

Submission by the
Acting Commonwealth Ombudsman

**REVIEW OF GOVERNMENT
COMPENSATION PAYMENTS**

Submission to the Senate Legal and Constitutional Affairs Committee by the
Acting Commonwealth Ombudsman, Mr Ron Brent

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Introduction

The Commonwealth Ombudsman has a special interest in the operation of the Compensation for Detriment Caused by Defective Administration (CDDA) scheme. The Ombudsman is effectively the only recourse the public has for external review of a decision made under an Executive scheme such as the CDDA. As part of investigation into general complaints the office can also recommend that an agency pay compensation under the CDDA scheme to a person where a moral obligation exists. The office deals with about 200 complaints annually that specifically raise CDDA issues.

Background

The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action
- developing policies and principles for accountability, and
- reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

Response to Terms of Reference

In general we believe that CDDA is an excellent scheme that is professionally administered by agencies. It provides a flexible means of compensating individuals who suffer financial injury as a result of defective administration by a government agency, without the need for legal proceedings. It acknowledges that people frequently interact with government, that they rely on government advice and can suffer a loss when wrongful government action occurs.

The Commonwealth Ombudsman recently conducted an own motion investigation into the administration of the CDDA scheme. The findings and recommendations of this investigation are set out in Report 11/2009 titled: *Putting things right: compensating for defective administration – Administration of decision making under the scheme for compensation for detriment caused by defective administration*. This report is attached and forms a key part of our submission to the Committee.

The report draws widely on the experience of this office in dealing with complaints about CDDA administration. A number of areas requiring general improvement in CDDA administration have been identified in this and earlier reports. In summary, we believe that there is a need for

- greater visibility of the scheme
- better assistance to claimants in accessing the scheme and making a claim

- improved monitoring and reporting of claims by agencies
- greater accuracy of agency records, particularly in recording oral advice that could give rise to a CDDA claim
- improved communication with CDDA claimants during the claim process
- readily accessible and consistent training materials for agency staff on CDDA administration
- less defensive and legalistic approaches to CDDA decision-making by agencies
- use of CDDA claims to identify systemic problems in agency administration coordination and consistency of CDDA administration across Australian Government agencies.

In February 2010 the Ombudsman's office also published a Fact Sheet on CDDA which sets out best practice principles for handling claims under the CDDA scheme. This Fact Sheet is also attached to this submission. The principles set out in the Fact Sheet are drawn from the *Putting Things Right* Own Motion Report and from the Ombudsman's office's experience of investigating CDDA related complaints.

In addition to the general observations about the operations of the CDDA scheme we would like to highlight a number of limitations which require further consideration and reform by government.

The first limitation is that CDDA applies only to agencies that come under the *Financial Management and Accountability Act 1997* (FMA Act). The office has investigated a number of complaints where a person claims they have suffered a financial loss due to defective administration by a Commonwealth entity [subject to the *Commonwealth Authorities and Companies Act 1997* (CAC Act)], but is unable to have their claim considered because the entity does not fall under the FMA Act.

A recent example of this is the Commonwealth Ombudsman's report regarding discretionary payments by Comcare (Report no. 04/2010 *Comcare and Department of Finance and Deregulation - Discretionary Payments of Compensation*). The report is also attached as part of this submission. That report found that, as Comcare is a CAC Act agency rather than an FMA Act agency, there was no direct means for Comcare to consider claims for compensation where the loss is caused by its defective administration. In response to the Commonwealth Ombudsman's recommendations in that report, Comcare has given an undertaking to explore how it can create a CDDA type scheme to deal with these types of claims in the future.

The second limitation relates to the capacity to compensate in circumstances where an agency contracts out its services. Clause 25 of the CDDA guidelines states that the scheme only applies if 'an official of the agency' causes loss as a result of defective administration. The CDDA scheme cannot be used where the defective administration is committed by a non-agency person such as a contracted service provider. This causes difficulties for complainants to have claims of financial loss dealt with consistently by providers and the Australian government agencies they are contracted to.

Many contracts for delivery of government services that are considered by this office do not prima facie contemplate that a private service provider will be liable for losses incurred due to defective administration. The office accepts that creating obligations that may not have been considered in detail during pre-contractual negotiations is problematic. The office is also aware that creating obligations for a private service provider could also impact on the cost of obtaining contracted services.

Left unresolved this situation means that the Australian Government agency has effectively contracted out its accountability for matters that it would otherwise be responsible to deliver. It also creates an inequitable situation as clients of those service providers currently do not have any obvious means of having their claims of defective administration addressed in a consistent manner.

Given the increasing contracting out of government services and the public's reliance on such services this limitation to the coverage of the CDDA scheme needs to be addressed. We suggest that government review this situation with a view to providing a clearer pathway for resolution of these types of claims.

A third limitation of the CDDA scheme, which is emerging as a result of further developments in government service delivery, relates to the interaction between government agencies. For example actions of one agency, such as assessment of income amounts, immigration status or care arrangements, may impact on entitlements that a person may have in another agency, such as payments administered by Centrelink, once information is passed on from one agency to another. A person may be affected by defective administration from one agency that may have led to missing out on an entitlement in another agency. At times defective administration may be shared by both agencies, for example where there is a system failure and transfer of information was not verified by the receiving agency. There needs to be greater clarity about who should take responsibility for compensating under the CDDA scheme in these situations.

The outsourcing of services by Australian government agencies to state, territory and local government agencies as well as the interaction between these tiers of government is also becoming increasingly common. The CDDA scheme does not enable a person to seek compensation when the defective administration (for example, wrong advice or failure to perform a service) was made by a state, territory or local government agency providing a service on behalf of the Australian government agency. Issues similar to the points raised above in relation to the contracting out of services and the interactions between government agencies apply here. This is another area that warrants further consideration by government.