

Submission by the
Commonwealth Ombudsman

**Accuracy of information provided to
Defence Force Retirement and Death
Benefits (DFRDB) members**

Senate Foreign Affairs, Defence and Trade References
Committee

Submission by the Commonwealth Ombudsman, Michael Manthorpe PSM

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Introduction and Summary

The Office of the Commonwealth Ombudsman (the Office) welcomes the opportunity to make this submission to the Senate's Foreign Affairs, Defence and Trade References Committee (the Committee) inquiry into the accuracy of information provided to Defence Force Retirement and Death Benefits (DFRDB) members (the inquiry).

The inquiry's terms of reference refer specifically to the findings made in our report titled *Investigation into the administration of the Defence Force Retirement and Death Benefits (DFRDB) scheme*, which was published in December 2019 following an own motion investigation by this Office. A copy of this report is **Attachment A**.

Our investigation considered issues relevant to the inquiry's terms of reference and focused on the accuracy of information provided to DFRDB members by scheme administrators and relevant departments.

We stand by the conclusions and recommendations in our report, which largely speaks for itself. To assist the Committee, in this submission we outline the key findings of our investigation and provide important contextual information about our Office's approach and reactions to our report.

Our investigation concluded that Defence provided incorrect advice to members about the operation of the DFRDB scheme, which led some DFRDB members to believe, incorrectly, that their commuted pensions would increase once they reached their life expectancy factor age. This amounted to defective administration. Our report acknowledged, and this submission recognises, the significant feelings of disappointment, frustration and anger experienced by members due to falsely raised expectations.

At the same time, our investigation concluded that the decision to commute, of itself, is not likely to have caused financial loss to DFRDB members relative to the other option available at law, and therefore we did not recommend compensation. The reasons for our conclusions are summarised in this submission and discussed in detail in our report including by reference to independent modelling by the Australian Government Actuary and KPMG.

Our report included commentary on policy issues that DFRDB members raised with us during the course of our investigation, but which fall outside the scope of our powers of investigation. Specifically, some DFRDB members argued that more beneficial options should be applied that are not currently available under the DFRDB legislation¹. While policy issues of this kind are matters for the Government and Parliament to decide, our report included a separate section on these issues in recognition of the fact that so many DFRDB members had taken the time to raise them with us.

Background

The purpose of the Office is to:

- provide assurance that the organisations we oversight act with integrity and treat people fairly, and
- influence systemic improvement in public administration in Australia and the region.

¹ *Defence Force Retirement and Death Benefits Act 1973*

We seek to achieve our purpose through:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action, and
- providing assurance that Commonwealth, State and Territory law enforcement, integrity and regulatory agencies are complying with statutory requirements and have sound administrative practices in relation to certain covert, intrusive and coercive powers.

In addition to resolving individual complaints, the *Ombudsman Act 1976* (Ombudsman Act) provides that the Ombudsman may also investigate administrative action taken by agencies on his or her own motion. At the end of these investigations, the Ombudsman may decide to write an own motion investigation report. These reports must include reasons for the Ombudsman's opinions or findings specified in the report and may include recommendations for remedial action or for improvements the Ombudsman thinks fit to make. The Ombudsman also has a discretion to publish these reports.

Response to Terms of Reference

The background to the commencement of the Ombudsman's investigation

The Office was approached by the Hon Darren Chester MP, Minister for Veterans' Affairs and Minister for Defence Personnel in April 2019 and asked if we would look into the administration of the commutation provisions contained in the DFRDB scheme.

The Ombudsman agreed to do so on the basis that there were serious allegations about how the scheme was administered. Specifically, there were allegations in relation to information provided by Defence and the Commonwealth Superannuation Corporation (CSC) about the operation of commutation (a choice to receive part of their DFRDB pension as a lump sum and access a reduced pension) under the scheme.

The main issue that was present in the media at the time was whether DFRDB members, or some of them, had been misled as to their DFRDB entitlements and were, consequently, owed compensation.

The Ombudsman commenced an investigation under the own motion powers in the Ombudsman Act into the accuracy of information provided to DFRDB members by scheme administrators and relevant departments about commutation of retirement pay.

The Ombudsman's investigation included a call for public submissions

As part of our investigation, we met with stakeholder groups with an interest in the administration of the DFRDB scheme and interviewed more than 30 people.

We also invited submissions from DFRDB members and the public to inform the investigation. The Office received 3,436 submissions. The submissions made to our Office presented a range of views in relation to the DFRDB scheme and Defence's advice. The submissions showed:

- the majority of DFRDB members who made submissions to our Office chose to commute and some of these decisions were based on a correct understanding of the scheme

- a small number of submitters understood the scheme's operation and decided not to commute
- many submitters felt they were misled to believe that the reduction to their retirement pay, resulting from commutation, was temporary and would cease when they reached their life expectancy factor age – some members felt frustration, disappointment and anger when this turned out to be incorrect
- a large proportion of submitters asserted that they relied on Defence's advice to their detriment, and were owed compensation, however, a small number of submitters told us that Defence's advice did not cause financial detriment, and some expressed that awarding compensation to the DFRDB members who chose to commute would be wrong.

Our report includes the Ombudsman's sincere thanks to each person who took the time to share their views with us during our investigation.

Actuarial modelling informed the Ombudsman's findings about the financial impact of commutation

For the purposes of informing the investigation, and in particular the likely financial effects of commutation on DFRDB members, the Office commissioned external actuarial modelling from two sources, the Australian Government Actuary (AGA) and KPMG.

The modelling provided by both the AGA and KPMG was based on real-life scenarios. The actuarial analysis showed that for most, if not all, members the commutation option was more beneficial in the long run than not commuting (which was the other legally available option).

The Ombudsman's conclusions and recommendations for Defence

Our investigation found that many members were provided incorrect information by the Defence personnel who were responsible for providing advice about the workings of the scheme. Those DFRDB members were led to believe, incorrectly, that their commuted pensions would increase once they reached their life expectancy factor age. We concluded that this was defective administration by Defence.

As a result, we recommended that the Chief of the Defence Force and the Secretary of the Department of Defence apologise to members for this historic maladministration, and they have done so. Their apology is published in the report.

The investigation considered whether the incorrect advice created a situation of 'financial detriment' for these members. Informed by the work of independent actuaries and consideration of the available options for DFRDB members under the legislation, we concluded that there was no financial detriment for DFRDB members.

For these reasons, while the investigation found that the incorrect advice Defence provided to DFRDB members amounted to defective administration, the Ombudsman stopped short of making a recommendation that compensation or reparation payment should be offered to those members who commuted their pensions.

This was because we considered it would be contrary to Parliament's original design of the scheme and the legislation. Our investigation found that the DFRDB Act is clear that when a person chooses to commute, the reduction to their pension is permanent. The legislation does not contain any provision for the pension to return to the pre-commutation amount. As stated in

the report, the Administrative Appeals Tribunal confirmed this position at law in a decision handed down in 2001².

We acknowledge members' disappointment and frustration. At the same time, missing out on a benefit to which a person is not actually entitled under the law does not necessarily mean that the person suffered financial detriment. As a matter of principle, compensation should only be paid where poor administrative practices cause actual financial loss.

In addition, recommending that those who chose to commute should receive compensation would place those who commuted at a further advantage over those who did not commute. This would be inequitable for the second group. In our view, it would have also represented an unjustified windfall for those who understood the scheme correctly and still chose to commute.

The Ombudsman's conclusions and recommendations for CSC

The investigation also found that the CSC's information in relation to commutation was correct at all times. However, we found that using clearer language may have avoided much of the inconvenience, frustration and disappointment experienced by DFRDB members. For this reason the Ombudsman recommended that the CSC update certain documents to further clarify these issues. These recommendations were accepted by CSC and implemented.

Policy issues raised during investigation

During our investigation we received many submissions that conveyed high levels of dissatisfaction about the DFRDB legislation and matters of government policy. As stated in our report, some DFRDB members also argued for more beneficial options or scenarios to be applied, which are not currently available under the *Defence Force Retirement and Death Benefits Act 1973*. Our power to investigate extends only to determining whether the law was correctly administered, not what might have been if Parliament had passed different laws.

As such, consideration of legislative or policy changes were not within the scope of the investigation. However, as the views were keenly felt and people took the time to provide these views to our Office, we included a section in our report summarising these out of scope issues raised with our Office as part of the submission process. This is included in Part 5 of our report to bring these matters to the Government's attention.

The report summarises how many members felt that the commutation divisor (formula used to calculate the reduction to a person's retirement pay) and the indexation arrangements under the DFRDB Act were unfair. The report also comments on the confusion we observed among members about how these provisions operate. The report suggests that the government publicly clarify its policy position to the DFRDB cohort. It also suggests that the government consider the impacts any policy changes will have on members who chose not to commute, or who transferred to other schemes.

Following publication of our report, the Hon Darren Chester MP issued a media statement which advised that "the Government has no plans to make changes to the DFRDB scheme"³

² Reynolds and Defence Force Retirement and Death Benefits Authority (2001) AATA 599

³ [Minister for Veterans and Defence Personnel - Media statement - Independent inquiry report into DFRDB scheme - 11 December 2019 \(medianet.com.au\)](https://www.medianet.com.au/news/minister-for-veterans-and-defence-personnel-media-statement-independent-inquiry-report-into-dfrdb-scheme-11-december-2019)

Reaction to our report

Following our report's publication, we received follow up communications from some members criticising the scope of our investigation and expressing dissatisfaction that our report did not recommend that compensation be paid. Some members requested a review of our Office's report findings and asked us to reopen the issues considered. We considered whether to review the investigation and the report and decided not to do so.

While we acknowledge the frustration and distress conveyed to our Office by many members throughout the investigation, as stated in our report, our assessment was, and still remains, that DFRDB members received what they were entitled to, even if it fell short of what they were misinformed they would receive. Further, the actuarial modelling illustrates that members were generally better off choosing the commutation option, compared to the other option that was available at law.

As stated in the report, the question of whether, as a matter of policy, an argument for compensation or policy changes have been made out is in the domain of Government and the Parliament to consider and decide.

We would be happy to discuss our report and the related issues with the Committee.