



WOMEN'S LEGAL SERVICES NSW

Incorporating
Women's Legal Resources Centre
Domestic Violence Advocacy Service
Indigenous Women's Program
Walgett Family Violence Prevention Legal Service
Bourke/Brewarrina Family Violence Prevention Legal Service

8 June 2010

Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Email: legcon.sen@aph.gov.au

By email

Dear Committee Secretary,

Review of Government Compensation Payments

1. Women's Legal Services NSW (**WLS NSW**) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee (**the Committee**) on its inquiry into the review of government compensation payments.
2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic casework services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims compensation, care and protection, human rights and access to justice.
3. We have assisted clients with a number of discretionary payment mechanisms including Indigenous Stolen Wages matters as well as payments made under the Scheme for Compensation for Detriment caused by Defective Administration (**CDDA**) and act of grace payments. In line with the Terms of Reference for this inquiry we will not address issues in relation to Indigenous Stolen Wages.
4. The issues we wish to raise arise from our work in relation to CDDA payments. We will refer to a specific unsuccessful claim under the CDDA scheme which illustrates a range of concerns.



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Background information

5. Our client made a CDDA claim in response to the failure of the Australian Federal Police (**AFP**) to prevent her ex-husband from leaving Australia when the Child Support Agency (**CSA**) had issued a Departure Prohibition Order (**DPO**). The ex-husband had a significant child support debt and at the time of his departure our client believed that he was carrying enough money to pay this debt.
6. The CDDA claim was made in early 2008, but the CSA did not arrange to meet with the AFP until August 2008. The agencies then conducted a joint assessment of the claim. In August 2009 the CSA advised the client that her claim was unsuccessful. The AFP finally advised the client of the same in February 2010.
7. This matter has been the subject of a specific investigation and report by the Commonwealth Ombudsman (**the Ombudsman**).¹
8. Amongst other things the Ombudsman found that there were no formal protocols between the CSA and the AFP for administering DPOs and inadequate communication by both agencies with the client, which left her uncertain and confused.
9. Whilst there was some acknowledgement of defect with the administration of the DPO both the CSA and the AFP concluded that this did not cause quantifiable loss for our client. We note that as a result of this case the AFP and CSA have now implemented new communication procedures.

Detriment

10. This matter highlights limitations of the definition of detriment, particularly for clients who are already vulnerable and disadvantaged.² In addition to the potential to recover child support monies owed, our client drew a lot of strength and hope from the knowledge that a DPO had been made and that it would be an offence for her ex-husband to try to leave Australia. As a victim of serious and ongoing domestic violence this was a small but very significant way for her to regain some control.
11. Unfortunately as a result of the mishandling of the DPO and the subsequent difficulties in getting a timely or appropriate response from the agencies involved our client now feels even more powerless. This kind of loss does not appear to fit into the current understanding of CDDA detriment.
12. We also note that victims of domestic violence with existing psychological injury are very unlikely to meet the objective threshold of 'normal fortitude' for psychiatric injury, even though later defective administration may clearly result in a further specific psychiatric injury. Information is not freely available as to how agencies are interpreting 'normal fortitude'.
13. The threshold for economic loss is also very high. The onus is on the applicant to establish both that there has been a lost opportunity and to quantify the amount lost.³ When it is a struggle for many clients to simply navigate the day to day procedures of government departments it will be almost impossible to understand the mechanics of what constitutes loss under a CDDA claim.

¹ *Australian Federal Police and the Child Support Agency, Department of Human Services - Caught between two agencies: The case of Mrs X*, August 2009, Commonwealth Ombudsman, Report No. 14/2009.

² 'Detriment' is defined in *Finance Circular 2009/09: Discretionary Compensation and Waiver of Debt Mechanisms*, Department of Finance and Deregulation at 13.

³ *Finance Circular 2009/09* at 14.

14. The authority to award compensation comes from the broad executive power under section 61 of the Constitution so there is opportunity for the government to consider alternative definitions of loss.

Multiple agencies

15. As a result of our client's experience we are concerned that the involvement of more than one agency in a defective administration matter may result in CDDA applicants being further disadvantaged. This may be because each agency assumes that the other is responsible and applicants fall through the gap or for the reason that the agencies decide to work together and present a united position, which can be confusing and overwhelming.
16. We suspect that the costs of 'defending' our client's claim were probably disproportionate to any possible compensation award as both agencies hired leading commercial law firms to represent them. This is not in the spirit of the 'moral' as opposed to 'legal' obligation that is central to CDDA.⁴

Delay

17. We are particularly concerned about how long it took to make a decision in this case.
18. In August 2009 the Ombudsman determined that the "delay is not justified by any inherent complexity" but was "instead attributable to administrative weaknesses in both agencies".⁵ We note that this statement was made about six months before the AFP decision was finally given. The Ombudsman is currently conducting a further review into the delay by the AFP in making the CDDA decision.
19. A CDDA factsheet prepared by the Ombudsman states "CDDA claims need to be handled in a timely manner".⁶ We support any movement towards the establishment of timeliness standards for dealing with CDDA claims.

Review

20. From the outset our client actively involved the Ombudsman who subsequently made strong recommendations to the CSA and AFP, many of which have not been implemented in full.⁷
21. Our client has limited options remaining as it appears there may be no further avenues of internal review within the CSA or AFP. Additionally, as "CDDA decisions are not made under an enactment, decisions are not amenable to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*".⁸
22. It has been suggested that a CDDA decision is "possibly reviewable by the Federal Court under s 39B of the *Judiciary Act 1903*, which applies to decisions made 'by an officer of the Commonwealth'".⁹ This does not appear to have been tested and the cost of such litigation is likely to be prohibitive for most.

⁴ *Putting things right: compensating for defective administration: Administration of decision-making under the Scheme for Compensation for Detriment Caused by Defective Administration*, August 2009, Commonwealth Ombudsman, Report No. 11/2009.

⁵ *The case of Mrs X* at 3.

⁶ *Compensation for detriment caused by defective administration*, Fact Sheet 9, Commonwealth Ombudsman, February 2010 at 1.

⁷ *The case of Mrs X* at 4-5.

⁸ *Finance Circular 2009/09* at 18.

⁹ *Putting things right: compensating for defective administration* at para 2.51. See also *Finance Circular 2009/09* at 18.

23. We also note that in advising their final decision neither the AFP nor CSA provided our client with information about the availability of alternative remedies such as act of grace payments. We suggest that once an individual makes a claim for one form of discretionary government payment that they be provided with a factsheet explaining all discretionary compensation mechanisms.
24. We also support the recommendation made by the Ombudsman for the establishment of an independent inter-agency review panel.¹⁰
25. We look forward to the Committee's report in September.

Yours faithfully,
Women's Legal Services NSW

Carolyn Jones
Solicitor

¹⁰ *Putting things right: compensating for defective administration* at para 2.55.