the Principal Member or other person at the SSAT for the production of documents (which includes the recording of a hearing by the SSAT) in relation to a review.

In stating that the SSAT must not produce a document in relation to the review, subsection 35(1) of the Directions is consistent with the requirement in section 103P of the Act that the hearing of a review must be private; the prohibition in subsection 16(2) of the Act on communication of protected information or a protected document by a person to whom section 16 applies (which includes a member or staff of the SSAT); and subsection 16(5) of the Act which prevents a member of the SSAT from being required to produce a document containing protected information to a court except for the purposes of the Act.

Subsection 35(1) is also consistent with the protection and immunity conferred on a member of the SSAT by clauses 21(1) and 21(1A) of Schedule 3 to the *Social Security (Administration) Act 1999*.

Where a subpoena is issued for the recording of the hearing by the SSAT for the purposes of an appeal under section 110B of the Act, the recording will be produced to the court which issued the subpoena. However, subsection 35(2) requires the person to whom the subpoena is addressed to object to a party being given, or permitted to make, a copy of the recording. The reason for such objection is to prevent possible use of the recording of a hearing (which the Act required to be held in private) for purposes unrelated to the Act.

Where a subpoena is issued for the recording of the hearing by the SSAT other than for the purposes of the Act, subsection 35(3) requires the person to whom the subpoena is addressed to object to production of the recording.

Statement of Compatibility with Human Rights
Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

SSAT Child Support Review General Directions 2012

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

This legislative instrument replaces and revokes the *SSAT Child Support Review Directions 2009* (the 2009 Directions) which require amendment on commencement of Schedule 3 to the *Social Security and Other Legislation Amendment (Further 2012 Budget and Other Measures) Act 2012* (the amending Act) which significantly amends Part VIIA of the *Child Support (Registration and Collection) Act 1988* (the Act).

Paragraph 103ZA(1)(a) of the Act permits the SSAT Principal Member to give general directions as to the procedure to be followed by the Social Security Appeals Tribunal (SSAT) in connection with the review of decisions under Part VIIA of the Act. A general direction must not be inconsistent with any provision of the Act (or the *Child Support (Assessment) Act 1989*).

New section 88(2) of the Act requires that the Principal Member pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick in performing or exercising his or her functions under the Act. This legislative instrument gives effect to that objective (and the other amendments to Part VIIA of the Act). This instrument is largely machinery in nature and will not substantially affect or alter reviews by the SSAT. The instrument is required because the 2009 Directions become inconsistent with some of the provisions of the Act on commencement of Schedule 3 to the amending Act.

Human rights implications

The human rights implications of the legislative amendments in Schedule 3 to the amending Act were set out in a statement of compatibility with human rights at the end of the explanatory memorandum to the amending Act. That statement concluded that Schedule 3 to the amending Act is compatible with human rights because the amendments that potentially limit human rights are considered reasonable and proportionate, and many amendments strengthen or protect human rights. This legislative instrument further advances the protection of human rights engaged by the amending Act.

This instrument engages the following human rights:

- The right to protection from exploitation, violence and abuse contained in articles of the *International Covenant on Civil and Political Rights (ICCPR)*, the *Convention on the Rights of the Child* and the *Convention on the Rights of Persons with Disabilities*;
- The right to a fair hearing in Article 14 of the ICCPR; and
- The right to protection against unlawful interference with privacy in Article 17 of the ICCPR.

Right to protection from exploitation, violence and abuse

Subsection 16(3A) of the Act (as inserted by the amending Act) permits a member of the SSAT to release protected information that has been disclosed, during a review, to the relevant authorities in order to prevent or lessen a threat to the life, health or wellbeing of an individual. Directions in this instrument require a member to communicate the protected information through the Principal Member or a Deputy Principal Member. However, where there is an immediate threat to the life of a person, a member may communicate protected information directly to a law enforcement authority.

The instrument also contains directions as to hearing arrangements when there is a family violence order. The directions require a party who has obtained, or obtains, a family violence order against another party to promptly give a copy of the order to the SSAT so that appropriate arrangements are made for the hearing. The directions recognise that there may be circumstances in which there may be no current family violence order because details of the whereabouts of a party are not known to the other party due to a history of family violence, and requires a party in that position to tell the SSAT so that information about the party's whereabouts is not disclosed in the review process. The directions

also require a party against whom there is a current family violence order to make oral submissions by telephone unless permission has been given for the party protected by the family violence order to make submissions by such means.

These directions engage and strengthen a person's right to protection from exploitation, violence and abuse contained in articles of the *ICCPR*, the *Convention on the Rights of the Child* and the *Convention on the Rights of Persons with Disabilities*.

Right to a fair hearing

The directions as to hearing arrangements when there is a family violence order also ensure that a party protected by a family violence order is able to actively participate in an SSAT review. This strengthens and protects the right of that party to a fair hearing contained in Article 14 of the *ICCPR*.

Right to protection against unlawful interference with privacy

The amending Act contains amendments which broaden the non-disclosure of information provisions in SSAT reviews to ensure non-disclosure orders can be made that cover all aspects of an SSAT review. This instrument contains directions as to the making of orders to protect a party's privacy and directions restricting access to documents containing personal information about another person. These directions strengthen a person's right to protection against unlawful interference with his or her privacy under Article 17 of the *ICCPR*.

Conclusion

This legislative instrument is compatible with human rights as it strengthens and protects an individual's right to privacy and promotes a person's right to protection from exploitation, violence and abuse.