Australian Government

Department of Veterans' Affairs

The Committee Secretary
Joint Standing Committee on Foreign Affairs, Defence Trade
Department of the House of Representatives
PO Box 6021
Parliament House
CANBERRA ACT 2600

Inquiry into RAAF F-111 Deseal-Reseal workers and their families

Responses to Questions taken on Notice by the Department of Veterans' Affairs at the Public Hearing on Monday 21st July 2008

Please find attached responses to questions on notice taken by the Department of Veterans' Affairs at the public hearing given to the Defence Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade on Monday 21 July 2008.

For the Committee's convenience, the questions have been grouped in order of :

- Ex-gratia;
- Compensation Arrangements;
- Health Care Schemes; and
- the Study of Health Outcomes in Aircraft Personnel (SHOAMP).

I would like to take this opportunity to thank the Committee for allowing an extension of time to submit the attached responses.

Yours sincerely

Ed Killesteyn
Acting Secretary
Department of Veterans' Affairs
4 September 2008

PARLIAMENTARY INQUIRY INTO ROYAL AUSTRALIAN AIR FORCE F-111 WORKERS AND THEIR FAMILIES
QUESTIONS ON NOTICE FROM 21ST JULY 2008 HEARING

EX GRATIA SCHEME

QUESTION 1:

Mr Baldwin asked the Acting Secretary of the Department of Veterans' Affairs:

> **Mr Killesteyn undertook to provide an additional submission on the administration of the ex gratia scheme (page 53).**

The Acting Secretary of the Department of Veterans' Affairs has provided a further submission at Attachment A.

QUESTION 2:

Mr Baldwin asked the Acting Secretary of the Department of Veterans' Affairs:

> **Can I assume you have now put together a detailed written policy document for assessing claims? (page 56).**

Answer

Approximately 99% of the applications under the ex-gratia scheme were finalised by the time the Ombudsman provided input on this issue. The Department noted the Ombudsman's comments and has taken the following action:

- to regularly remind staff of protocols in relation to record-keeping and as part of ongoing training programs and procedures the need for good decision making and the production of reasons of decision.

- a new protocol for producing decision letters was implemented in 2006 in response to this issue. All letters issued after that time met the required standards.

This protocol, along with the Department's existing protocols for administrative decision making, will be used to inform policies around recording of reasons for decision for any future ex-gratia schemes.

EX GRATIA SCHEME (continued)

The Department notes that ex-gratia payments are not set out in any specific legislative or statutory provision but emanate from the Government's executive powers under section 61 of the Constitution. These payments are designed to deliver financial outcomes at short notice and rely on flexible mechanisms to produce workable outcomes. As such, they do not have pre-set criteria in the same way as other discretionary schemes. This view is reinforced by the Department of Finance and Deregulation who describes such schemes as *"permissive"* and state that *"general principles, rather than prescriptive rules, underlie the mechanisms"*.

QUESTION 14:

Chair asked the Acting Secretary of the Department of Veterans' Affairs, upon notice:

> **The incorrect classification of the firefighter was by virtue of what error - length of days exposure? (page 80).**

Answer

Both Claimant A and Claimant B were trainee Fire Fighters who attended a Fire Fighter's course at Amberley during a similar period in the 1980s. Claimant A was assessed as Tier 3, while Claimant B was assessed as Tier 2. Both the decisions were made on the basis that the Fire Fighters were involved in Deseal Reseal activities. However, it later came to light that due to the fact that they were attending a course, neither should have been found eligible.

When Claimant A's case was assessed not long after ex-gratia payments were first introduced, the available advice was that due to the nature of their duties and the generic nature of their records, all Fire Fighters should fit into the Tier 3 definition. At the time of Claimant B's assessment, procedures were clearly in place to assist delegates in assessing each individual case on the available evidence, and as a result the advice concerning Fire Fighters as a group was no longer applicable.

A summary of the cases is as follows:

- Claimant A was a trainee Fire Fighter who was at RAAF Base Amberley attending a Fire Fighter's course. Because of an erroneous Personnel Employment Record, Claimant A was assessed as meeting the requirements for the Tier 3 definition.

- Claimant B was incorrectly assessed as meeting the Tier 2 definition because he was a Fire Fighter who had been located at RAAF Base Amberley for almost three months in 1988. Category 5 of the definition states that *"Fire fighters whose usual place of duty was a Unit at RAAF Base Amberley and who spent at least 60 cumulative working days actively involved in the burning of by-products from the F-111 DSRS process during the period 1976-1994."*

> This decision was incorrect because Claimant B was not posted to a unit at RAAF Base Amberley and was actually undergoing a Fire Fighter's course as a student during that period and was attached to the Fire Fighting mustering for that course.

Another occupation in which individuals have experienced differing eligibility is that of aircraft metal workers (also known as aircraft structural fitters). Two individuals who performed duties as aircraft metal machinists have been assessed, one receiving a Tier 2 payment and the other a Tier 1 payment. The difference between the results of these two claims relate to the differing periods of involvement of the individuals.

QUESTION 18:

Senator Trood asked the Acting Secretary of the Department of Veterans' Affairs upon notice:

> **Did you have any expectation that most people would fall within Tier 1 or 2? Did you know that at the time you were making these assessments? (page 88)**

Answer

DVA expected that most Tier 1 and Tier 2 claimants would be classified as Tier 1 on the basis of the Defence estimate. Thus DVA expected that around 70% would be classified as Tier 1 and around 30% as Tier 2. On the basis of actual experience, around 90% were classified as Tier 1 and 10% as Tier 2.

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COMPENSATION ARRANGEMENTS

QUESTION 3:

Chair asked the Acting Secretary of the Department of Veterans' Affairs, upon notice:

> **As with my earlier question, is it possible to identify a case study? That $67 million is made up of all of the schemes—the ex gratia scheme, the SHOAMP and the two compensation acts. […] Is it possible to get some indicative case studies? (page 60).**

Answer

The following case studies illustrate the broad range of outcomes under the compensation, ex gratia and health care scheme arrangements. These are provided at Attachment B.

Case Study Number	$ Value (not lifetime)	Benefits Received		
		VEA & SRCA	Health Care Scheme	Ex Gratia Scheme
1	40,300	No	Yes	Yes
2	178,600	Yes	No	Yes
3	124,100	Yes	Yes	No
4	33,500	Yes	Yes	No
5	426,700	Yes	Yes	Yes

Note that "whole of life" liability estimates are being prepared (see interim response to Question 4 also).

QUESTION 4:

Mr Robert asked the Acting Secretary of the Department of Veterans' Affairs, upon notice:

> **I would also be interested if you could produce an idea of the liability to government based on standard actuarial tables as to what the amount of money, given expected life expectancies for those who are currently receiving pensions, would be, (page 60).**

Answer

Due to the complexity and volume of work required in order to be able to obtain an estimate for this query, this information will be provided to the committee as soon as it becomes available.

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COMPENSATION ARRANGEMENTS (continued)

QUESTION 5:

Mr Robert asked Mr Douglas of the Department of Veterans' Affairs, upon notice:

> **Considering the figures of those who have been accepted—and I note that there are a range of conditions—how many people have been knocked back completely? (page 60)… So how many claimants does the knocking back of 427 claims equal? How many people does that relate to? (page 61).**

Answer

Of the 629 (previously 626) individuals who have lodged claims for compensation under the VEA and SRCA on the basis of their DSRS involvement, 148 have had no claim accepted. The figure of 148 includes five individuals who have one or more conditions that are yet to be determined.

QUESTION 6:

Chair asked the Acting Secretary of the Department of Veterans' Affairs, upon notice:

> **This may be in your submission and I just have not come across it, but does it contain the list of diseases that have been endorsed by the Military Rehabilitation and Compensation Commission with respect to deseal-reseal? (page 61).**

Answer

The following diseases are accepted as meeting the requirements of sub-section 7(2) of the SRCA and ss31 of the *Commonwealth Government Employees* (C(CGE)) *Act 1971* for all ADF personnel involved in the DSRS programs at RAAF Base Amberley with a Tier 1, 2 or 3 employment classification:

- **Skin Rashes and associated systemic conditions (**Dysplastic naevus, Eczema/dermatitis);
- **Neurological conditions (**Multiple sclerosis, Parkinson's disease, Peripheral neuropathy, Spinal muscular atrophy, Erectile dysfunction, Cauda equine syndrome, Neurogenic bladder, Non-alcoholic toxic encephalopathy, Acquired colour vision deficiency);
- **Mental disorder and personality changes (**Depression, Sleep disorders with neurological basis, Bi-polar affective disorder, Vertigo, Memory loss, Anxiety, Panic disorders (including Agoraphobia with panic disorder), Impaired cognition;
- **All malignant neoplasms and myeloproliferative disorders**
- **Liver disease (**Liver disease and pancreatic disease, excluding diabetes);

COMPENSATION ARRANGEMENTS (continued)

- **Gastrointestinal problems (**Irritable bowl disorder, Ulcerative colitis/Crohn's disease, Diverticulitis, Bowel polyps); and
- **Immunological disorders -** Mixed connective tissue disease, SLE (systemic lupus erythematosus), Sarcoidosis.

Note that the same conditions have been accepted as meeting the requirements of section 31(1) of the C(CGE) Act, the SRCA predecessor. This is the equivalent provision of SRCA section 7(2).

Note also that drug and alcohol dependence, which are conditions that can be treated under the SHOAMP Health Care Scheme, are not covered by sections 7(2) and 31(1) because liability for these conditions are have not been accepted under the SRCA or CCGE.

QUESTION 15:

Ms Grierson asked the Acting Secretary of the Department of Veterans' Affairs, upon notice:

> **So they (DAC) would have made recommendations. Who made the final decision on their recommendations? Were they changed, were they accepted?... Could you get us the advice and then the final outcome? (page 81).**

Answer

The Doctor's Advisory Committee's (DAC) primary role was to determine which conditions would be included in the SRCA sub-section 7(2) list of conditions. The DAC included doctors from Department of Defence and DVA who prepared the sub-section 7(2) list based on results of SHOAMP and the conditions they believed showed a significant increase in presentations in the F-111 DSRS cohort when compared to other personnel engaged in duties at RAAF Bases Amberley and Richmond.

This list was developed to assist decision-makers in assessing claims made by former ADF members who participated in the F-111 DSRS programs. The sub-section 7(2) list of conditions was approved by the Military Rehabilitation and Compensation Commission (MRCC).

A copy of the DAC's recommendation and final decision is provided at Attachment C. Please note that the documents the Committee has requested to view also contain recommendations and decisions unrelated to the DAC or F-111 Deseal/Reseal. As this information cannot be made publicly available, the documents required could not be copied to their original state of legibility.

COMPENSATION ARRANGEMENTS (continued)

QUESTION 7:

Ms Grierson asked Mr Douglas of the Department of Veterans' Affairs, upon notice:

> **Could you give some information to the committee about that (the quality assurance program) and what their findings were? (page 64).**

Answer

DVA's Quality Assurance programs are based on monthly checks of randomly selected samples of cases. The primary focus of QA, apart from process improvement, is to provide reasonable assurance that the decisions made are lawful ones.

During the period 1 January 2005 and 21 August 2008, no unlawful decisions were identified in the DSRS claims that were sampled. The same quality assurance protocols applied to the sampling and consideration of SRCA and VEA compensation claims were applied to DSRS cases.

QUESTION 8:

Ms Grierson asked Mr Douglas of the Department of Veterans' Affairs, upon notice:

> **Do you think that the implied accusation that there is a cosy network of specialists who just support DVA's case or protect the DVA is at all reasonable? Is it unreasonable, possible or impossible? (page 66).**

Answer

DVA does not have contractual agreements with individual medical specialists for DSRS compensation claims.

By way of background, prior to lodging a claim for compensation, the Department encourages an individual to consult their General Practitioner to obtain a diagnosis of the condition/s being claimed and the time of onset of the condition(s). If an individual's claim requires further medical evidence or clarification from a specialist in order to make an assessment, DVA refers them to a specialist who is either a consultant with the Medico-Legal or with appropriately qualified privately practising specialists.

The Department sourced the Medico Legal Firms (MLCOA) to assist with the provision of medical services to its clients following the intake of F-111 DSRS claims which arose when the findings of the Board of Inquiry were released.

For the few claims that were lodged before this time, DVA utilised the services of appropriately qualified privately practising specialists and medical practitioners who

COMPENSATION ARRANGEMENTS (continued)

were, where possible, conveniently located in relation to a claimant's place of residence.

The Department invited the MLCOA to assist with the provision of medical assessments, reports and advices to ensure consistency in reporting standards and approaches. MLCOA was approached as it was one of the only two medico-legal firms at that time who had consulting rooms in most major locations around Australia and had access to a wide range of medical specialists. The firm selected medical specialists who were known not only to be experts in their field, but who were also well known for their high level of client skills.

The other medico-legal firm, Health Services Australia (HSA) now known as Health for Industry, was not sourced to assist with the DSRS compensation claims as the Department had previously entered into a contract with the firm to provide medical and psychological testing for the Study of Health Outcomes in Aircraft Maintenance Personnel (SHOAMP). The Department did not want there to be a perceived conflict of interest in light of the fact that HSA had performed the testing for SHOAMP and also provided medical opinions in relation to causation.

In preparation for the claiming process the following measures were taken:

- An agreement for the provision of medical assessment services was drawn up with agreed pricing, an agreed reporting structure and timeliness in relation to the making of appointments and provision of reports.

- MLCOA administrative staff and available doctors were escorted on a tour of Amberley RAAF Base. This included viewing the F-111s, their fuel tanks and also a demonstration of protective apparel that had been available for use over the extended period of the formal programmes. DVA staff from both the Compensation Team and the Interim Health Care Scheme were included on the tour as were doctors from HSA. This was arranged by Defence and it enabled the people involved in the reporting and decision making process to have a clearer understanding of the conditions of service.

- MLCOA called together all the medical specialists who were to be involved in the reporting process to a meeting in Brisbane. One of DVA's doctors gave a presentation that detailed the DSRS work conditions, the chemicals that were used during the process and the compensation reporting requirements.

- All doctors who were to report for DSRS were required to provide DVA with a CV, to satisfy the department that they were appropriately qualified.

- MLCOA management agreed that any new doctors who had not received the briefing, would be briefed (with a copy of the DVA presentation) by their senior doctor, and also provided with a list of the DSRS chemicals. Any new doctors had to first provide a copy of their CV for consideration.

COMPENSATION ARRANGEMENTS (continued)

- Privately practising specialists who were asked to report were also provided with a list of the chemicals involved in the DSRS process.

QUESTION 9:

Senator Trood asked Mr Douglas of the Department of Veterans' Affairs, upon notice:

> **Are there any people in the category of people who have served in relation to these aircraft and whose claims have been rejected because your doctors are not persuaded that they have a condition? (page 68).**

Answer

Yes, there are individuals who have had conditions rejected because the claimed condition was found not to be present based on the medical evidence. In terms of providing you with a picture, it is not useful to talk in terms of individuals as any single individual is likely to have multiple conditions, some of which have been accepted and some of which have been rejected.

This is summarised in the table below.

Relevant Act	No Incapacity Found	Total Conditions Claimed	Proportion of Total Conditions Claimed where No Incapacity was Found
SRCA	555	3778	15%
VEA	680	3661	19%
Total	**1235**	**7439**	**17%**

Claims are the number of *conditions* claimed (by 629 individual claimants).

These numbers have been influenced by the fact that a large number of claims were lodged in relation to undiagnosed or self reported symptoms which could not be identified as compensable conditions (see Case Studies, Question 3).

Please note that DVA does not use its own doctors when seeking a diagnosis of an individual's condition(s). Any diagnosis of an individual's condition/s is done by either their own General Practitioner, or a relevant specialist or medical professional. DVA pays a fee for this service. See Question 8.

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COMPENSATION ARRANGEMENTS (continued)

QUESTION 11:

Mr Baldwin asked Mr Douglas of the Department of Veterans' Affairs, upon notice:

> **Can you please advise me how many of the claimants are…EDs? (page 77).**

Answer

There are currently a total of three DSRS claimants in receipt of the Extreme Disablement Adjustment (EDA) rate of Disability Pension.

QUESTION 12:

Chair asked Mr Douglas, and the Acting Secretary of the Department of Veterans' Affairs, upon notice:

> **1. For the purposes of our inquiry, if they had prior or post service in Darwin, Laverton or anywhere else for which they are submitting a claim, it seems to me that does not relate to our inquiry? ie why is it included? (page 79).**

Answer

The figures relating to claims accepted under the VEA and SRCA 'for other reasons', has been provided in order to illustrate the case management approach taken by the Department when determining individual compensation claims. In determining the outcome of each claim, reference was made not only to the individual's involvement with DSRS activities, but in the broader context of their overall work history. This meant that even if the claimant believed that the cause of their condition was their DSRS work, Departmental staff looked for any possible cause from other eligible Defence Service when assessing their claim.

The term 'for other reasons' refers to a claim that was lodged in relation to DSRS service but accepted in relation to other service.

> **2. If you think it does, tell me how? (page 79).**

These figures have been provided because DSRS claims covered a very wide range of conditions and, in many cases, undiagnosed or self reported symptoms.

COMPENSATION ARRANGEMENTS (continued)

If a claim was received that included conditions that could not necessarily be related to chemical exposure, the DSRS Team also investigated and determined these claimed conditions. For example, many of the claims included hearing loss (under both Acts). Hearing Loss could not be attributed to chemical exposure, but it could certainly be linked to noise exposure and many of these claims were successful under both Acts. Other commonly claimed conditions were for cardio respiratory problems. Under the VEA, these conditions could not be related to chemical exposure via the Statement of Principles (SoPs), but could often be accepted due to a service related smoking habit which satisfied SoP criteria. Psychiatric conditions were regularly claimed. Medical opinion frequently enabled these conditions to be accepted under SRCA, however, under the VEA they could often not be linked to chemical exposure via the SoPs. Orthopaedic conditions were commonly claimed under both Acts. This did not involve any contention that the conditions were caused by chemical exposure, but by accidents during their DSRS work – falling off a wing, for example.

To provide a consistent service in a "case management" environment, all of these claims were investigated and determined by the DSRS Team. Other aspects of the claimants' service were always considered and often there were circumstances during their employment that satisfied the relevant legislative requirements.

In providing figures in relation to the amounts of compensation paid (table 9 page 30), it was not possible to identify payments that were made specifically for conditions accepted due to chemical exposure. The figures under both Acts represent the amounts of money that have been paid in relation to claims that were lodged with, and determined by the DSRS Team. As explained above, many of the conditions were not accepted because of an established link to chemical exposure.

QUESTION 21:

Ms Grierson asked Wing Commander Sanders, Deputy Director, F111 Deseal-Reseal Board of Inquiry, Department of Defence, the following question upon notice:

> **Do you have a list of those sorts of people who are putting forward claims or seeking ex-gratia payments because of related activities rather than direct [involvement in the deseal/reseal programs]? (page 27).**

Answer

No. While a comprehensive list is not available, it could be assumed that those who meet Tier three definitions for the purposes of section 7(2) determinations were involved in undertaking related activities that were not part of the DSRS program itself. DVA can provide numbers of individuals in this situation should the Committee request them.

For privacy reasons, DVA is unable to furnish the Committee with any lists containing the names of ex gratia or compensation claimants.

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COMPENSATION ARRANGEMENTS (continued)

QUESTION 13:

Chair asked Mr Douglas, and the Acting Secretary of the Department of Veterans' Affairs, to:

> **Reconcile the 556 individuals named on page 30 and those who have been included under one of the tier definitions, (page 79).**

Answer

Act	Claimants	Tiers			
		1	2	3	Total
SRCA	556	239	16	46	301
VEA only	70	20	2	8	30
Total	**626**	**259**	**18**	**54**	**331**

Of the 556 individuals who had lodged claims under both the SRCA and VEA or SRCA only as at the date of the submission, 301 individuals satisfied the eligibility criteria of a DSRS participant under the Tier definitions. This figure is made up of 239 individuals deemed eligible under the Tier One eligibility criteria, 16 individuals under the Tier Two eligibility criteria and 46 individuals under the Tier Three eligibility criteria.

COMPENSATION ARRANGEMENTS (continued)

Of the remaining 70 individuals who had lodged claims under the VEA only, 30 individuals satisfied the eligibility criteria of a DSRS participant under the Tier definitions. This figure consists of 20 individuals who have been deemed eligible under the Tier One eligibility criteria, two individuals under the Tier Two eligibility criteria and eight individuals under the Tier Three eligibility criteria.

Therefore, of the total 626 individuals who had lodged claims for compensation under either the VEA or SRCA or under both pieces of legislation on the date that the submission was written a total of 331 individuals satisfied the eligibility criteria of a DSRS participant under the Tier definitions. This figure consists of 259 individuals under the Tier One eligibility criteria, 18 individuals under the Tier Two eligibility criteria and 54 under the Tier Three eligibility criteria.

Of the 295 individuals remaining, 77 have not lodged a claim for an ex gratia payment and therefore have not been considered as a DSRS participant under the Tier definitions.

QUESTION 17:

Senator Mark Bishop asked Ms Spiers of the Department of Veterans' Affairs, upon notice:

1. **From my reading of your submission, the department appears to be reading down the meaning of that section (s180a) in that your interpretation now is that, to qualify for an ex gratia payment, the MRA (sic) has to establish under the SoPs some sort of causal link between the incident and the damage claimed. That being the case, does that not negate the intent of having ex gratia payments? (pages 86-87) We understand the Senator's question to be that SoPs have a 30-day requirement and so does ex-gratia, but you argue that ex-gratia has nothing to do with health?**

Answer

The ex-gratia payment relates to the environment experienced only and is not linked to any illness or injury that participants may have.

The 30 day requirement is intended to distinguish between those individuals who were part of the core working group who were subject to the unique working conditions of the DSRS environment for significant periods of time as opposed to those who were only involved for limited periods of time on an ad-hoc basis or those who were involved in the normal F-111 maintenance programs.

COMPENSATION ARRANGEMENTS (continued)

The 30-day requirement equates to six weeks' employment in the DSRS program. This was considered to be a significant time of involvement and therefore attracted the highest lump sum payment.

The ex gratia scheme is not linked to a specific illness or injury incurred as a result of service and therefore differs to the SoP regime under which eligibility to compensation entitlements under the VEA is determined. The SoP regime required an examination of an individual's specific health condition against the casual factors listed in the SoP and their link to the person's service as the mechanism to determine compensation for that condition.

2. What is the authority that the department has for putting that interpretation (s180A) before us? (page 87).

Answer

The outline of s180A provided in the departmental submission is a combination of:

- statutory interpretation of the legislation and the ancillary documents accompanying the introduction of the legislation;
- Repatriation Commission policy; and
- external legal advice.

Section 180A was introduced as part of the *Veterans' Affairs (1994-95 Budget Measures) Legislation Amendment Act 1994*, which also introduced the Statement of Principles (SoP) regime and the established the Repatriation Medical Authority (RMA). The Explanatory Memorandum and the Second Reading Speech provide context as to the purpose behind the introduction s.180A. In short, it was recognised that the certain diseases affecting particular classes of veterans have, in the past, been accepted as war-caused as a matter of policy rather than on proper medical-scientific grounds. Section 180A was intended to permit the Repatriation Commission to continue to determine policies in relation to such classes of veterans and to make grants of pension even if the RMA finds that there is no sound medical-scientific grounds for such determinations. However, it was noted that the power to make determinations under s.180A was to be used only in exceptional circumstances and was not intended as a means to usurp to functions of the RMA.

The reference to 1998 in the submission relates to the Repatriation Commission consideration of a specific request to apply s.180A. At the time, the Repatriation Commission had received a request from an individual to exercise its use of s180A.

COMPENSATION ARRANGEMENTS (continued)

In this particular case, there was a RMA SoP, the applicant was an individual (rather than a class of veterans) and had not exhausted all avenues of appeal in respect of the applicable SoP. It was noted at the time that there is nothing in the VEA or the Explanatory Memorandum that suggests that s.180A should be used an additional appeal stage. The Repatriation Commission determined "that it will not entertain [s.180A] applications in situations where there is not cogent medico-scientific evidence, as defined in the VEA; and then only in respect of classes of veteran."

Subsequent external legal advice confirmed that all the preconditions in s.180A(1) must be met in order for the Repatriation Commission to exercise its discretion under s.180A.

3. Has it changed since it was first determined in 1998? (page 87).

Answer

In 1995, during the first year of the section's operation, the Repatriation Commission made four determinations under s.180A in respect of Vietnam veterans and in respect of exposure to herbicides in Vietnam for the conditions of:

- acute myeloid leukaemia;
- chronic myeloid leukaemia;
- acute lymphocytic leukaemia: and
- chronic lymphocytic leukaemia.

The basis for these determinations was a report commissioned by the Department from leading epidemiologists, Professors MacLennan and Smith, on the issue of herbicides and various conditions including leukaemia. The report found that there was evidence to support a link between exposure to herbicides and the development of leukaemia. At the time, there was not a sufficient body of medical-scientific evidence to allow the RMA to make or amend a SoP. In making these determinations, the Repatriation Commission noted that the circumstances behind the s.180A determinations were unique. It further noted that the making of such determinations should not be viewed as a precedent for the future use of s.180A. It was a balance between the specific circumstances raised by the case being considered and the general policy position of giving primacy to the RMA's role in making SoPs.

In 1998, the Repatriation Commission considered a request to exercise its powers under s.180A. The Repatriation Commission stated that in terms of its power under s.180A that it will not exercise its power to make determinations in situations where there is not cogent medico-scientific evidence, as defined in the VEA; and then only in respect of classes of veterans.

COMPENSATION ARRANGEMENTS (continued)

The Repatriation Commission noted that in that particular case there were still a number of legislative avenues of appeal available to the individual and that even if the Commission were legally capable of making a s.180A instrument for an individual case, it should first require an applicant to exhaust all other avenues of challenge to the SoPs under the VEA.

In 2002, external legal advice confirmed the Repatriation Commission approach and noted specifically that if there is no SoP in force and the RMA has not made a decision to make or amend a SoP (i.e. s.180A(1)(a) has not been met), the Repatriation Commission is unable to make a s.180A determination. Additionally, the Commission is unable to form the relevant opinion required in s.180A(1)(b).

4. Was that interpretation made by the department or by the minister of the day? (page 87).

Answer

Neither. As outlined above, the Repatriation Commission made the 1995 determinations and then the 1998 policy position.

5. Has the original determination since been reviewed by senior counsel or Queen's Counsel? (page 87).

Answer

No. The Repatriation Commission has relied on expert in house and suitability qualified external legal advice.

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HEALTH CARE SCHEMES

QUESTION 19

The Acting Secretary of the Department of Veterans' Affairs agreed to undertake to do further research upon notice, on 21st July 2008:

> **regarding the number of individuals that might benefit if the SHCS closure date was removed.**

Answer

There are potentially an additional 917 personnel who could have access to SHCS services for Group 1 participants if the cut-off date of 20 September 2005 is changed.

Of these 917 personnel, there are:

- 213 Group 1 participants who did not lodged claims before the cut-off date. This group includes current serving personnel who can receive medical treatment through the ADF;
- 346 ex-gratia recipients who did not apply for the SHCS before the cut-off date; and
- 358 Personnel who are neither a Group 1 participant or an ex-gratia recipient.

QUESTION 20:

Mr Robert asked the Acting Secretary of the Department of Veterans' Affairs upon notice:

> **To explain the different criteria for the Interim Health Care Scheme and the SHOAMP? (page 92)**

Answer

The SHOAMP and the IHCS had different purposes hence the difference in the criteria for each.

The Interim Health Scheme (IHCS) was introduced by the Chief of Air Force in September 2001 before the SHOAMP commenced. It was established as an immediate response to the Board of Inquiry's recommendations to provide medical checkups and sympathetic advice and treatment to F-111 aircraft maintenance personnel who may have experienced adverse health affects. As the IHCS was intended to include anyone that may have been affected, a broad definition of IHCS

HEALTH CARE SCHEMES (continued)

eligibility was established, pending the outcome of the SHOAMP. This Scheme was an integral part of the arrangements put in place for those who were awaiting the outcome of the SHOAMP and offered access to comprehensive health care for personnel who were ill at the time.

The SHOAMP examined the health of F-111 DSRS personnel against two comparison groups. Only participants of the four formal DSRS programs were examined in the target group because the Scientific Advisory Committee believed that personnel from a defined group with a higher level of participation would be most likely to show more adverse health outcomes than a more generalised group.

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SHOAMP

QUESTION 10:

Mr Robert asked Mr Telford of the Department of Veterans' Affairs, upon notice:

> **Can I confirm that you are saying that those people (482 squadron) who were involved in that work (picking and patching) were part of the control group? Let us know if people from 482 were in the target or the control group? (page 73) that all of 501 Wing was able to be in the study group, whereas you are saying that only those in the four formal DSR programs could be in the study group? (page 74)**

Answer

The researchers at the University of Newcastle Research Associates (TUNRA), who conducted the SHOAMP study, have advised that some of the Pick and Patch personnel may have been included in the control group/s, but this could not be determined as they were not specifically asked if they were involved in Pick and Patch. Personnel in the Amberley control group were recruited from non-technical trades, such as medical or administrative officers, and non-specialist personnel.

Only participants of the four formal DSRS programs were examined in the target group because the Scientific Advisory Committee believed that personnel from a defined group with a higher level of participation would be most likely to show more adverse health outcomes than a more generalised group.

Additionally, those only involved in Pick and Patch and 501 Wing were not included in the target group as it was difficult to identify these individuals as a group.

QUESTION 16:

Chair asked the Acting Secretary of the Department of Veterans' Affairs, upon notice:

> **With the control groups that were part of the SHOAMP, is it possible that someone in either control group—in Richmond or in Amberley—could have previously been involved in the pick and patch or in other work on the deseal-reseal (pages 83-84).**

Answer

As stated previously in question 10, some of the Pick and Patch personnel may have been included in the control group/s, but this could not be determined as they were not specifically asked if they were involved in Pick and Patch. Personnel in the Amberley control group were recruited from non-technical trades, such as medical or administrative officers, and non-specialist personnel while personnel in the Richmond control group were recruited from technical trades but had not been involved in F-111 DSRS activities. Consequently, in the event that personnel involved in Pick and Patch or other F-111 aircraft maintenance were included in the Amberley or

SHOAMP (continued)

Richmond control groups, the small numbers would not have affected the results for this group or the credibility of the study.

ATTACHMENT A

SUPPLEMENTARY SUBMISSION ON THE F-111 EX-GRATIA SCHEME

1.0 OVERVIEW

This supplementary submission follows on from the agreement with the Committee to address the decision making processes adopted by the Department for the ex-gratia scheme, in particular it deals with observations made by the ombudsman in his submission to the Inquiry.

The Ombudsman made a number of observations regarding the F-111 Ex-gratia Scheme in Dr Thom's letter to the Secretary in May 2007 (Attachment A1). The then Secretary responded to Dr Thom in June 2007 (Attachment A2). No further action was taken by the Ombudsman and the matter was thus concluded in the 2006-07 financial year.

There has been no further correspondence between DVA and the Ombudsman's office on this issue since May 2007, however the Department notes the Ombudsman's comments in the 2006-07 Annual Report:

> *"The consultation between our office and DVA about the scheme has generally functioned well. While the administration of the scheme presented certain challenges, the deseal/reseal issue serves as a good example of the effective way our office and DVA have been able to interact to obtain briefings, seek information about a case or have a decision reconsidered"*[1].

Ombudsman Submission

In general terms, the Ombudsman's submission to the Inquiry covered the following issues:

- deficiencies in the original records created in relation to the involvement of personnel in the Deseal/Reseal process;
- guidance and policies regarding the gathering of evidence in relation to these claims;
- clarity regarding the weighting of evidence including Statutory Declarations and insufficient guidelines for assessing claims apart from the tier definitions;
- skills of the team involved including a lack of administrative skills and an inadequate understanding of the role of the Ombudsman's office;
- understandable delays in claims processing and updating claimant's on the progress of their claim;

[1] CommonweaIth Ombudsman Annual Report, 2006-2007, Chapter 7.

- recording keeping including:
    - the basis for decisions where there was no technical assessment made;
    - technical assessments did not always source the information relied on and were undated;
    - there were insufficient records in regard to reconsiderations;
    - the need for files to be folioed;
    - the need for records of conversation be produced; and
    - the identity of hand-written comments was not apparent.

Summary

In summary, the Department's approach to deciding ex-gratia applications was consistent with Administrative Review Council Guidelines and the then Department of Finance and Administration guide for schemes of this nature.

Given the limited discretionary powers available to the Delegate, the Department believes that there was sufficient guidance in the form of the Tier definitions and the checklist of evidence available to the team to make assessments in relation to this Scheme.

Similarly the Department believes, given the technical nature of the assessments, that the ex gratia team was appropriately skilled and qualified.

Nonetheless, the Department has noted observations of the Ombudsman and will take them into account in the execution of any similar scheme in the future. It is noted that all but 6 claims for ex gratia payment had been determined by the time of the Ombudsman's observations to DVA.

2.0 DISCUSSION

2.1 Deficiencies in the original records

The limitations of Defence employment records for service in connection with F-111 aircraft maintenance has been canvassed elsewhere.

2.2 Policies and guidelines

The Department's approach to deciding ex-gratia applications was consistent with Administrative Review Council Guidelines and the then Department of Finance and Administration guide.

The characteristics of ex-gratia schemes

Ex-gratia payments are not set out in any specific legislative or statutory provision but emanate from the Government's executive powers under section 61 of the Constitution. These payments are designed to deliver financial outcomes at short notice and rely on flexible mechanisms to produce workable outcomes. As such, they do not have pre-set criteria in the same way as other discretionary schemes. The Department of Finance and Deregulation describes such schemes as *"permissive"* and that *"general principles, rather than prescriptive rules, underlie the mechanisms"*.[2]

The previous Government provided the authority for a decision to be made in relation to an ex-gratia lump sum payment if certain facts existed. That is, that the applicant was assessed as being a DSRS Participant as articulated in the relevant Tier definition. Thus, an application was to be refused if the applicant did not meet those criteria.

While there were no express discretionary powers in relation to these criteria, the previous Government had also provided policy advice relating to the reason for making a payment to those in the relevant tiers. The decision maker was able to exercise judgment about whether the criteria had been met by examining the facts of the case and assessing whether the applicant met the relevant criteria.

The only procedural requirement was that a written application was to be lodged with DVA using the appropriate application form. However, applications would have been accepted where the applicant had provided information that substantially complied with the information requested on the relevant form. Further, there were no International Conventions or other relevant Acts which required explicit observance in relation to the administration of this Scheme.

As there was no explicit standard of proof nominated, the usual standard which applies to administrative decisions, that is the civil standard or "balance of probabilities". Similarly, there were no explicit guidelines provided by Government in relation to the application of natural justice. Thus the usual rules applied.

The only avenue of appeal for these claimants was to the Commonwealth Ombudsman and the use of this mechanism was actively encouraged by the Department.

Administrative Review Council Guidelines

The Administrative Review Council's (ARC's) Best Practice Guides on Administrative Decision Making are also relevant. These Guides, issued in 2007, cover five areas:

- Lawfulness;

[2] Finance Circular No.2006/05, *Discretionary Compensation Mechanisms*, paras 8-9.

- Natural Justice;
- Evidence, Facts and Findings;
- Reasons for Decisions; and
- Accountability.

The general principles discussed in the Guides are subject to the relevant decision making powers assigned to the Scheme.

2.3 Guidance and Policies regarding the gathering of evidence

The definition of a DSRS participant set out the factors that must be considered in each case. The definitions for each Tier, as well as the evidence checklist provided strong boundaries in relation to each case assessed.

As the factors listed in the definitions are complete, or exhaustive, the decision maker was not permitted to consider other things. Sometimes the facts needed to support a decision were clear and uncontroversial, but in other cases it was necessary to obtain and evaluate additional information. The agreed principles for dealing with these cases are set out below.

Tier Definitions

A statutory power to make a decision usually depends on the existence of certain 'material facts'. For example, the material facts in a statutory power to grant a seniors concession to an applicant who is an Australian resident aged over 60 years and not in paid employment are the age, resident status and employment status of the applicant. The facts are material in the sense that the existence or non-existence of each one can affect the decision. This was similar to the case for determining whether an individual met the criteria for assessment as a DSRS participant and the Ombudsman has previously described the processing of claims as '*simple to understand'*.[3]

Tiers of Evidence

The weight attached to particular information was governed by three tiers of evidence.

In determining eligibility, the claims processing team considered all available evidence and consistently weighted this evidence as follows:

- Primary evidence – sourced from official Air Force (or other employer) records including Medical records, individual service and personnel records, the Airman's Trade Progress Sheet, Air Force Record of Training and Employment, and Defence pay records. All of this evidence carried equal weight and was considered to be of the highest importance.

[3] CommonweaIth Ombudsman Annual Report, 2006-2007

- Secondary evidence – sourced from statements made to the Air Force Board of Inquiry or in support of an individual's compensation claim, or from the individual's application for inclusion in the Interim or SHOAMP Health Care Schemes. Again, this evidence was considered to be of equal importance in establishing eligibility but of lesser importance than primary evidence. and

- Tertiary evidence - usually in the form of personal photographs, copies of their service records which may have been missing from their individual personnel records or a Statutory Declarations where the Declaration is supported by primary or secondary evidence. This evidence carried the least weight.

In all cases where there was a lack of primary evidence, the person responsible for gathering the evidence contacted the individual to see what other information the applicant may have held and then asked them to submit this information in writing. In most cases this resulted in the applicant providing copies of their Record of Training and Employment.

Evidence Checklist

The team was assisted by guidelines in the form of a checklist which set out the evidence which could be considered. This information matched the records listed within the three tiers of evidence discussed above and provided guidance on the scope of information gathering to be undertaken in relation to the assessment of a claim. However, in some instances where these source documents did not exist, the team went to extraordinary lengths to contact former supervisors and work colleagues to see if they had any information that might assist the team in arriving at a favourable outcome. Where this was the case, additional Statutory Declarations were often provided.

Reasonable Satisfaction

In all cases where the Primary evidence clearly pointed to an outcome and there was no secondary or tertiary evidence available, a Technical Assessment was not requested. However, where there was conflicting evidence or the evidence was too evenly balanced to support a definite finding of fact, a Technical Assessment was requested. In these cases, the Technical Assessment constituted 'expert evidence' in relation to Deseal/Reseal processes and procedures.

Expert Evidence

The ARC best practice guides caution decision makers that while they may evaluate expert evidence, they should be wary of relying on their own non-expert opinion in a matter that requires expert judgment. For example, if a medical practitioner gives a diagnosis of an applicant's illness on the basis of tests the practitioner conducted, it would be unsound for a decision maker to prefer a diagnosis they made on the basis of observing the applicant.

Expert evidence usually consists of a factual component and opinion evidence. The factual component can be evaluated by examining the adequacy of the expert's research and inquiry and the reasonableness of the inferences and conclusions drawn.

The opinion component can be evaluated by, for example, considering the factual basis for the opinion, the expert's qualifications and area of expertise, and whether the expert seems impartial and objective. In this case, the Technical Advisor has extensive knowledge and directly relevant experience gained as a Flight Sergeant and senior supervisor overseeing Deseal/Reseal section personnel during the last three years of the 1st F-111 Fuselage Deseal/Reseal Program. In this capacity, he supervised all phases of the Deseal/Reseal work for the last six aircraft in that program.

In a number of cases, there were conflicting versions of a factual matter. Given the length of time between certain events and the claim, this outcome was not unexpected as it is possible for people to perceive and remember events differently. In order to resolve such issues, the team always gave more weight to contemporaneous written evidence than to an individual's recollection and where possible considered this evidence against statements made to the Board of Inquiry. This is also consistent with the ARC's Guidelines which state:

> *A better way of evaluating a witness's statement is to examine its consistency with other evidence. A statement is more likely to be true if it accords with known facts, the documentary evidence, or other evidence from a source independent of the witness. The decision maker should also note whether the witness's statement is internally consistent and whether it accords with what the witness has said on other occasions.*[4]

Notorious Facts

When it comes to what kind of evidence is regarded as sufficient to prove certain facts, Agencies' practice varies. Requirements can also vary depending on the consequences of the decision, the risk of deception, and the difficulty of obtaining better evidence. This last point was particularly relevant in relation to these claims and has been highlighted by the Ombudsman. Further, decision makers may also take account of 'notorious facts', which are part of ordinary experience or common knowledge—for example, that each person's handwriting is unique. In the case of DSRS, there are some 'notorious facts' known to both the claimant and the assessment team such as the circumstances under which an Airmen's Evaluation Report (AER) is raised on an individual and other internal RAAF administrative processes. This knowledge can account for potential "gaps" in documentation.

Summarised Evidence

It is not always necessary for the decision maker to hear or receive the evidence and submissions in person. Some decisions are made by the Minister or a senior officer, relying on a briefing paper or summary prepared by a subordinate. The summary must be fair and accurate and must not omit relevant evidence or submissions. This was the process followed by the team in reaching decisions.

[4] Administrative Review Council Best Practice Guide No 3 – Evidence, Facts and Findings, p.10

Logic, Common Sense and Knowledge

A decision should be made on the basis of the evidence and information before the decision maker. In evaluating that material, the decision maker is entitled to draw on their commonsense and general life experience as an ordinary member of the community. They can also apply any specialist knowledge they have acquired through professional training or experience in the relevant area of administration. This use of specialist knowledge was pivotal in relation to the administration of the claims processing and the team's assessments.

Relevant Policy and Legislation

The Government had also provided policy advice relating to the reason for making a payment to those in the relevant tiers. This advice was publicly available through Ministerial press releases published on both the APH and DVA websites and was a relevant consideration. Therefore, the delegate took this advice into account when the decision was being made.

For example, policy advice in relation to the burning of chemicals used in the DSRS process was taken into consideration in relation to claims from Fire Fighters who served at RAAF Base Amberley during the relevant periods. In exercising this judgement, the delegate relied on technical advice from the RAAF about which Units had responsibility for this task during which periods throughout this 30 year timeframe.

In addition, the Delegate took into account relevant Agency practices such as the rules regarding the use of Statutory Declarations and how they could be applied.

Lawful Decisions

The ARC Guidelines make a number of recommendations in relation to making lawful decisions. As and where applicable, the team followed the advice now available in these Guides regarding making a lawful decision.

In making these decisions, only the officer appointed as the Delegate exercised that power or made that judgment. While they could and did take into account the advice or recommendations of others, it was their responsibility to exercise the discretion and make the decision. Further, their decision was not made according to the wishes or views of any other person—including a supervisor, the Secretary or the Minister.

Natural justice principles were also applied in ensuring lawful decision making. There are two primary rules of natural justice. They are:

- the 'bias rule' which states that the decision maker must be impartial and must have no personal stake in the matter to be decided; and

- the 'hearing rule' which states that people who will be affected by a proposed decision must be given an opportunity to express their views to the decision maker.

In line with best practice, the team adhered to both these principles of procedural fairness or natural justice. The concern with natural justice is not whether the decision itself was fair in and of itself. Rather a fair decision is one that is properly made, in accordance with the relevant guidelines and meets the requirements of natural justice.

Bias Rule. The most common breach of the bias rule is where the decision maker has a conflict of interest. A conflict of interest can arise from non-material interests such as involvement in political, social, cultural, religious or sporting associations and activities, or a close family or personal relationship. Generally, this means that an employee must disclose their interests to the Agency, and the Agency assesses and manages any conflict with the employee's duties.

However, not every conflict of interest can be foreseen. Sometimes a conflict becomes known only after the decision-making process has started. For example, in the course of dealing with a matter a decision maker might become aware that a friend or family member is a party, a witness or an applicant. It does not automatically follow that the decision maker is in breach of the APS Code of Conduct or other similar code but, to avoid a breach, they must promptly disclose their interest to the agency and, in consultation with their supervisor, take reasonable steps to resolve the conflict.

Given that the ex-gratia lump sum payment team had all served in the RAAF, the team declared all cases where a close family or personal friend was involved. Where this occurred, the relevant records, advice, assessment or decision was made by another similarly qualified individual (usually from outside the team). This practice is consistent with the Australian Public Service Values and Code of Conduct, as expressed in the *Public Service Act 1999* (Cth).

The bias rule of natural justice is not only concerned with conflict of interest. It also requires that a decision maker be impartial and free of actual or apparent bias. The concept of 'Actual bias' is where a decision maker has a predisposition to decide a matter with something other than an impartial and unprejudiced mind. 'Apparent bias' means that in the circumstances a fair-minded observer might reasonably suspect that the decision maker is not impartial. Actual or apparent bias can arise if a decision maker plays conflicting roles, such as making allegations and fact finding. To address any perception of bias in this regard, each member of the team was assigned a specific role which did not overlap with that of any other member. Therefore, given the stability of the team, handwritten comments on particular aspects of a claim were easily attributable to the team member responsible for that role. That information was available to the Ombudsman's office in 2007.

Hearing Rule. The hearing rule of natural justice is designed to ensure that a person whose interests will be affected by a proposed decision receives a fair hearing. The hearing rule requires that a person whose interests could be adversely affected by a decision be notified that the decision is to be made. However, the hearing rule does not provide a standard set of procedures. Its requirements are adjusted to take account of the legislative framework, the subject matter, and the nature and potential consequences of the decision to be made.

As this Scheme did not specify the type and format of the hearing, the team satisfied the hearing rule by affording the applicant the opportunity to make additional written submissions. In general, no evidence was taken orally.

Conclusion

Given the limited discretionary powers available to the Delegate, the Department believes that there was sufficient guidance available to the team to make assessments in relation to this Scheme.

2.4 Skills and Make-up of Processing Team

DVA is responsible for processing claims for the lump sum benefit, including the determination of eligibility whilst Defence provides the technical assistance to DVA in accessing and interpreting Air Force records. This process of eligibility determination has been in operation since the scheme was implemented and the staffing of this team has remained stable throughout this process.

To assist in processing F-111 ex gratia lump sum payment claims, an F-111 Ex-gratia Lump Sum Payment Team (the team) was established comprising a:

- Flight Sergeant Clerk (Administration) who is well versed in researching service records;
- Warrant Officer Engineer who has extensive DSRS engineering background which he uses to provide technical advice on claims;
- Group Captain Administration Officer who prepares recommendations for the Delegate based on the Air Force records and technical advice; and
- DVA Delegate who is an ex-RAAF Administration Officer who determines and authorises claims for payment.

In all, the team has more than 100 years of service experience between them. They are well versed in researching and interpreting RAAF records. Further, between them, the team has approximately 75 years of experience in Administrative decision making.

Every member of the team had significant experience in interpreting RAAF personal records such as Airmen Evaluation Reports (AERs), Records of Training and Employment, relevant personal entitlements relating to the payment of workplace allowances, etc.

Ombudsman Review

The *Commonwealth Ombudsman Annual Report 2006-07 Chapter Five* makes the following comments in relation to this Scheme.

> *Deseal/reseal complaints presented several challenges. First, although the **process to assess claims** is a recent activity **and simple to understand**, almost all of the evidence relied upon to assess claims was old—in some cases nearly 30 years old. Much of the material that was presented by complainants was, of itself, technical as well. For example, we dealt with extracts from aircraft maintenance logs, service duty statements and performance evaluation reports, and trade proficiency certificates.*
>
> *To deal properly with these complaints, Ombudsman staff had to conduct considerable research and develop an understanding of the processes employed in each of the four deseal/reseal programs and the roles of the various groups involved. In some cases they needed to gain an understanding of the sequence of maintenance events unique to each program and the roles of each of the trades involved, the fuel and engine systems of the F-111, the unusual tools used by maintenance workers, and the behaviour of some chemicals used in each program.*
>
> *The strategy we employed to deal with deseal/reseal complaints was to **centralise our handling of these complaints to allow a specialist team to develop an extensive body of knowledge.** In partnership with DVA we developed clear lines of communication and we held numerous meetings to expand our knowledge about the F-111 and refine our understanding of key issues*[5].

The approach used by the Ombudsman to deal with the complexity of the issues, in establishing a centralised and specialist team, was identical to the approach used by DVA.

2.5 Delays in claims processing and updating claimant's on the progress of their claim

Delays

The Department acknowledges that it was reactive in responding to issues regarding delays and could have adopted a more proactive strategy in this regard.

Consultation with Claimants

The affected person's attention was drawn to any information or fact that was crucial to their case and, because of the staged decision making process, new information was often provided in writing in the form of a Statutory Declaration and considered. That said, the ARC guidelines make it clear that there is no general duty to give an affected person an assessment of their case before the decision is made.

Reviews

Where an individual was adversely affected by the decision, they could request that either the team reconsider their claim or they could appeal to the Commonwealth

[5] Commonwealth Ombudsman Annual Report 2006-07, Chapter Five

Ombudsman. All decision letters provided advice on this appeal mechanism and actively encouraged those whose claims had been unsuccessful to exercise their only external right of appeal which was to contact the Commonwealth Ombudsman.

Administrative powers that affect the rights and interests of individuals and organisations can usually be reviewed or appealed against. Much has been made of the number of cases considered by the Ombudsman's office. However, unlike determinations made under statutory compensation schemes, there were no formal mechanisms for internal independent review of decisions made to refuse recognition under Tier 1, 2 or 3 of the F-111 Ex-gratia Lump Sum Payment Scheme. This means that decisions were not reviewable by the Veterans' Review Board or the Administrative Appeals Tribunal. It is not surprising therefore that DSRS complaints to the Ombudsman appeared to be high.

All applicants were advised that if they were dissatisfied with their decision and considered that they had either new or additional information they wished to have considered, they could request reconsideration from the F111 Ex-gratia Lump Sum Payment Team. The Ombudsman has commented on the fact that where the team conducted a reconsideration of the case, there was little or no evidence on file of the basis for that reconsideration. This is because in most cases, there was no new evidence available to the Delegate during a reconsideration. Therefore, there was often no basis on which to reach an alternative view.

Alternatively, if the applicant considered that their claim had not been fully and fairly considered by the Department, or that the decision was not reasonable, the Commonwealth Ombudsman may consider their case. Applicants were also advised that the Ombudsman could not amend the definition of a DSRS Participant but would review the process undertaken and the information considered by the Department which resulted in the decision. This advice was provided and cleared by the Ombudsman's Office. However, a significant number of the 102 appeals to the Ombudsman's Office related to definitional issues.

2.6 Record Keeping

Folioing

The Ombudsman has identified the need to folio files. The *National Archives Act* no longer requires files to be folioed. There are only two exceptions to this advice. These are where:

- you need to refer to specific pages within a file, or
- the file documents a high risk activity and you need to account for every page.

In relation to Ex-Gratia Files, neither circumstance was relevant. A checklist of documents was attached to each file clearly annotating the source documents contained on an individual's file. This checklist makes it obvious if a document has been removed from the file. Further, each of these source documents have internal formatting which make it clear if portions of the document are missing as the formatting is sequential. Lastly, all relevant documents contained on the file were

"flagged" and the relevant information was permanently highlighted. These flags related to evidentiary sources and replaced the requirement for a folio. While the Ombudsman's Office recommends file folioing as best practice, in 2007 they appeared to accept that the extant process was sufficient and provided a similar document control mechanism to folioing.

Records of Conversation

A further criticism of the team was a failure to use extensive records of conversation. As the best practice guides note, evidence can be provided orally or in documentary form. When evidence is provided orally - as during an interview or telephone call - the decision maker should make a file note or written record of the interview at the time or soon afterwards, while the memory is fresh. The team were aware of this requirement.

As previously advised in relation to the hearing rule, due to the small team structure, evidence was generally not accepted orally by the team. In all cases, applicants were advised to provide information in writing either through photocopies of documents or through the provision of a Statutory Declaration. Therefore, in line with the ARC's best practice guides, there was generally no requirement for the team to keep records of conversation or file notes in relation to these conversations.

However, the Ombudsman's review did find that in a small number of cases, the Technical Assessment referred to conversations held to clarify issues but the relevant record of conversation was not on file. DVA accepted this valid criticism in regard to these small number of cases.

Reasons for Decision

Providing a statement of the reasons, evidence and facts for a decision is a fundamental part of administrative review. While there was no legal or statutory requirement to do so under this Scheme, a statement of reasons was prepared in relation to every claim. These reasons were provided to applicants within 28 days of a decision in relation to their claim being made and included the following:

- the decision;
- the reasons for the decision;
- information on lodging a compensation claim;
- compensation appeal rights;
- access to the SHOAMP Health Care Scheme; and
- Appeal rights.

The original 'unsuccessful' letter provided for claimants was less than satisfactory and was revised in September 2006. However, in all cases where an applicant sought a more detailed explanation of why their claim had been rejected, the file was

reviewed again and a detailed advice letter provided. The current version of the 'unsuccessful' letter contains specific details of the investigation, including a reference to military employment records, records of task employment authorisations and, where relevant, advice that supervisory personnel have been contacted to clarify details unable to be substantiated from other sources.

Accounting for a decision, including the findings of fact, is an important part of a decision maker's function. Full and accurate records should be kept—including copies of documentary evidence, notes of inquiries, findings of fact, and reasoning. This process was followed in all cases through the use of a decision coversheet which recorded the finding of material facts in relation to the tier definition and was either based on uncontroversial primary evidence or on a technical assessment of the records where there was any doubt.

Conclusion

While the Ombudsman's office may have preferred a different approach in relation to the team's record keeping, in general, the Office accepted the constraints imposed on the Department in administering this Scheme and made no finding of administrative deficiency.

I would be happy to elaborate further on the points raised in this Submission.

Yours sincerely

Ed Killestyn
Acting Secretary

September 2008

PARLIAMENTARY INQUIRY INTO ROYAL AUSTRALIAN AIR FORCE F-111 WORKERS AND THEIR FAMILIES
QUESTIONS ON NOTICE FROM 21ST JULY 2008 HEARING

ATTACHMENT B

Case Studies as shown at Question 3

Please double click on the icons below to access details relating to each case study.


Case 1.xls


Case 2.xls


Case 3.xls


Case 4.xls


Case 5.xls

ATTACHMENT C

Recommendation

It is recommended that:

1. the MRCC approve the adoption of a policy whereby MRCC delegates are to apply the reverse onus of proof power in subsection 7(2) of the SRCA where:
   (i) The claimant was an ADF member and participated in the F111 Deseal/Reseal program at RAAF Base Amberley; and
   (ii) The ADF member suffers from a specific disease, or type of disease, listed at Attachment A.

Branch Head Military Compensation

24/2/2005

Attachment A to the MRCC Submission on the SRCA response to SHOAM

The following diseases are accepted as meeting the requirements of sub-section 7(2) of the SRCA for all ADF personnel involved in the Deseal/reseal program at RAAF Base Amberley

Skin Rashes and associated systemic conditions
Dysplastic naevus, Eczema/dermatitis

Neurological conditions
Multiple sclerosis, Parkinson's disease, Peripheral neuropathy, Spinal muscular atrophy, Erectile dysfunction, Cauda equina syndrome, Neurogenic bladder, Non-alcoholic toxic encephalopathy, Acquired colour vision deficiency

Mental disorders and personality changes
Depression, Sleep disorders with neurological basis, Bi-polar affective disorder, Vertigo, Memory loss, Anxiety, Panic disorders, Impaired cognition

All malignant neoplasms and myeloproliferative disorders

Liver disease
Liver disease and pancreatic disease (excluding diabetes)

Gastrointestinal problems
Irritable bowel disorder, Ulcerative colitis/Crohn's disease, Diverticulitis, Bowel polyps

Immunological disorders
Mixed connective tissue disease, SLE (systemic lupus erythematosus), Sarcoidosis.

Item 10

MRCC 13/2005 Use of sub-section 7(2) of the SRCA for F111 Claims

The Commission RESOLVED to approve in-principle the adoption of a policy for MRCC delegates to apply the reverse onus of proof power in subsection 7(2) of the SRCA where:

- the claimant was an Australian Defence Force (ADF) member and participated in the F111 Deseal/Reseal program at RAAF Base Amberley; and
- the member suffers from a specific disease, or type of disease, listed at Attachment A to the submission;

subject to the policy's definitions of an "ADF member" and "participation in the Reseal/Deseal Program" being consistent with the Government's decision on lump sum payments.

The Commission REQUESTED that the resolution be resubmitted to it for further consideration once the Government's decision on lump sum payments is finalised.