

Committee Secretary
Foreign Affairs, Defence and Trade Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600



**Submission by the
Commonwealth Ombudsman**

**INQUIRY INTO THE PROVISIONS OF
THE VETERANS' AFFAIRS LEGISLATION
AMENDMENT (OMNIBUS) BILL 2017**

Submission by the Acting Commonwealth Ombudsman, Ms Doris Gibb

May 2017

The Commonwealth Ombudsman welcomes the opportunity to respond to the Senate Standing Committee on Foreign Affairs, Defence and Trade Inquiry into the provisions of the Veterans' Affairs Legislation Amendment (Omnibus) Bill 2017.

BACKGROUND

The Office of the Commonwealth Ombudsman seeks to ensure that administrative action by Australian Government agencies is fair and accountable. It does this by handling complaints, conducting investigations, performing audits and inspections, encouraging good administration, and discharging other specialist oversight tasks. The Commonwealth Ombudsman is guided by the values of independence, integrity, accessibility and professionalism.

The Defence Force Ombudsman

The Commonwealth Ombudsman is also the Defence Force Ombudsman (DFO), a function conferred on the Ombudsman in 1983 to provide assurance of independence and integrity in the management of complaints about matters of administration within the Australian Defence Force (ADF). The DFO provides an external and independent complaints mechanism for serving and former members of the ADF for administrative and employment matters that have not been resolved by Defence.

Complaints made to the DFO specific to the ADF include decisions about promotion, demotion, discharge, postings, leave, housing, allowances and handling of Redress of Grievance processes. We can assess the handling of allegations of misconduct, harassment and abuse. We can also refer matters to the Inspector General ADF, where it is found to be a more appropriate investigation avenue.

Complaints made to the DFO specific to the Department of Veterans' Affairs (DVA) include adverse decisions about payment entitlements, payment rates and calculations, offsetting of pensions, delays in the processing of claims, access to support and ancillary services and decisions relating to compensation and debt waiver.

From 1 July 2016 to 24 April 2017 the DFO has received 489 approaches about matters of administration in Defence agencies. Of the 489 approaches, 123 were about DVA. Of these we investigated 27 matters (22 percent).

From 1 December 2016 the DFO's functions were expanded to provide an independent mechanism to accept reports of abuse in Defence. We accept reports of serious abuse, defined as sexual abuse, serious physical abuse and/or serious bullying and harassment.

The DFO provides support for people who report incidents of serious abuse, using a trauma-informed care model to support those making a report, based on the principle of 'do no further harm'. We assess available options, which can include a referral to counselling or assessment for participation in a Restorative Engagement conference, a facilitated meeting where the person making the report can meet with a member of Defence to have their report of abuse heard and acknowledged. We can also advise on whether the reported matter should be referred to the police, Defence or another agency for further consideration.

From 1 December 2016 to 24 April 2017, the DFO has received 90 reports of abuse in Defence.

RESPONSE TO TERMS OF REFERENCE

Schedule 1—Veterans' Review Board (VRB) and additional subsection 155(8A) dismissing applications for review that are deemed frivolous or vexatious

The Ombudsman is aware of the high level of agency resources involved in the processing of applications from small numbers of applicants whose conduct may be considered as vexatious or frivolous. It is therefore reasonable for agencies to formalise legislative provisions to deal with these applications to minimise the impact on service delivery to the majority of applicants.

Our own legislation allows delegated officers to decline to investigate matters considered to be vexatious, frivolous or not made in good faith. It is important that the VRB considers the level of delegation required to make decisions under this provision, for example, senior officers. This will provide assurance that serious consideration has been given to the use of this provision at an appropriate senior level.

Caution should be exercised in the processing of vexatious applications as application specific rather than applicant specific. It is possible for an individual to make an application that is considered vexatious, but a subsequent or unrelated application may have grounds for consideration. While our office is satisfied that the proposed subsection 155(8A) specifically refers to the application, it is important that any related policy and guidance also reflects this focus.

Plain English guidelines should also be developed to ensure a level of consistency and minimise the wide variations that can occur across independent decision makers.

Finally, internal review processes are essential to ensure that procedural fairness is addressed. Options may include the use of quality assurance processes and an internal review mechanism. Applicants should also be provided with clear guidance on what external appeals mechanisms are available.

Schedule 2—Specialist Medical Review Council and travelling expenses for making oral submissions

Our office welcomes any additional legislation that assists DVA applicants with meeting costs associated with the claims process.

Schedule 4—Employer Incentive Scheme payments

The enhancement of rehabilitation and vocational assistance services for eligible serving and former Defence Force members, reservists and cadets is of potential benefit to both recipients and the wider community.

Schedule 5—Disclosure of information between DVA and the Commonwealth Superannuation Corporation (the CSC)

This office has investigated a number of complaints about debt recovery which have involved debts being raised by DVA as a result of delays in receiving information from CSC that was critical to the determination of the relevant entitlement.

When a DVA entitlement is granted, it is not always clear to recipients whether superannuation related payments will affect the entitlement. It is also difficult for individuals to determine whether DVA has assessed any previous or ongoing superannuation related payments in its calculation of payment rates.

We are aware of cases where DVA did not identify the omission of critical CSC information until many years after the grant of an entitlement. A debt was subsequently raised and individuals were required to pay the full gross amount of overpayment.

In December 2008, our office raised this issue in our submission *Defence Force Ombudsman: 25 Years of Service*. At section 3.17 we stated:

The Ombudsman outlined the office's general approach to such complaints—that there was no prima facie reason why a person should make a windfall gain because of an administrative error, but on the other hand someone who receives an overpayment in good faith should not suffer financial hardship in repaying it. In general repayment should be by instalments, and only of the after-tax amount.

The issue is further complicated when the affected individual attempts to recover the double taxation monies. Overpayees will have paid an initial amount of taxation when the original superannuation payment was made. However, when DVA raises a subsequent related debt it is calculated inclusive of taxation, despite the fact the individual has previously met the taxation obligation.

The current DVA policy is to advise affected individuals that they need to recover any double taxation through the amendment of previous income tax returns. The documentation required by the Australian Taxation Office (ATO) to proceed with an amendment is only provided once the overpayment to DVA is recovered in full. We have noted cases where the taxation components were over \$10,000, which is a significant amount to individuals whose only source of income is a DVA entitlement.

For individuals amending their income tax and seeking a refund, the time limit is generally two years, from the day after the ATO provided the notice of assessment for the year in question. It is our understanding that there is some discretion to change a tax return after the time limit has passed, through the ATO's internal processes. However, this is generally limited to recently submitted return years (less than five years). **Given that DVA may not discover the overpayment for many years, the opportunity to seek tax recovery is limited and individuals are often unable to recover overpaid tax.**

Given the vulnerabilities of many DVA customers, debts not only have a significant financial impact, but can exacerbate serious mental health issues. Therefore, the formalisation of data sharing between CSC and DVA should reduce the risk of overpayments linked to the delay or omission of superannuation related evidence.