

Investigation into the Actions and Decisions of the Department of Veterans' Affairs (DVA) in Relation to Mr A

July 2018

REPORT BY THE COMMONWEALTH OMBUDSMAN,
MICHAEL MANTHORPE, UNDER THE *OMBUDSMAN ACT 1976*

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FOREWORD

This report stems from a complaint made by a veteran with over 30 years of service to Australia, and the difficulties he faced in accessing his correct entitlements through the Department of Veterans' Affairs (DVA).

What started as a minor unchecked oversight between agencies culminated in multiple administrative deficiencies, including the raising in excess of \$100,000 in debts and the veteran enduring periods with no financial support, followed by the identification of an underpayment of more than \$500,000.

The negative impact on the life of this veteran cannot be overstated. He expressed to my Office that he lives in constant fear that tomorrow there may be no payment in his account, or that payments may be recovered in the future and he may not be able to meet his basic needs. His health has suffered and his relationships have been strained.

There are currently around 300,000 veterans who access benefits and payments through DVA. They rely on efficient and effective administration to ensure they receive regular payments and entitlements as well as access to essential health services. They put their trust in the hands of the Commonwealth and have every right to expect that the Commonwealth will, in turn, provide best practice service.

Many of our veterans who access the services of DVA are extremely vulnerable. They face physical and mental health challenges that many Australians will fortunately never encounter. They are more likely to suicide and self-harm than the general population¹ and face physical incapacity at a higher rate² than the general population.

To its credit, DVA has implemented significant reforms to better meet the needs of our veterans and continues to work at simplifying a complex and confusing legislative system borne out of years of accreted adjustments to policy settings.

But more work is needed to assure the public, serving personnel and veterans that processes, policies and guidance are robust and rigorous. In this case, DVA failed to ensure timely record keeping and adequate quality assurance and internal review processes were in place. Simple additional checks from the very earliest of DVA's dealings with this veteran may have prevented the snowballing of events that led to years of suffering to one man. While cases involving this level of accumulated administrative errors are rare, the individual errors are not isolated incidents.

I trust that this report highlights the importance of getting basic administrative practices right, identifies areas of systemic improvement within DVA and serves as a reminder to all who work in public administration to consider the human impact of their decisions.

I welcome the response from the Secretary of DVA acknowledging the errors made and committing to address the recommendations through the significant program of transformation already underway in DVA.

Michael Manthorpe PSM
Commonwealth Ombudsman

¹ Australian Institute of Health and Welfare: [Reports & statistics Veterans Incidence of suicide among serving and ex-serving Australian Defence Force personnel 2001–2014](#)

² DVA and the health care sector Stakeholder Engagement Workshop June 2015: <https://www.dva.gov.au/sites/default/files/files/consultation%20and%20grants/discussion-paper.pdf>

EXECUTIVE SUMMARY

In February 2016, our Office began an investigation into the actions and decisions of DVA in relation to Mr A, a former member of the Royal Australian Navy (Navy) who had various recognised health conditions related to his previous service.

Mr A initially advised he had experienced difficulties in having his claims for incapacity benefits processed. He also advised that there had been a number of instances where incorrect or omitted information resulted in the raising of debts and incorrect offsetting (the reduction of one compensation payment in recognition of another compensation payment for an incapacity³) of his DVA payments.

While DVA was the primary agency dealing with his matters, the information provided and actions undertaken by both the Commonwealth Superannuation Commission (CSC) and the Navy impacted on the actions undertaken by DVA and subsequent negative outcomes for Mr A.

In response to our investigation, DVA advised of errors that had resulted from information provided by CSC and the Navy, as well as administrative errors on the part of DVA. These administrative deficiencies led to the incorrect application of the relevant policies and legislation, resulting in overpayments, omission of benefits and incorrectly identified benefits. Attempts to recover the overpayments were themselves infected with further error.

It is our Office's view that DVA did not undertake the relevant checks to identify Mr A's ongoing status as a current member, failed to undertake simple quality assurance measures to rectify human and system errors, failed to update records in a timely manner when it became aware of additional and critical information from CSC, failed to provide adequate information to Mr A in relation to the calculations of his benefits and, through significant delay, caused significant financial, health and personal detriment to Mr A.

This matter has also highlighted systemic issues in relation to the interaction of taxation law and policy with the delivery of the veteran entitlement programs, particularly with regard to recovering overpayments or making lump sums to address underpayments.

Our Office is of the view that this matter is of sufficient seriousness, given the number of administrative deficiencies and systemic issues identified, to warrant the preparation of a report under s 15 of the *Ombudsman Act 1976*. In addition to recommendations for DVA to address systemic issues arising from this investigation, the Ombudsman's Office (the Office) also recommends DVA provide an appropriate remedy to Mr A.

³ Further information on offsetting is available at: <https://www.dva.gov.au/factsheet-dp82-disability-pension-and-compensation-offsetting>

The Office makes the following recommendations for action by DVA:

Recommendation 1

The Office recommends that DVA ensure that appropriate quality assurance processes are implemented in the following areas:

- the determination of Defence member serving status when applying offsetting decisions
- the determination of CSC payments affecting DVA entitlements
- the determination of overpayments and the commencement of debt recovery action.

Recommendation 2

The Office recommends that DVA continue to work with the Australian Defence Force (Defence) and CSC on the enhancement of data exchange regarding Defence member serving status and linked superannuation payments.

Recommendation 3

Our Office recommends the development of a simplified template for offsetting and overpayment decisions to assist affected veterans in better identifying the determining factors in DVA decisions, particularly those involving:

- CSC and other compensation payments
- determination of the Defence member serving status
- any paygrades, loadings and other employment related determinations affecting rate of payment
- any other payments or liabilities as appropriate
- information about the calculations applied.

Recommendation 4

The Office recommends that DVA, if it has not already taken this step, identify all cases that may have been affected by the same misapplication of offsetting legislation and policy as occurred with Mr A's Military Rehabilitation and Compensation (MRCA) payments, with particular focus on those members transitioning from permanent service to reserves, and conduct a review of those cases. DVA may also wish to consider alerting veterans to this issue through its usual public notification processes.

Recommendation 5

The Office recommends that DVA consider amending its current policy on the recovery of overpayments to waive any taxation component.

Recommendation 6

The Office recommends that DVA:

- apologise to Mr A
- waive his current debt of over \$17,000
- give an undertaking not to raise any further overpayment debts, unless they arise from an error on the part of Mr A
- if DVA forms the opinion that Mr A has suffered loss, it take steps, informed by precedent, to offer appropriate financial restitution.

Response from DVA

On 4 May 2018 our Office provided DVA with a copy of this report for comment. On 25 June 2018 DVA responded to the report and its recommendations. In summary, DVA acknowledged the errors associated with the administration of Mr A's case and provided responses to all six recommendations. A copy of the response from DVA is at **Attachment A**.

Our Office welcomes the changes that DVA is currently implementing through its veteran centric reform initiatives, as well as the additional planned reforms to its decision records and quality assurance processes. These changes should ensure that cases such as this no longer occur, and provide assurance to veterans and their families that DVA's service delivery is robust, reliable and reputable.

PART 1. INTRODUCTION AND SCOPE OF INVESTIGATION

1.1 Under Part IIA of the *Ombudsman Act 1976* (Ombudsman Act) the Commonwealth Ombudsman is also the Defence Force Ombudsman. The Ombudsman provides an external and independent complaints mechanism for serving and former members of the Australian Defence Force (Defence) for administrative matters that have not been resolved by Defence agencies, including the Department of Veterans' Affairs (DVA).

1.2 In February 2016, Mr A lodged a complaint with our Office about his dealings with DVA. He identified the following primary issues:

- the accrual of three debts (amounting to over \$57,000) relating to overpayments by DVA which had resulted from incomplete data exchange between DVA and the Commonwealth Superannuation Commission (CSC)
- incorrect payment calculations on his Incapacity Payments since 2008
- the taxing of debts through the gross recovery of overpayments.

1.3 As a result of our investigation we identified multiple administrative deficiencies which stemmed from six main events:

- 1.3.1 the processing of Mr A's 2007 claim for compensation under the *Military Rehabilitation and Compensation Act 2004* (MRCA)
- 1.3.2 the processing of a subsequent claim in 2010 under MRCA
- 1.3.3 the raising of debts in 2015 in relation to the overpayment of incapacity payments under MRCA
- 1.3.4 the processing of Mr A's Special Rate Disability Pension (SRDP) eligibility
- 1.3.5 the incorrect offsetting of Mr A's entitlements
- 1.3.6 the further raising of a debt in 2017 in relation to the overpayment of incapacity payments under MRCA.

1.4 Under s 15 of the Ombudsman Act, the Ombudsman may prepare a report where he or she is of the opinion:

- a) that a decision, recommendation, act or omission to which this section applies should be referred to the appropriate authority for further consideration
- b) that some particular action could be, and should be, taken to rectify, mitigate or alter the effects of, a decision, recommendation, act or omission to which this section applies
- c) that a decision to which this section applies should be cancelled or varied
- d) that a rule of law, provision of an enactment or practice on which a decision, recommendation, act or omission to which this section applies was based should be altered

- e) that reasons should have been, but were not, given for a decision to which this section applies, or
- f) that any other thing should be done in relation to a decision, recommendation, act or omission to which this section applies.

1.5 On this occasion, we consider the administrative deficiencies to be so significant that an s 15 report is the most appropriate avenue to make recommendations for DVA's action to mitigate the effects of significant detriment in Mr A's case.

PART 2. OMBUDSMAN'S INVESTIGATION

2.1 Our Office reviewed the information provided by Mr A in February 2016 and decided that an investigation into this matter was warranted.

2.2 Our investigation focused on obtaining a history of Mr A's dealings with DVA and CSC, including information on Mr A's current and past DVA entitlements and the raising and calculation of debts in relation to Mr A.

2.3 We also raised the issue of DVA's policy to recover debts at a gross amount and whether DVA assists its customers in recovering any overpaid taxation.

History of service

2.4 From the information provided by Mr A and DVA our Office determined the following history of his service:

- 2.4.1 He served in the permanent Navy for two separate enlistment periods, from the mid-1970s to 1997 and 2002 to 2007. During his second enlistment he completed war-like service.
- 2.4.2 In 2007, he retired from the permanent Navy and transferred to Active Reserves. He subsequently transferred to Standby Reserves in 2012.
- 2.4.3 He was granted military compensation entitlements for injuries under all three DVA Acts, the *Veterans' Entitlements Act 1986* (VEA), the *Safety, Rehabilitation and Compensation (Defence-Related Claims) Act 1988* (DRCA) and the *Military Rehabilitation and Compensation Act 2004* (MRCA).
- 2.4.4 He was also entitled to invalidity benefits under the *Defence Force Retirement and Death Benefits Act 1973* (DFRDB).
- 2.4.5 In 1997, he initially discharged from the permanent Navy and took a commuted portion of his DFRDB military entitlements in a lump sum and a reduced fortnightly superannuation pension, which ceased in 2002 when he re-enlisted with the permanent Navy.
- 2.4.6 In 2007, he discharged from the full-time Navy and transferred into the Naval Reserves for a five year enlistment, taking another commuted portion of his DFRDB pension.
- 2.4.7 In 2008, Mr A advised DVA that he was undertaking part-time work with the Naval Reserves.
- 2.4.8 In 2016, Mr A was discharged from the Naval Reserves on the grounds that his skills had atrophied. However, he did not receive the official termination decision letter until later in 2016.

PART 3. KEY FINDINGS AND RECOMMENDATIONS

3.1 The following key findings represent a summary of the errors that have occurred in Mr A's case.

The processing of the 2007 claim for compensation under MRCA

3.2 In October 2007 Mr A applied to DVA for incapacity payments under MRCA.

3.2.1 In December 2007, CSC advised DVA of the payment of a DFRDB lump sum paid in September 2007, but failed to advise of a 1997 lump sum payment. This resulted in DVA calculating Mr A's payment at a higher rate than that to which he was entitled.

3.2.2 In April 2008, DVA wrote to Mr A advising that incapacity payments had been granted with effect from September 2007. The decision did not advise the reasons for calculating the entitlement.

3.2.3 Between July 2008 and February 2009, DVA adjusted Mr A's payments at least four times, on each occasion without adequate explanation.

3.2.4 In March 2009, DVA advised Mr A that he had been overpaid as a result of earnings calculated against his entitlement. DVA advised that he was no longer entitled to his incapacity payments as he was receiving ongoing payments for work undertaken as a Reservist.

3.3 The processing of Mr A's initial claim under MRCA included various administrative deficiencies that resulted in incorrect payments.

3.3.1 Initially, CSC failed to provide complete information to DVA regarding the lump sum payments provided to Mr A, resulting in the incorrect calculation of the entitlement. It is our view that this occurred as a result of human error within CSC by not reporting a 1997 lump sum payment to Mr A after he discharged from the permanent Navy for the first time in 1997. While human error can occur, this would likely have been identified if DVA had sought, or CSC had offered, a breakdown of any lump sum payments into employer and employee contribution components.

3.3.2 DVA failed to provide adequate and transparent advice and calculations as to how it determined and varied payment calculations. As an example, DVA failed to correctly calculate Mr A's entitlement to include a Remuneration Loading (see Glossary). Had DVA provided the basis on which its decisions were made, Mr A may have been able to identify the missing lump sum payment himself, leading to the earlier identification and rectification of the incorrect entitlements being paid.

3.4 This case also demonstrates that while minor errors can often initially result in small adjustments to payments, left unchecked these can quickly accumulate to a significant amount.

The processing of a subsequent claim in 2010 under MRCA

3.5 In July 2010, Mr A again applied to DVA for incapacity payments under MRCA.

- 3.5.1 In August 2010, CSC advised DVA that Mr A had received a superannuation lump sum payment in 2007 and an arrears payment in 2008, due to Navy incorrectly calculating his salary, but again failed to advise of the 1997 lump sum payment. This failure to notify of the 1997 payment resulted in the continued incorrect rate of payment of Mr A's entitlements.
- 3.5.2 In August 2010, DVA accepted his claim and backdated payments to the date of application. As part of this, DVA advised Mr A that his MRCA lump sum payments would be reduced to offset the additional payments he had received from CSC. While this would have been correct if Mr A was a former member, this was incorrect given Mr A was a Reservist.
- 3.6 The processing of this claim was also affected by administrative deficiencies, as was the ongoing review and monitoring of his entitlements.
- 3.7 On multiple occasions, CSC failed to provide complete information to DVA regarding the lump sum payments provided to Mr A. Each failure resulted in the incorrect calculation of the entitlement. DVA also failed to clarify the types of lump sum payments as personal or employer contributions, which impacted the calculation of the entitlement.
- 3.8 This was the result of either human or system errors within CSC, compounded by a failure by DVA to check this information. The failure of DVA to seek information from Navy as to Mr A's service status also contributed to the incorrect payment calculations.
- 3.9 As with the earlier claim, the processing of this claim was again affected by instances where DVA failed to provide adequate advice and calculations as to how it determined Mr A's entitlements. Once again, had such information been provided, it would have given Mr A the opportunity to identify, and correct, the incorrect rate of payment of entitlements, which otherwise continued.

The raising of debts in 2015 in relation to the overpayment of incapacity payments under MRCA

- 3.10 In June 2013, CSC reported the missed 1997 lump sum payment to DVA in response to a request from DVA for a review of Mr A's entitlements as he was now 55 years old.
- 3.11 DVA did not acknowledge or act on this information immediately, but contacted CSC on three occasions between June 2013 and January 2015 to clarify the extent of any and all payments made by CSC to Mr A.
- 3.12 In 2015, DVA finally acted on the information about the missed 1997 lump sum payment. In May 2015, it sent Mr A a notice about an overpayment debt of over \$50,000, being the amount by which his entitlements under MRCA should have been reduced by offsetting the 1997 CSC lump sum payment.
- 3.13 Between May and July 2016, Mr A attempted to lodge a request for review of the overpayment with the Veterans' Review Board (VRB). Due to issues with the uploading of the forms on myGov, as well as the manual processing of the application by DVA as an alternative approach, by the time his request was properly received, he was out of time for review.

3.14 The raising of an overpayment debt, and subsequent debt recovery action, would usually be an appropriate course of action in these circumstances. However, it is our view that this action was unreasonable and harsh in the circumstances of this case, in light of the passage of time and the multiple earlier opportunities to identify the payment and reconcile Mr A's case.

3.15 A better approach would have been for DVA to have regard to the individual circumstances of this case, including that the errors were not of Mr A's doing, and that DVA had contributed to the size of the debt by failing to identify the error earlier, despite multiple opportunities to do so. In these circumstances, it should have either waived the debt or not otherwise pursued debt recovery action.

3.16 There were also errors in relation to the review process. Flawed systems, associated with the uploading of Mr A's request for review in myGov, resulted in non-receipt and subsequent delay to the VRB application. Further, once finally received, DVA failed to notify the correct departmental area, which contributed to unreasonable delay in the processing of the application.

The processing of Mr A's Special Rate Disability Pension eligibility

3.17 In May 2015, Mr A lodged a request to have his eligibility assessed for the Special Rate Disability Pension (SRDP). As part of this, he applied for payment for his dependents under the Military Rehabilitation and Compensation Act Education and Training Scheme (MRCAETS).

3.18 In May 2016, DVA granted the SRDP and MRCAETS payment. However, DVA failed to recognise that he was still a serving member and therefore was not entitled to the SRDP portion of his MRCA payment (or the related MRCAETS payment to his dependents).

3.19 In September 2016, DVA advised it would be revoking the SRDP and the related MRCAETS payment on the basis that Mr A was still a serving member and therefore ineligible.

3.20 In October 2016, Navy advised Mr A that he had been discharged from Naval Reserves with effect 1 September 2016. This meant that as at 2 September 2016, Mr A became eligible for the SRDP and MRCAETS payments (although he remained ineligible for the period before 1 September).

3.21 DVA's failure to cross check Mr A's status as a current or former serving member resulted in the incorrect payment of an entitlement. This included both human error and system deficiencies relating to checking of relevant information.

3.22 Our Office is also of the view that there was unreasonable delay in the processing of Mr A's SRDP eligibility, which took 12 months to finalise, and then was granted in error.

3.23 The incorrect decision to grant the SRDP, and the educational payments, resulted in harsh outcomes for Mr A's dependants. They had commenced higher education in reliance on the DVA decision to grant the educational supplement, which was a reasonable course of action. When this was cancelled, they were left with no financial means of continuing to undertake this education.

The incorrect offsetting of Mr A's entitlements

3.24 In July 2016, as a result of our Office raising the issue of the incorrect offsetting of Mr A's MRCA entitlements, DVA advised that it would be conducting an internal review of the May 2015 overpayment decision.

3.24.1 In September 2016, DVA advised Mr A that his over \$50,000 debt decision was found to be incorrect.

3.24.2 Further, DVA determined Mr A was in fact owed over \$500,000 in back payments for the incorrect offsetting of his MRCA payments. This was because DVA had been reducing his MRCA payments by the amount of his lump sums since June 2007, which should not have occurred while Mr A was still a Naval reservist.

3.24.3 DVA also advised this new lump sum payment placed Mr A into the highest tax bracket during the 2016–17 financial year, leading to a tax liability of over \$200,000.

3.25 The errors that led to this significant underpayment are those already outlined above, but fundamentally came down to DVA being unaware of Mr A's status as a current Reservist, which led to the incorrect offsetting of earlier lump sum payments when it should not have done so. These errors were compounded by a failure by DVA to provide the basis for their calculations, which would have given Mr A a better opportunity to identify the errors, and significant delay in reviewing his case when he did raise concerns about offsetting.

A further debt recovery in 2017 in relation to the overpayment of incapacity payments under MRCA

3.26 Mr A understood the significant payment, of more than \$500,000, that he received in 2016 brought an end to this matter. However, DVA commenced further debt recovery action in 2017.

3.26.1 In May 2017, DVA advised Mr A's dependants that their MRCAETS would be reinstated, but they had both accrued a debt of over \$1,000 each due to the incorrect granting of SRDP while Mr A was still a serving member and before his discharge.

3.26.2 Later in May 2017, DVA advised Mr A that it had re-assessed his MRCA Incapacity Payment based on his recent discharge and a debt of over \$28,000 had been raised. However, DVA agreed to waive the taxation component of over \$11,000, leaving him a debt of over \$17,000, which remains outstanding to this day.

3.27 The two new debts raised may have been technically correct. However, such action must be considered in light of Mr A's history with DVA, and what he believed to be a substantial resolution the previous year through the lump sum payment of over \$500,000. In this context, our Office is of the view that seeking to claim back further overpayments, again not caused by any error on the part of Mr A or his dependants, was unduly harsh and unreasonable in the circumstances.

3.28 While the Office notes that DVA undertook to waive the taxation component of the debt, the impact of the raising of the remaining debt still had a significant impact on Mr A who was of the belief that his matters with DVA had been resolved.

Recommendations

3.29 A case involving all of the above errors, with the resulting impact on the individual, is rare. However, the individual errors are not isolated and our Office is aware of other decisions within DVA being affected by similar errors, both from the complaints we received and from our discussions with stakeholders.

3.30 It is not possible to remove all human error from administrative decision making processes. However, it is our view that some adjustments to processes and procedures will reduce the risk of such errors arising and, where they do, provide greater opportunity for these to be identified and rectified at a much earlier stage.

3.31 Accordingly, our Office makes four recommendations for systemic change within DVA. These are focussed on quality assurance processes, data checking and providing greater transparency for the basis for decisions. We also recommend that DVA apply the lessons learnt from this matter, particularly with respect to offsetting payments, to determine if other cases are affected by similar errors.

Recommendation 1

3.32 The Ombudsman recommends that DVA ensure that appropriate quality assurance processes are implemented in the following areas:

- the determination of Defence member serving status when applying offsetting decisions
- the determination of CSC payments affecting DVA entitlements
- the determination of overpayments and the commencement of debt recovery action.

Recommendation 2

3.33 The Ombudsman recommends that DVA continue to work with Defence and CSC on the enhancement of data exchange regarding Defence member serving status and linked superannuation payments.

Recommendation 3

3.34 The Ombudsman recommends that DVA consider the development of a simplified template decision record for offsetting and overpayment decisions to assist affected veterans to identify the determining factors in DVA decisions, particularly those involving:

- CSC and other compensation payments

- determination of the Defence member serving status
- any paygrades, loadings and other employment related determinations affecting rate of payment
- any other payments or liabilities as appropriate, and information about the calculations applied.

Recommendation 4

3.35 The Ombudsman recommends that DVA, if it has not already taken this step, identify all cases that may have been affected by the same misapplication of offsetting legislation and policy as occurred with Mr A's MRCA payments, with particular focus on those members transitioning from permanent service to reserves, and conduct a review of those cases. DVA may also wish to consider alerting veterans to this issue through its usual public notification processes.

Taxation Issues

3.36 As part of our investigation, we identified two taxation issues impacting Mr A, both of which led to financial disadvantage.

3.37 Our Office does not have the jurisdiction to investigate taxation related complaints so we have been working with the Inspector-General of Taxation (IGT) on these matters. However, we make the following observations on these two issues.

3.38 The first issue arises where an agency errs by *overpaying* a person over several years, and then raises a debt to recover these overpayments. In these circumstances, although the person paid tax on the original payments, the agency seeks to recover the gross overpayment in full. This leads to financial disadvantage, as the person is required to pay back the higher *gross* amount, having only received the lower *net* sum. This essentially results in the person having paid tax on a sum of money they technically never received.

3.39 The second issue arises where an agency errs by *underpaying* a person over several years, and then seeks to rectify this by making a lump sum payment. In these circumstances, the lump sum paid in a single financial year generally attracts a higher rate of taxation than if it had been paid in smaller, regular amounts to which the person was properly entitled.

- *Taxation implications of overpayment debt recovery action*

3.40 Over the last three years, we have received a number of complaints relating to the tax implications of a debt recovery action. The Australian Taxation Office (ATO) policy requires full repayment of the gross amount on debts owed to the Commonwealth, with individuals then encouraged to seek a refund of the tax paid from the ATO directly. However, for individuals amending their income tax and seeking a refund following the repayment of a debt, the time limit is generally two years (or up to four years where a special ruling is applied for). Given that agencies often do not discover overpayments for many years, as is the case in this matter, the opportunity to seek a tax adjustment is limited and problematic.

3.41 We referred Mr A's case, along with seven other cases relating to the issue of the recovery of gross overpayments where tax had been paid, to the IGT. The IGT has concluded their investigations into all cases, determining that the relevant taxation policy was correctly applied, with the result the individuals concerned have paid tax on a sum of money they technically never received.

3.42 It is our view that the current application of taxation law and policy to this scenario results in harsh impacts to individuals, who are left out of pocket, often to a significant degree, as a result not of their own doing, but an agency error.

3.43 This policy issue is significant and warrants further consideration. The Office intends to formally bring this issue to the attention of the Secretary to the Treasury and the IGT for their further consideration.

3.44 In the interim, we note DVA waived the taxation component of the most recent overpayment debt raised against Mr A. It is our view that this approach should be followed as a matter of course in all cases of overpayment resulting from an error on the part of the agency, rather than the individual affected.

Recommendation 5

3.45 We also recommend that DVA amend its current policy on the recovery of overpayments to waive any taxation component of the debt.

- *Taxation implications of lump sums to rectify underpayments*

3.46 Mr A's case also involved taxation implications for the lump sum paid to address previous underpayments. We determined that he paid over \$200,000 in tax out of the lump sum payment of over \$500,000. Mr A's assessed income for the 2017–18 financial year resulted in him being taxed at the highest marginal rate. He also paid a Temporary Budget Repair Levy of over \$10,000 (2 per cent on that part of a person's taxable income which exceeds \$180,000). While we cannot exactly determine Mr A's taxation liability, it is fair to estimate that, as a recipient of veterans' payments, had he been paid the correct entitlements in relatively small instalments over many years, his taxable income would have led to him paying significantly less tax in those years.

3.47 In April 2018, the IGT advised our Office that it referred Mr A's matter to a subject matter expert within the ATO which led to the taxation component subsequently being reduced under the ATO's Lump Sum in Arrears Taxation Offset Policy. However, the IGT advised that this policy cannot be applied to the *Tax Laws Amendment (Temporary Budget Repair Levy) Act 2014*, and as such Mr A was unable to have this levy refunded by the ATO.

3.48 Accordingly, the subsequent taxation assessment of the lump sum has left Mr A financially worse off, due to the non-refundable Temporary Budget Repair Levy, than if the payments had been correctly applied in the first instance. This highlights the importance of service delivery agencies undertaking robust quality assurance processes to limit the risk of errors in the calculation and payment of benefits or entitlements.

Personal impact on Mr A

3.49 There have been many serious flaws associated with the handling of Mr A's case. While each isolated event may appear to be limited, the sustained and continued errors and resulting actions had a profound negative impact on Mr A's financial, physical, psychological and emotional state. This has been escalating since his dealings began with DVA in late 2007.

3.50 During the two year period our Office has investigated this matter, staff members have noted concerns regarding Mr A's welfare on multiple occasions. The constant threat of debt recovery, changes to his and his family's entitlements, fear of repercussions and uncertainty about his future dealings with DVA have resulted in a significant negative shift to Mr A's personal confidence and wellbeing. He advised that in the last two years he has experienced suicidal ideations on multiple occasions, including an episode which led to his detention by Victorian Police under mental health provisions.

3.51 The financial effects continue to impact Mr A. He believed this chapter in his life had come to an end on being notified of the significant lump sum payment in 2016, only to then receive notice of a new debt raised in 2017, of which over \$17,000 remains outstanding.

3.52 Further, he was still attempting to remedy his taxation situation resulting from the earlier lump sum payment until April 2018. This difficulty was compounded by DVA initially sending him a Taxation Payment Summary containing incorrect data.

3.53 Mr A's extended dealings with DVA have also incurred significant indirect costs and losses. These include accountancy costs, lost interest opportunities and costs associated with travel, communication and record keeping in trying to resolve his matters. Further, he has told us the experience has had a harmful effect on his physical and mental health, his personal relationships and his lifestyle.

3.54 Perhaps the most negative impact on Mr A has been the loss of his time to enjoy his leisure activities. His vigilance in monitoring his DVA interactions and deciphering the events of the last 10 years has led to the steady decrease in Mr A's ability to undertake normal life activities. He has stated that his anger and fixation on his dealings with DVA contributed to the breakdown in personal relationships.

3.55 Mr A feels that he has never been taken seriously by DVA and he is yet to receive an apology for the many mistakes. He distrusts the regular recalculation decisions in relation to his incapacity payments and feels anxious every time he is contacted by DVA. While he advised our Office that a forensic audit is the only way to provide him assurance, he acknowledges that it would result in further uncertainty and distress. He now seeks closure and confirmation that his 'nightmare' is over.

3.56 In light of the extended history of this matter, and to acknowledge its errors, we are of the view that DVA should waive the existing outstanding debt. It should also undertake not to raise any more debts in relation to Mr A unless it is satisfied they have arisen as a result of an error on his part, rather than a miscalculation or other error by DVA.

3.57 DVA should apologise to Mr A for the distress it has caused. It should also consider whether, having regard to precedent, it would be appropriate to make financial restitution to Mr A for any loss he has suffered.

Recommendation 6

3.58 The Ombudsman recommends that DVA:

3.58.1 apologise to Mr A

3.58.2 waive his current debt in the amount of over \$17,000

3.58.3 give an undertaking not to raise any further overpayment debts, unless they arise from an error on the part of Mr A

3.58.4 if DVA forms the opinion that Mr A has suffered loss, it take steps, informed by precedent, to offer appropriate financial restitution.

GLOSSARY OF TERMS

Commutation / Lump Sum Commutation

Commutation refers to a lump sum payment of part of a person's future retirement pay. If a person retires and is entitled to retirement pay, they can elect to commute (i.e., exchange) part of their retirement pay for a lump sum amount.

Commuted Portion

Commuted portion refers to a percentage of their total entitlement that a person elected to receive as a lump sum payment as part of their retirement pay.

Incapacity Payment

Incapacity payments are payments issued by DVA for economic loss if a person can't work or has a reduced capacity to work because of an injury or disease accepted as service-related under the *Military Rehabilitation and Compensation Act 2004* (MRCA). Incapacity payments can be made to relevant Defence members who are incapacitated for service or work as a result of an injury or disease for which liability has been accepted.

These payments are generally taxable as they are income-related payments. In some circumstances payments may be exempt from taxation when the payments they are replacing were also exempt from taxation. Incapacity payments are also *offset*—that is, reduced—by the employer-funded portion of any Commonwealth superannuation a person may be receiving.

Military Rehabilitation and Compensation Act 2004 (MRCA)

The MRCA provides rehabilitation and compensation coverage for members and former members (subject to certain conditions) of the Australian Defence Force with service on or after 1 July 2004.

Military Rehabilitation and Compensation Act Education and Training Scheme (MRCAETS)

The Military Rehabilitation and Compensation Act Education and Training Scheme (MRCAETS) established under the MRCA is an assistance scheme which provides financial assistance, support services, guidance and counselling for eligible dependants to help them with full-time education or career training.

Notice of Assessment

A notice of assessment, issued by the Australian Taxation Office, is an itemised account of the amount of tax a person owes on their taxable income. It also contains other details that are not part of the assessment, such as the amount of credit a person may have for tax already paid during the income year.

Offsetting

Offsetting, in most cases, is the process of reducing one compensation payment in recognition of another compensation payment for the same incapacity or death. The principle behind compensation offsetting is that a person should not be compensated twice for the same incapacity just because they have additional eligibility from another source.

If a veteran, who is in receipt of a veterans' entitlement, receives any award of compensation or damages from another source for the same incapacity, such as another statutory compensation or common law damages, there must be a corresponding reduction (or *offset*) applied to the amount of disability pension to preclude double compensation.

Remuneration Loading

Normal earnings are calculated by DVA on the basis of the relevant Australian Defence Force (Defence) rate of pay and allowances and do not take into account additional salary benefits, such as subsidised housing and medical treatment and other member entitlements. The remuneration loading is an additional payment used to compensate for the additional benefits of military service that discharged members forgo.

Special Rate Disability Pension (SRDP)

The SRDP provides an alternative form of periodic compensation (instead of incapacity payments) for people whose capacity for work has been severely restricted because of conditions due to military service on or after 1 July 2004. SRDP is not automatically granted. If a person is assessed as being eligible for the SRDP, they are offered the choice between commencing SRDP or continuing to receive incapacity payments.

Standby Reserves

Standby Reserves are personnel who maintain their affiliation with the Australian Defence Force without being in the Active Reserves but retain surge capacity for the regular forces when necessary.

Members of the permanent Navy and members of the Active Reserve who joined after 1 July 2003 are (subject to certain conditions) required to transfer to the Standby Reserve at the end of their period of service.

The Veterans' Entitlements Act 1986 (VEA)

The *Veterans' Entitlements Act 1986* (VEA) covers service in wartime and certain operational deployments, as well as certain peacetime service between 7 December 1972 and 30 June 2004. For peacetime service eligibility, a member who had not completed a qualifying period of three years' service prior to 7 April 1994 is not covered under the VEA, unless they were medically discharged. British nuclear test defence service during the 1950's and 1960's in Australia is also covered when the relevant criteria are met.

Veterans' Review Board (VRB)

The Veterans' Review Board (VRB) is an independent tribunal that reviews decisions made by DVA officers which has been given power by the Repatriation Commission under the VEA to decide claims for pension and applications for increase in pension. These officers are called 'delegates' of the Repatriation Commission.

The VRB's role was extended in 2004 to review determinations under the MRCA. It is concerned with rehabilitation and compensation for members of Defence and their families for injury, disease or death related to service rendered on or after 1 July 2004.

In conducting a review, the VRB is not bound by the rules of evidence or any of the findings within the decision it is reviewing.

ATTACHMENT A: LETTER OF RESPONSE FROM DVA



Australian Government
Department of Veterans' Affairs
OFFICE OF THE SECRETARY

Ref: EC18-000581
Your ref: A1592881

Michael Manthorpe PSM
Commonwealth Ombudsman
GPO Box 442
CANBERRA ACT 2601

Dear Mr Manthorpe *Michael,*

Thank you for your letter of 3 May 2018 providing the opportunity to respond to your Section 15 report concerning Mr [REDACTED] and the administration of his matters by the Department of Veterans' Affairs (DVA).

I would firstly like to extend a personal apology to Mr [REDACTED] for the mishandling of his case and express my deep disappointment for the long term stress and hardship that this situation has caused. Sadly, the department did not take into consideration Mr [REDACTED]'s circumstances or personal hardships when responding to his claims.

There were a number of procedural shortfalls and human errors that can be characterised generally, as gaps in the quality of communication between the department and Mr [REDACTED]. Unfortunately poor data exchange between DVA, the Department of Defence (DoD), Commonwealth Superannuation Corporation (CSC) and Mr [REDACTED] compounded the issues.

What I can assure you is that I am focused on making sure errors of this magnitude do not continue to happen. This is why we have commenced a significant program of transformation within the department. This program is a 5 year journey to overhaul the way DVA manages and interacts with veterans and their families and to prioritise their wellbeing.

My understanding is that Mr [REDACTED]'s outstanding matters were finalised on [REDACTED] 2018 when he received an offer for Special Rate Disability Pension (SRDP) under the *Military Rehabilitation and Compensation Act 2004* (MRCA) and has 12 months to consider the offer. If Mr [REDACTED] is unhappy with this offer, has any further concerns, or wishes to discuss any further claims, injuries or illnesses related to his service, I understand [REDACTED] is his point of contact from now on and can be contacted directly on [REDACTED]

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I have addressed your recommendations at Attachment A. While these respond to issues specific to Mr [REDACTED]'s matters, your feedback and recommendations will be utilised and prioritised in shaping our transformation program going forward.

Yours sincerely



Liz Cosson AM CSC
Secretary

24 June 2018

Recommendation 1 – Appropriate Quality Assurance

DVA is reviewing its quality assurance processes. That said, I can confirm that we do undertake Quality Assurance (QA) checks of Incapacity Payments when a decision has been made. Cases are selected randomly for checking to ensure that the decision is correct.

When reviewing a case as part of the QA process, DVA will assume that the data provided by CSC is correct as DVA does not have the ability to access and check CSC data within their system. DVA therefore relies on CSC providing the correct information, and only checks that the delegate has applied the legislation correctly in regard to the payments.

The status of ADF service is also checked in the QA process. The functionality to check ADF status is built into a new claims processing system, R&C ISH. It is now easier for incapacity delegates to request up to date service details from DoD prior to determining a claim and throughout the ongoing claims process for clients with certain ADF service.

If there is an overpayment on a case selected for QA, the overpayment process, including debt recovery, and waiver or writeoff will be reviewed.

Mr [REDACTED]'s case was not selected for QA review otherwise the errors may have been discovered earlier.

DVA has been introducing the use of automated processes to assist in making decisions. Our current trial of the online service portal 'MyService' will have the capability to process and accept claims online in a matter of minutes, for certain commonly accepted conditions.

This is making the process of submitting a claim far simpler and faster for veterans. In a number of cases, MyService replaces a waiting period of up to 100 days with an immediate decision. It also reduces the current 30 plus question paper form with as few as 3 online questions. These are the types of advancements DVA are striving for to encourage consistent and quick decision making. It also reduces the risk of administrative error.

Recommendation 2 – Data Exchange

There is a large body of work currently underway in the department to improve understanding the unique nature of military service. I am able to report that DVA has and continues to undertake significant improvement to service delivery for veterans and families in engaging with the DoD, the CSC, the Australian Tax Office (ATO) and Child Support Agency (CSA) to provide timely quality data exchange for the benefit of our shared clients.

CSC currently advise DVA of veterans who are subject to a superannuation pension reclassification, to allow DVA to make adjustments to the rate of Incapacity Payments if necessary.

The Information Management Working Group (IMWG) brings together DVA, DoD and the CSC to discuss how the departments information management access and exchange, to better facilitate quicker outcomes for shared clients.

There are now arrangements in place where The DoD is regularly providing details of ADF personnel to DVA.

Under this agreement, known as the Early Engagement Model, members who joined the ADF from 1 January 2016, and those who separated from the ADF after 27 July 2016 are now being registered with DVA. This includes more than 14,000 current and former ADF members who have not made a claim or otherwise approached DVA. This registration process loads the contact details for members, dates for enlistment/appointment and separation, service arm and unit, as well as basic biographical information.

This information automatically satisfies DVA's proof of identity requirements, reducing the time it takes to process future claims. The data also allows DVA to connect with ADF members in a proactive way at appropriate times to ensure they are aware of the care, support and services available to them now and into the future.

DVA is currently using this data to contact all new recruits, introducing them to the benefits available. This data is also being used to support the provision of White Cards for free mental health treatment to transitioning ADF members. The data will also be used to recognise Operational Service which results in DVA entitlements.

Under the EEM, the information shared with DVA will be updated at certain points during a persons' ADF career providing the opportunity for DVA to proactively engage with these members as needs arise.

The Departments are now working together on facilitating the release of information when an ADF member becomes seriously injured or ill as a result of their service. Collecting this information close to the time of the event; and having this available in advance of a claim being made, further reduces the time taken to process claims and facilitates a seamless transition between Defence and DVA entitlements.

Recommendation 3 – Template Decision Record

DVA has made amendments to the Incapacity decision letter to provide clear information to clients about the calculation of their payments. This provides clients with the opportunity to contact DVA if information is incorrect.

Recommendation 4 – Identification of other affected clients

DVA is looking to identify any other clients who may be affected by conducting an annual review of payments. Recent improvements to this process include a requirement for delegates to obtain current service details for clients receiving payments under the MRCA. DVA has amended the internal Incapacity General Review Checklist to remind delegates of the importance of checking service details due to the potential for overpayment. Delegates are also asked to send a request to CSC for information regarding superannuation payments for clients 55 years of age and over. DVA also asks clients to complete a Review form to advise of any change in circumstances.

Recommendation 5 – Overpayment recovery

DVA is expanding debt waiver policy under the MRCA and DRCA. This will allow waiver of the amount of the debt that is equivalent to the overpaid tax amount which cannot be recovered from the ATO. Typically the ATO can only retrospectively review tax liability up to a period of four years. The waiver provisions would allow the tax paid on overpayments from periods more than four years prior to be waived.

Recommendation 6 – Personal Impact on Mr [REDACTED]

I am pleased to advise that DVA has decided to waive Mr [REDACTED]'s overpayment in full. DVA wrote to Mr [REDACTED] on [REDACTED] June 2018 informing him that the debt of \$ [REDACTED] has been waived and is no longer recoverable. The letter included an apology for undue stress caused by DVA. DVA had previously apologised to Mr [REDACTED] both verbally and in writing.

An undertaking not to raise future debts against Mr [REDACTED] is not possible. However, DVA undertakes that all options, including debt waiver, will be considered if a debt is raised in future. A debt may be waived where it is considered unreasonable to pursue recovery, which would be likely in Mr [REDACTED]'s case.

I understand that Mr [REDACTED] is aware of the option to seek Compensation for Detriment for Defective Administration as DVA has previously provided him information on this option. If Mr [REDACTED] would like to explore this avenue, please make contact with [REDACTED] directly on [REDACTED] and he will assist to progress this.