

In contrast, the Court in the present case adopted the principle used in Jebb v Repatriation Commission (1988) 8 AAR 285, that the VRB is required to have regard to the evidence as to disability as it may be at the date of consideration. This principle has been taken into account in recent legislative amendments to veterans' legislation (see Administrative Law Watch).

The Administrative Appeals Tribunal had considered a further VRB decision denying that it had jurisdiction to review a particular Commission decision because of the expiry of the time limit as specified. Deputy President Bannon had taken the view that a decision denying jurisdiction was not a 'decision by the Board' to affirm a decision of the Commission as provided by section 175(1) of the Veterans' Entitlements Act 1986, and that therefore the Tribunal had no jurisdiction. Justice Wilcox found that, if the effect of what the VRB did was to affirm the Commission's decision, then it was clear that the AAT itself did have jurisdiction in the matter. His Honour concluded:

'It would be a very odd situation if the position were as perceived by Mr Bannon; that is, if the (VRB) found that it had no jurisdiction, and the AAT - which is set up by statute to review on their merits decisions of the Board - was then precluded from considering for itself whether that Board in fact had jurisdiction and, if so, what decision it should have made...I think that the true position is that the VRB is always in the position of having to decide whether to affirm, to vary or to set aside the decision of the Commission; and that, whatever decision it makes, that decision is subject to review by the AAT.'

The Court set aside the decisions of the Boards and remitted the application to the Veterans' Review Board.

Commonwealth Ombudsman

Annual Report

The 1987-88 Annual Report of the Commonwealth Ombudsman and Defence Force Ombudsman was tabled in the Parliament on 20 October, 1988.

On 18 November the Ombudsman and senior officers appeared before the Senate Standing Committee on Legal and Constitutional Affairs as part of the Committee's examination of the Ombudsman's annual report.

One of the most pressing matters of concern raised by the Ombudsman was the continuation of cuts in resources resulting in reductions in both investigating and support staff. The Ombudsman warned that these reductions would probably lead to an increase in the time taken to deal with complaints generally and to extensive delays for particularly difficult cases. In addition, the conduct of hearings in relation to complaints may have to be abandoned, with implications for the resolution of

complaints against the Federal Police. It is also likely that the Ombudsman's capacity to examine matters of departmental practice and policy, or the appropriateness of the law on a particular question would be markedly diminished.

Fourth International Ombudsman Conference

The Fourth International Ombudsman Conference was hosted by the Commonwealth Ombudsman's Office from 23 - 27 October, 1988. It was preceded by meetings of the International Ombudsman Institute and the International Ombudsman Consultative Committee. 165 participants from 36 countries attended, with 69 Ombudsmen's jurisdictions represented.

The Conference highlighted the similarity in problems and issues across jurisdictions, with the major exception to this pattern being provided by the developing countries. Ombudsmen in Africa in particular expressed the view that the Conference concentrated on the Ombudsmen from a Eurocentric viewpoint which did not fully represent the full range of Ombudsmen's concerns.

The primary themes of the Conference were identified as:

- (i) comparison with other institutions;
- (ii) identification of the Ombudsmen's tasks;
- (iii) methods of achieving Ombudsmen's recommendations;
- (iv) the Ombudsman and politics.

Perhaps the most significant outcome of the Conference from the Commonwealth Ombudsman's viewpoint was a realisation of the relative lack of interest in the Ombudsman shown by Parliament here compared with other countries, and the gross under-resourcing of the Commonwealth Ombudsman's office, again in relative terms. The Conference showed that other Ombudsmen are able to investigate matters in greater depth than the Commonwealth Ombudsman. For instance, the use of an oral enquiry is commonplace in other jurisdictions, whereas only in exceptional cases is such an enquiry conducted by the Commonwealth Ombudsman.

A major issue confronting all Ombudsmen is the extent to which the office's resources should be devoted to individual complaint resolution on the one hand and systems improvement on the other. The Conference's viewpoint was that resources have to be devoted primarily to resolving individual complaints, but an office is not fulfilling its role if it is not examining the systems that are giving rise to complaints. Most Ombudsmen felt that there was a greater role for them to play in the general improvement of public administration.

With regard to the realisation of Ombudsman's recommendations, the Commonwealth Ombudsman did not seem to be in any different position to his overseas counterparts. While some participants suggested greater authority be given to Ombudsman's recommendations, the overall impression from the Conference was that there should be no general departure from the classical Ombudsman's model of recommendation and report only. There was agreement that Ombudsmen should not be given determinative powers.

Self-Government: A.C.T. Ombudsman

Before self-government comes into force in the ACT, an Ombudsman Ordinance is to establish the position of an ACT Ombudsman. Until a specific appointment is made to that position, the Commonwealth Ombudsman will be authorised under the ACT Self-Government (Consequential Provisions) Act 1988 to perform that function. This arrangement will require certain consequential amendments to the Ombudsman Act.

Australia Post: infringement of complainant's copyright

The Ombudsman received a complaint that Australia Post had incorporated an original article in its official publication on the history of the Moruya Post Office. The complainant was seeking an acknowledgement of the authorship of the work and payment for its use.

Examination of Australia Post's files showed that the authority's legal adviser had given an opinion agreeing that the complainant's copyright had probably been infringed. This advice also expressed the opinion that this was a case in which the Ombudsman would not become involved, as it was open to the complainant to pursue a claim through the Court. It was suggested that, if the complainant was faced with pursuing a lengthy claim through the Courts, she might become discouraged and not continue the claim. The advice recommended denial of the complainant's case despite the view that if the matter did reach court Australia Post would probably lose and possibly have costs awarded against it.

After investigation, the Ombudsman informed Australia Post of the extent of his discretion under s.6(3) of the Ombudsman Act, which states that the Ombudsman may decide not to investigate a complaint where the matter could alternatively be reviewed by a court or other tribunal. Given that he had decided to investigate in this case, he suggested that Australia Post reconsider its position in light of the legal advice provided by its staff.

Household Expenditure Survey

The Ombudsman received a request in relation to the 1988 Household Expenditure Survey (HES) being conducted by the Australian Bureau of Statistics (ABS). The primary issues for investigation were whether the HES is lawful in the sense that its subject matter is authorised by relevant legislation, whether persons could be compelled to answer the survey and whether, if compliance is compulsory, the survey is unreasonably intrusive and burdensome.

Following consultation with the ABS, the Ombudsman formed the tentative conclusions that:

- . there was no doubt that the subject matter of the survey was lawful;
- . there were well-founded legal arguments that the 1988 HES was a new proposal which should have been tabled in the Parliament;

- . significant consequences would follow if there had been a failure to table the HES;
- . given the balance of private and public interests, the HES was not unreasonable or oppressive, but there was perhaps a need to compensate for their time those persons compelled to comply;
- . it was desirable to clarify the relevant legislation, perhaps including amalgamation of the ABS and Census and Statistics Acts; and
- . the 1988 HES should, in any event, be tabled forthwith.

On 29 September 1988 the ABS tabled a proposal for conducting the balance of the 1988 HES along with various other proposals. It has agreed to examine the questions of rationalizing and clarifying the legislation and of compensating persons compelled to participate.

Senator Ray informed the Senate on 5 December 1988 that a response had been made to the Commonwealth Ombudsman on this matter, and that 'an opinion from the Attorney-General's Department has been provided to the Ombudsman in relation to the household expenditure survey.' On the same date, Senator Sheil gave notice of motion for a private member's Bill to 'amend the Australian Bureau of Statistics Act 1975 to provide for parliamentary supervision of the collection of information for statistical purposes.'

Social Security: compensation components for past and future losses

The last edition of Admin Review (18:88) referred to recent amendments to the Social Security Act, with regard to the effect of compensation and damages payments on entitlement for benefits. The Ombudsman has now advised Admin Review of a correction to his earlier information, namely that the Social Security Act contains a discretionary provision (Section 156) to cover special circumstances such as hardship with regard to these matters; and the Department of Social Security has completed an extensive publicity campaign to bring the impact of the amendments to the Act to the attention of the legal profession.

The Department of Social Security has also provided advice that, contrary to the Ombudsman's previous advice, it was as a result of a legislative amendment in July 1986 that components of a lump sum payment attributable to economic loss were no longer required to be separated into past and future loss.

Social Security payments to recipients of lump sum compensation payments

Recent amendments to section 152 of the Social Security Act 1947 mean that, where a person receives a lump sum payment by way of damages compensation for personal injuries, 50 per cent of the lump sum is to be treated for the purposes of Part XVII of the Act as being the 'compensation part of a lump sum payment by way of compensation' (section 152(2)(c)).

However, in section 152(2)(a), a reference to 'a payment by way of compensation' is inter alia a reference to 'payment that is,

in whole or in part, in respect of an incapacity for work'. Under Victorian legislation persons are precluded from recovering damages for 'pecuniary loss' and, in effect, are limited to a claim for damages for pain and suffering and loss of amenities of life only.

The Ombudsman has suggested to the Department of Social Security that any lump sum paid by way of settlement of a claim of damages under the Victorian legislation is not 'a payment that is, in whole or in part, in respect of an incapacity for work'. Hence, 50 per cent of any lump sum should not be treated as 'the compensation part of a lump sum payment of compensation' for the purposes of Part XVII of the Act.

Support for this view appears from advice provided by the Attorney-General's Department in another case investigated by the Ombudsman to the effect that a payment of damages at common law for loss of amenities of life does not duplicate, in full or in part, payments made under section 3(4) and (11) of the Compensation (Commonwealth Government Employees) Act 1971 since the head of common law damages represents non-economic loss.

As a result of the Ombudsman's intervention, the Department of Social Security received legal advice from the Attorney-General's Department that damages awarded under section 135 of the Victorian Accident Compensation Act 1985 are not covered by Part XVII of the Social Security Act 1947.

Australian Taxation Office: Audits and the self-assessment tax system

The Taxation Office is to restructure its decision-making process so that, where a taxpayer has been subjected to an audit and subsequently lodges an objection to the assessment, the objection will not be dealt with by the same officer who conducted the audit. The Ombudsman had expressed his concern that this was an improper practice after receiving complaints from taxpayers following the introduction of the self-assessment system for income tax and the corresponding increase in audits.

Immigration and the Sex Discrimination Act

The Ombudsman has referred to the Human Rights and Equal Opportunity Commission for its consideration and advice the general issue whether the migration program and its implementation are covered by the Sex Discrimination Act 1984.

This followed a complaint to the Ombudsman that the Department of Immigration, Local Government and Ethnic Affairs had refused a woman's application because she had insufficient points. The complainant and the Immigration Review Panel argued that she should have been awarded more 'employment' points because she had interrupted her career to raise her children and that to fail to award extra points for continuous employment amounted to sexual discrimination. The Department rejected this argument on the grounds that the migration program was not covered by the Sex Discrimination Act.

Devolution of act of grace powers to agencies

Previous issues of Admin Review (17:63) have referred to arrangements for a limited trial devolution of the Minister of Finance's act of grace powers to agencies. The Minister has now signed the necessary instrument delegating his powers under the Audit Act. The powers are to be exercised in accordance with working arrangements which agencies will be expected to observe. These include a requirement that draft recommendations by the Ombudsman are to be referred to the Department of Finance for comment before being forwarded to the agency concerned. The trial period is to be for two years.

A D M I N I S T R A T I V E L A W W A T C H

New Social Security appeals system

The Social Security (Review of Decisions) Act 1988 came into force on 1 November. As reported in Admin Review (18:89), the Act gives effect to the Council's Report No.21 by providing a legislative base and determinative powers to the Social Security Appeals Tribunal. The Act also formally establishes the position of Department of Social Security review officers.

Veterans' Entitlements Act Monitoring Committee recommendations

The Veterans' Affairs Legislation Amendment Bill 1988 has been agreed to by the Senate (13 December 1988). The Bill gives effect to certain recommendations of the Veterans' Entitlements Act Monitoring Committee by providing for:

- the introduction of an extreme disablement adjustment;
- a reduction, to 70% of the general rate, in the degree of incapacity required for entitlement for the intermediate or special rate pension;
- an amendment to the 'application day' provisions to enable a veteran to qualify where he or she meets all the criteria at a date between the date of lodgment of the claim or application and the date of the decision of the Commission or any review body.

Privacy legislation

The Privacy Act 1988 came into operation on 1 January 1989. The Act establishes a Privacy Commissioner and provides privacy protection for individuals in relation to records of personal information held by Commonwealth agencies and in relation to tax file numbers information.

The Act imposes new obligations on Commonwealth agencies when collecting and handling records of personal information. The legislation requires agencies to comply with statutory rules (the Information Privacy Principles) for the collection, storage, access to, correction of, use and disclosure of records of personal information. The principles dealing with access and correction of agencies' records are subject to other