



Submission by the  
Commonwealth Ombudsman

**PRODUCTIVITY COMMISSION INQUIRY INTO  
COMPENSATION AND REHABILITATION FOR  
VETERANS**

Submission by the Office of the Commonwealth Ombudsman

**June 2018**

The Office of the Commonwealth Ombudsman (the Office) welcomes the opportunity to respond to the Productivity Commission Inquiry into Compensation and Rehabilitation for Veterans.

## **Background**

The Office safeguards the community in its dealings with Australian government agencies by:

- correcting administrative deficiency 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
- reviewing statutory compliance by law enforcement agencies with record-keeping requirements applying to telephone interception, electronic surveillance and like powers

Our role in the oversight of Commonwealth administration allows us to understand experiences from members of the public who are dissatisfied with the way the government has dealt with their issue. Through our investigation of complaints about the actions of government agencies, we are able to identify the complex and systemic problems facing government agencies and assist agencies in resolving these issues.

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

Complaints made to the DFO specific to serving members in the Defence Force 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 Australian Defence Force, 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 2017 to 22 June 2018 our Office received 170 complaints about matters of administration by DVA. We investigated 30 (17 per cent) of these matters.

## **Response to the Terms of Reference**

### ***Introduction***

Our Office is aware of the significant number of inquiries and studies recently undertaken in relation to veteran health and entitlements and the difficulties faced by veterans in navigating the complex legislative framework that overarches the entitlements available to the veteran community. While we note there has been significant work undertaken by DVA on legislative and policy reform to provide enhanced services to veterans and their families, our Office continues to receive complaints about DVA's actions and decisions around service related injuries and related entitlements.

Our submission to the Inquiry provides context to the main themes we observe in our complaints about DVA and the actions and outcomes from the investigations we have undertaken.

We have analysed the complaints our Office has received about DVA over the last five years (710 in total). The most common themes arising from these complaints (noting complaints may raise multiple issues or themes) are:

1. Pension and Permanent Impairment payment decisions (raised in 23 per cent of complaints received)
2. Access to health care services, including rehabilitation and treatment options (16 per cent)
3. Incapacity benefits, including calculations and decisions (14 per cent)
4. Offsetting of payments and pensions (12 per cent)
5. Service delivery issues (12 per cent)

More information on each of these themes follows.

### **1. Pension and Permanent Impairment payment decisions**

#### Defence related service

Our Office has received a number of complaints in relation to decisions by DVA to reject liability for injuries and conditions on the basis that the condition is not linked to Defence service. While we advise complainants of their rights to seek review of these decisions through either the Veterans Review Board (VRB), Administrative Appeals Tribunal (AAT) or both, we sometimes find that the record of decision provided to the veteran does not include an adequate explanation as to why the claim was not linked to service. In these cases, we may request that DVA provide the veteran with either a reconsideration of the decision, or a better explanation of the original decision. Without an adequate explanation as to the reasons why the claim was rejected, veterans are unable to address these issues on review.

We have also received complaints about decisions that identify a lack of connection to service on the basis that the injury or condition did not occur during the normal course of employment, despite the 'event' where the injury was caused being linked to military obligations. For example, when a member is required to attend a compulsory after hours formal function, and sustains an injury and DVA rejects the liability on the basis that the injury was not sustained while undertaking normal duties. In such a case the member was ordered to attend the function and failure to attend would have resulted in disciplinary action. While it is our understanding that these matters are often

overturned at the VRB or AAT, the veteran is often unable to receive health care or income subsidy while the matter is under review and the review process can be long and arduous<sup>1</sup>.

We have also observed cases where records are not available to substantiate the events raised by the veteran due to the passage of time or the particular service environments, and this has resulted in DVA decision makers being unable to verify that the injury or condition was linked to service. As an oversight body, these are particularly difficult cases to investigate, as the only evidence may be the person's own account. However, we note a number of DVA policy changes have resulted in a more beneficial assessment where there is a lack of verifiable evidence.

### Statement of Principles (SOPs)

The SOPs are legislative instruments that set out the factors which can connect particular injuries, diseases or death with service. SOPs are determined by the Repatriation Medical Authority (RMA) and set out what factors could cause a medical condition that is the subject of a claim. In order for a claim to succeed at least one of the SoP factors must be related to service.<sup>2</sup>

Our Office receives a number of complaints about the application of the SOPs in the DVA decision making process. While we investigate very few of these matters (due to the availability of review rights for complainants) we sometimes note that the decision record does not provide the veteran with an adequate explanation as to why the SOP was not met. As discussed above, without an adequate explanation as to reasons, veterans are unable to address any inconsistencies or evidence related issues on review.

### Weighting of medical evidence

Medical evidence continues to be a recurrent theme in complaints concerning DVA decision making. Primarily there appears to be confusion by veterans as to the weighting of medical evidence provided in support of claims and the decision by DVA to seek additional medical reports by its contracted providers. In addition, DVA will sometimes put a higher weighting on the reports provided by its providers and this is often not explained in the decision record.

We have also seen cases where veterans have been required to attend multiple medical assessments by DVA contracted providers resulting in prolonged claims processing timeframes, often greater than twelve months. These cases are particularly concerning where the veteran has significant mental health issues and is unable to access the appropriate health treatment and income support. While DVA now has non liability health care and interim veteran payment schemes, the length of time a claim remains outstanding can still have significant impacts, particularly mental health impacts, on vulnerable veterans.

## **2. Access to health care services, including rehabilitation and treatment options**

Complaints about health services are varied and often associated with accessing health services that provide repatriation rates or treatments and aids that are covered under specific legislative schemes. Issues of particular concern include:

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<sup>1</sup> Veterans Review Board Annual Report 2016-17 (page 11): Average time taken to decide an application was 52 weeks. Administrative Appeals Tribunal Annual Report 2016-17 (page 25): Average time taken to finalise an application was 43 weeks.

<sup>2</sup> Source: DVA Factsheet DP22 - Statements of Principles

- Veterans experiencing difficulty locating medical service providers who accept the scheduled repatriation rate. Our information indicates that this may be particularly notable for individuals seeking psychiatric, neurological and orthopaedic services.
- Medical service providers often have significant waiting periods given the high level of demand. Access may require significant travel by veterans to have their medical needs met inside the repatriation fee schedule. These issues are of particular concern for those with mobility, mental health and support barriers.
- Veterans may start a course of treatment with a provider who accepts the repatriation rate, but through the course of the treatment, the provider introduces treatment that is not fully covered by the repatriation rate and DVA is unable to pay for the continued treatment with the provider. This can result in further detriment to health where the veteran has to find a new provider and recommence waiting periods and subsequent treatments.

While DVA does have the discretion to pay above the repatriation rate, it can only do so where there are exceptional circumstances, and these situations must be applied for in advance of any treatment. This becomes problematic for veterans who have paid for the treatment and seek reimbursement of out of pocket costs.

### **3. Incapacity benefits, including calculations and decisions**

Complaints about incapacity benefits most often involve issues around the correct rate of payment (based on pay scales), discrepancies with the application of the 45 week rule<sup>3</sup> and the acceptance of medical and employment evidence. While investigation of the complaints do not necessarily identify error by DVA, the volume of complaints on this issue indicates the reasons for decisions are not clearly explained or well understood.

### **4. Offsetting of payments and pensions**

#### Offsetting between Acts

The application of offsetting, the complexity of offsetting calculations and the interaction between government agencies in relation to the treatment of lump sum compensation and superannuation payments continues to be one of our most significant complaint themes.

The general principle of compensation offsetting holds that a person should not be compensated twice for the same incapacity. Where a veteran has received compensation from another source for an incapacity which is also accepted under the *Veterans Entitlement Act 1986* (and therefore contributing to their impairment assessment), a notional assessment is conducted by DVA to establish how much pension would be payable to the veteran excluding the compensable condition. The difference between the total actual pension rate and the pension that would be payable excluding the compensable condition is determined to be the *notional rate*.

The complexities lie in the differing terminology, legislative provisions and application of offsetting between the three main veteran entitlement acts. Even where our Office attempts to provide a better explanation to veterans, the ability to simplify a complex legislative environment is limited.

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<sup>3</sup> Section 129 of the *Military Rehabilitation and Compensation Act 2004* defines a maximum rate week as one during which:

- a person's incapacity prevents the person from working either his or her normal weekly hours, or working at the level he or she worked before the incapacity; and
- the total number of hours in that week and all previous maximum rate weeks during which the person's incapacity has prevented him or her from so working does not exceed **45 times the person's normal weekly hours**.

In the majority of our investigations we have found that DVA has correctly applied offsetting, although where mistakes are made, they can, if not discovered quickly, have significant financial consequences. In addition, even where offsetting is applied correctly, DVA has inadequately explained its decision to veterans. We note that DVA has made significant efforts to simplify its decision letters regarding offsetting. While we have seen some improvement in the transparency in decisions to veterans, we continue to see cases where veterans were not provided clear information about the potential impact of offsetting, or where the offsetting calculations could have been better explained.

## **5. Service delivery issues**

### Claim delays

While our Office still receives complaints about claim processing timeframes, this issue has been significantly reduced with the commencement of the Veteran Centric Reform program. Where a veteran raises the issue of delay with our Office, we generally transfer the matter back to DVA in the first instance to expedite the finalisation of the claim.

### Client Liaison Unit

Our Office has received a number of complaints in relation to process and policy around veterans having their access to DVA restricted and being referred into the Client Liaison Unit (CLU) for Unacceptable Complainant Conduct (UCC).

While it appears that in most cases, the decision to place someone into the CLU was a decision open to DVA to make, there have been inconsistencies in the application of the UCC policy and procedures in relation to the CLU.

Some of the issues that veterans have brought to our attention include:

- being assigned to the CLU prematurely and often without a warning letter
- warning and decision letters signed by the wrong delegate
- lack of notification advising of the restriction of access to DVA
- not providing review rights as per the UCC policy, and
- DVA failing to give the veteran the right to appeal their service restriction and inclusion in the CLU.

We note the significant work undertaken by DVA to provide a more targeted approach with CLU veterans and acknowledge the dramatic reduction in the number of veterans in the CLU for UCC from over 100 to around 20 within the last two years.

### **The role of the Defence Force in the transition process**

Our Office acknowledges the beneficial and extensive work undertaken by DVA and Defence through the Defence Community Organisation (DCO) concerning the transition of members out of Defence. The work that has been undertaken in the last five years has been positive in assisting veterans into civilian life and ensuring continuity of healthcare.

We have noted a reduction in the number of discharge related complaints to our Office, particularly where members with significant health issues were being administratively discharged. Our Office will continue to work with both DVA and DCO to monitor these initiatives.