

Submission by the
Commonwealth Ombudsman

**INQUIRY INTO THE
PUBLIC SERVICE AMENDMENT
(PAYMENTS IN SPECIAL
CIRCUMSTANCES) BILL 2011**

CONDUCTED BY THE SENATE STANDING
COMMITTEE ON FINANCE AND PUBLIC
ADMINISTRATION

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INTRODUCTION

On 12 May 2011, Senator Nick Xenophon introduced the *Public Service Amendment (Payments in Special Circumstances) Bill 2011* (the Bill) into the Senate.

The Bill seeks to amend the *Public Service Act 1999* by repealing s 73(4), which provides that authorisation for payment in special circumstances cannot be made if it would involve, or would be likely to involve, a total amount of more than \$100,000.

On 7 July 2011 the Senate, on the recommendation of the Selection of Bills Committee, referred the Bill to the Finance and Public Administration Legislation Committee for inquiry and report.

The Explanatory Memorandum for the Bill indicates that it arose from a report by the Commonwealth Ombudsman in relation to discretionary payments by Comcare and the Department of Finance and Deregulation. As such, the Commonwealth Ombudsman welcomes the opportunity to contribute to this inquiry.

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.

While the primary function of the Ombudsman remains to receive and investigate complaints about government agencies, over the years the role has broadened to encompass the improvement of public administration. The independent examination of government administration through the investigation of individual complaints as well as broader, systemic issues, gives the Ombudsman a unique perspective.

Our office has a particular interest in compensation mechanisms available to members of the public who have been affected by the defective administration of Commonwealth agencies and their contracted service providers, and those state, territory or local government agencies who provide services on behalf of Australian Government agencies.

RESPONSE TO THE BILL

The amendment proposed by this Bill removes the limit on payments in special circumstances under s 73 of the *Public Service Act 1999*, which currently provides for a maximum payment of \$100,000.

The Explanatory Memorandum for the Bill indicates that the removal of this limit will allow future claimants a fair avenue of compensation until an equivalent to the Compensation for Detriment caused by Defective Administration (CDDA) scheme can be put in place for agencies not covered by the *Financial Management and Accountability Act* (the FMA Act).

The issue of compensation for people affected by the defective administration of non-FAM agencies, contracted Australian Government service providers and state, territory or local government agencies who provide services on behalf of Australian Government agencies has been a matter of interest for this office in recent years.

Discretionary compensation mechanisms – FMA agencies

Agencies that come under the FMA Act are accountable to the Department of Finance and Deregulation (Finance) for how they use public money. Finance Circular 2009/09¹ contains guidelines that set out when and how public money can be spent in certain circumstances, when compensation can be paid, and when debts can be written off or waived.

One of the discretionary compensation mechanisms included in Finance Circular 2009/09, the CDDA scheme, is an administrative scheme that provides a means of compensating individuals and bodies that have suffered financial loss because of defective government administration in situations where there is a moral obligation to pay compensation rather than any legal liability arising under the general law.

Other compensatory mechanisms described in Finance Circular 2009/09 include:

- settlement of a legal claim under the Legal Services Directions
- act of grace payment under s 33 of the FMA Act
- waiver, postponement or deferral of a debt under s 34 of the FMA Act
- write-off of a debt under s 47 of the FMA Act
- an ex gratia payment, authorised by the Prime Minister or Cabinet.

Discretionary compensation mechanisms – CAC agencies

The CDDA scheme and other discretionary compensation mechanisms included in Finance Circular 2009/09 only apply to Australian Government agencies established under the FMA Act.

This office is concerned about the capacity to compensate individuals and bodies affected by the actions of those agencies established under the *Commonwealth Authorities and Companies Act 1997* (the CAC Act), as the CDDA scheme does not apply to these agencies.

¹ *Discretionary Compensation and Waiver of Debt Mechanisms*, at <http://www.finance.gov.au/publications/finance-circulars/2009/09.html>

These concerns were expressed in June 2010 by the Commonwealth Ombudsman in a submission to the Senate Standing Committee on Legal and Constitutional Affairs Committee, relating to its inquiry into government compensation payments².

The Standing Committee recommended in the final report of its inquiry that:

“...the Department of Finance and Deregulation investigate the extension, in appropriate circumstances, of the Compensation for Detriment caused by Defective Administration scheme to *Commonwealth Authorities and Corporations Act 1997* agencies and to third party providers performing functions or providing services on behalf of the Commonwealth.”³

Our submission to the Inquiry was based on information gained through our investigation of complaints concerning Comcare’s miscalculation of workers compensation payments to two individuals, Ms A and Mr B, over many years and the lack of appropriate means to fully redress their respective underpayments. Comcare is established as a body corporate under s 74 of the *Safety Rehabilitation and Compensation Act 1988* (SRC Act). As such, it falls within the definition of a ‘Commonwealth authority’ under s 7 of the CAC Act, not under the FMA Act. Hence the CDDA scheme and other discretionary compensation mechanisms do not apply to Comcare’s actions. In March 2010, this office published a report (Report No. 04/2010)⁴ which included the results of our investigation.

On becoming aware of its errors in Ms A and Mr B’s cases, Comcare paid each of the complainants the amounts they should have originally received. However, both complainants requested further compensation on the grounds that they had been deprived of the benefit of the underpaid amounts for a number of years due to Comcare’s errors.

Our investigation of Ms A and Mr B’s complaints confirmed that neither Comcare nor Finance had any direct means for people who have suffered a financial loss due to Comcare’s defective administration to have their compensation claims considered.

In response to our investigation Comcare was able to arrange for Ms A to be compensated for the full amount of her loss through her original employer. Comcare also obtained independent actuarial advice of Mr B’s loss and made a payment of \$100,000 to him under s 73 of the *Public Service Act 1999*. However this did not cover the total amount of Mr B’s loss and no other mechanism was available to Comcare to address this shortfall.

In Report 04/2010 this office recommended that Comcare and Finance develop a proposal for establishing a scheme, similar to the CDDA scheme, whereby people adversely affected by poor administration of the SRC Act can seek compensation. Comcare and Finance responded positively to this recommendation.

In response to this recommendation Comcare advised that it would prepare a submission to the Deputy Prime Minister to seek a direction that would allow

² *Submission by Acting Commonwealth Ombudsman – Review of Government Compensation Payment – Submission to the Senate and Legal and Constitutional Affairs Committee, June 2010*

³ *Legal and Constitutional Affairs References Committee, Review of Government Compensation Arrangements, The Senate, Canberra, December 2010*

⁴ *Comcare and Department of Finance and Deregulation - Discretionary Payments of Compensation, March 2010*

http://www.ombudsman.gov.au/files/comcare_dofd_discretionary_compensation_payments.pdf

determining authorities under the SRC Act to develop and implement a scheme similar to the CDDA scheme. Such a scheme would allow determining authorities like Comcare to deal with claims for compensation arising from defective administration. The creation of such a scheme may enable Mr B to receive any additional compensation payable to him in excess of the maximum amount that was payable to him under the *Public Service Act 1999*.

Discretionary compensation mechanisms – contracted service providers

The CDDA Scheme does not apply to contracted service providers, and contracts between Australian Government agencies and service providers do not often contemplate means of redress for losses incurred due to defective administration on the part of the contracted service provider. As a result there is no direct means for users of contracted service providers to claim compensation for a financial loss caused by a provider's defective administration. If such services had been provided by FMA agency staff the CDDA scheme would apply, i.e. a consistent means by which financial losses could be considered and compensated where appropriate. This creates an inequity.

In light of the increased contracting out of Australian Government services and the public's reliance on such services it is the view of this office that the Government needs to review this situation as clients of service providers do not currently have a clear means of having claims of defective administration addressed in a consistent manner, as clients of FMA agencies do⁵.

In an Issues Paper sent to the Department of Education, Employment and Workplace Relations (the Department) in June 2010 this office raised the above concerns⁶. The Department is one of many agencies that contracts out the provision of services. In the Issues Paper we advised the Department that we consider it should ensure a CDDA type means of providing compensation for losses incurred as a result of the defective administration of contracted providers, and anticipate the need for a compensation mechanism in future contracts with third party providers. In response the Department acknowledged that our suggestions were worthy of further consideration but took the view that these are whole of Government issues that should be canvassed at a whole of government level. The Department advised that it would be happy to have input into and comply with such whole of Government changes.

Similarly the CDDA scheme does not allow a person to seek compensation when the defective administration was made by a state, territory or local government agency providing a service on behalf of the Australian Government agency, which creates a further inequity.

CONCLUSION

While this office welcomes the amendment proposed in this Bill to remove the monetary limit on payments in special circumstances under *Public Service Act 1999*, unfortunately it will not fully address the current inequities in compensation across different agency types.

⁵ *Submission by Acting Commonwealth Ombudsman – Review of Government Compensation Payment – Submission to the Senate and Legal and Constitutional Affairs Committee by Acting Commonwealth Ombudsman, Mr Ron Brent, June 2010*

⁶ *Issues Paper – Discretionary Compensation and DEEWR Contracted Service Providers, June 2010*

It is our firm position that more comprehensive work needs to be done to establish CDDA-type schemes to address defective administration in actions by non-FMA agencies, contracted Government service providers and state, territory and local government authorities who provide services on behalf of Australian Government agencies.

We note that it has been over six months since the report of the Legal and Constitutional Affairs Committee's Review of Government Compensation Payments was tabled in The Senate. We urge the government to promptly provide a response to this report and move quickly to develop programs which address the current inequities in the provision of compensation for defective administration, regardless of agency type.