Commonwealth OMBUDSMAN

Submission by the Commonwealth Ombudsman

REVIEW OF MILITARY COMPENSATION ARRANGEMENTS

Submission by the Commonwealth Ombudsman, Prof. John McMillan

3 July 2009

INTRODUCTION

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.

In my role as Defence Force Ombudsman, I also investigate complaints that arise from a person's service in the Australian Defence Force (ADF). This includes complaints about actions that occur after a person has left the ADF, for example compensation and rehabilitation assistance given by, or on behalf of, DVA for injuries sustained during ADF service.

Most of the approaches to my office about DVA I investigate as the Defence Force Ombudsman. In practice, the way investigations are conducted, and my abilities to make recommendations or suggestions, do not differ markedly between the two roles.

Complaints about DVA

The following table show the number of approaches made to my office about DVA in the last five financial years.

	2004–05	2005–06	2006–07	2007–08	2008–09
Department of Veterans' Affairs	216	276	256	139	162*

*this number is provisional and may alter after year-end data is checked

The approaches cover the entire range of DVA's activities. Approximately one fifth of these complaints are solely about decisions made, or actions taken, under the *Military Rehabilitation and Compensation Act 2004* (MRCA).

A number of complaints concern both MRCA and possible entitlements under other legislation. The crossover and complexity of the legislative scheme is one of the most marked features of military compensation for our office. It is certainly reflected in the complaints made to our office, and the number of complainants who are not able to tell us at the outset which, or what type, of military compensation payments they are receiving.

RESPONSE TO TERMS OF REFERENCE

I have based this submission on information gathered from investigating complaints to my office. My submission is therefore mostly focussed on responding to the first term of reference of the Review; namely examining the operation to date of MRCA, and the decisions and administrative actions taken by DVA under that Act.

Delay

Up until 2006, the main cause of complaint about MRCA, by a considerable margin, was delay. The complaints were about delay in making the original decision, delay in doing internal reconsiderations of decisions, and delay in processing claims and entitlements after liability for the injury had been accepted. In February 2007 our office wrote to the Deputy President of the Repatriation Commission advising that our office would undertake an investigation into the delays in the processing of MCRS claims.

We note that in 2006 and 2007 DVA put in place a number of initiatives to decrease processing times. Although delay is still a cause of complaint to our office, our observations, and the statistics provided by DVA, show that these changes have improved processing times for MCRS claims since 2006. We finalised our specific investigation into these matters in July 2007. A copy of the letter sent to DVA advising of our conclusions in relation to the delays is attached.

Transition out of the ADF

The ADF is responsible for providing medical treatment and rehabilitation to members while they are still in the ADF. DVA then provides medical treatment and incapacity payments, if required, after the member leaves the ADF. Both organisations have recognised that the transition phase is a complex and difficult time for a member, and have put in place a range of mechanisms with the aim of making the medical treatment seamless.

Despite these measures, complaints to our office show that transition continues to be a high risk time for administrative error. DVA requires certain steps to be done before an ex-member can access entitlements, and DVA is normally proactive in ensuring that these occur. However if DVA does not ensure that these happen then it can have serious consequences for the ex-member. For example, in one recent complaint, an ex-ADF member did not have a needs assessment at the time of discharge. This oversight caused problems for the member in the three years following discharge in attempting to establish his medical condition and requirement for assistance from DVA.

In transition management, synchronising the dates of discharge from the ADF and the timing of any medical treatment, including obtaining specialist opinions, becomes important. In a recent complaint to our office, a member was in the process of being discharged for an identified disability. Although DVA had requested a postponement of the discharge date for medical reasons, those reasons did not relate to the medical condition that led to the member's discharge. We are concerned that, where a disability is identified when a member is still serving but is not a disability taken into account in the discharge decision, the disability is not recognised by the ADF for the purposes of timing transition management.

In my view, these examples show that transition management should continue to be given a high priority in the military compensation scheme.

Stabilisation

We also receive complaints from clients who have been required to wait until their condition has stabilised before receiving compensation for permanent impairment. While DVA is correct in requiring the condition to be stable, we note that this is an area where the process and the reasoning is not well understood. To clients, it can seem that the requirement to wait means that DVA expect them to either recover, or become much worse.

The time frame for potential stabilisation can be many years, and clients are understandably frustrated that their claim for their illness cannot be resolved sooner. This is particularly so when they have psychologically adjusted themselves to a serious and permanent health condition. It may be that this is an area where more explanation of the process and the reasons for waiting, in very plain terms, would assist clients in understanding DVA's decision.

Ongoing relationship

In our experience, DVA is aware that claimants for military compensation are likely to be in a relationship with DVA for a long period of time. However there are two aspects of this ongoing relationship issue that I would like to mention.

Firstly, the quality of recordkeeping is especially important where it is possible that the record will be relevant to benefits that may be paid for the next few decades. Our observations support the conclusions and recommendations of the ANAO Audit Report No. 28 of 2008-09 *Quality and Integrity of the Department of Veterans' Affairs Income Support Records.*

In particular we support the ANAO's Recommendation 3, which recommends strengthening the data entry system and validation of customer data. Although this problem is not limited to MRCA claims, we have received complaints by clients where data was given to DVA, but not processed. When the information was re-submitted and processed it resulted in a substantial overpayment. This overpayment could have been avoided with accurate data collection and validation.

The second aspect of an ongoing relationship involves processing and making decisions on numerous claims at differing times. If a client is dissatisfied with a MRCA decision, there are appeal avenues available. However it can be difficult for a client to be disputing DVA's decision in the Administrative Appeals Tribunal, while putting in a separate claim for another injury or condition. Although these matters are dealt with separately within DVA, the distinction may not be always apparent to a client.

This becomes particularly problematic when DVA is negotiating a settlement with a client who has other current matters with DVA. It is easy for clients to have a perception that refusing a settlement on one matter will affect the consideration of the other claim. As the MRCA scheme continues and clients have increasingly complex case histories, it is likely that these situations will become increasingly common.

Pre-approval of medical treatment

A regular source of complaint to our office is the requirement to have pre-approval for medical treatment. We have received complaints about the timeliness of pre-approvals given, and incorrect advice given prior to work being undertaken about whether a client would be reimbursed.

We also receive complaints which stem from a client's misunderstandings of the approvals given by DVA. For example, we received a complaint that DVA had approved dental work and then refused to pay for the work after it had been completed. After investigation, it was clear that DVA had approved the dental work subject to a certain monetary limit. The client in this case had not noticed the limitation placed on the approval. I suggest that where approvals contain restrictions or limits, those limits are spelled out clearly at the front of the correspondence.

Interaction of legislative schemes

The introduction of MRCA has made considerable progress in assisting the confusion that existed in relation to accessing pre-2004 entitlements. However we do receive complaints about the way earlier legislation interacts with MRCA, in particular the operation of the offsetting provisions. These arise where a member has entitlements under both the *Veterans' Entitlements Act 1986* and the *Safety Rehabilitation and Compensation Act 1994* and any government pension.