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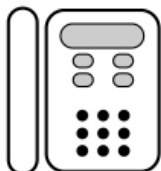
Anonymised Investigation Report

A summary of an anonymised investigation report on complaint against the Lands Department and Land Registry is at **Annex A**.



***Direct Investigation on Granting of Disability Allowance and
Processing of Appeals by Social Welfare Department***

The executive summary of the investigation report is at **Annex B**.



Enquiries

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**Office of The Ombudsman, Hong Kong
29 October 2009**

Summary of Investigation Report

Complaint against Lands Department and Land Registry

The Complaint

In 2000, the complainant discovered that without his knowledge, the title to a lot owned by him in the New Territories had been wrongly registered under the names of another four persons. He then enquired of a District Lands Office (“DLO”) under the Lands Department (“Lands D”) about the land title. However, DLO did not respond to his enquiries properly. In the same year, he also requested the Land Registry (“LR”) to rectify the error in its Land Register, but his request was rejected.

2. Four years later, through his lawyer, the complainant requested DLO to take action and asked LR to correct the records. It was not until 2007 that DLO replied to say it could not amend the records. Meanwhile, LR indicated that it did not have responsibility for such rectification.

3. The complainant, therefore, complained to this Office against Lands D and LR for failing to help him resolve the problem.

Sequence of Events

4. The complainant purchased the subject lot in 1963 and had never assigned it to anyone. However, in 1975, staff of the Counter Conveyancing Service* of a District Office under the former New Territories Administration (“NTA”) wrongly included the lot in an Assignment as Gift (“the Assignment”) and its Memorial and recorded the subject lot in the Land Register as being owned by another four persons.

5. In 2000, not having received any Notice of Rateable Value for his lot, the complainant enquired of DLO. He then discovered that the land title for the lot had been altered. He, therefore, lodged a complaint with DLO. However, DLO merely advised him to consult his lawyer if the land title was illegally possessed.

6. In 2004, the complainant’s lawyer enquired of DLO. As the matter involved land records, DLO referred the case to LR. In response, LR promptly informed the lawyer that it was in no position to amend the Land Register since the Memorial of the Assignment had been prepared by NTA.

7. Between 2004 and 2005, the complainant’s lawyer wrote to DLO four times to request for action. However, it was not until 2006 that DLO sought in-house legal advice.

8. Subsequently, DLO was advised that if the subject lot had been mistakenly included in the Assignment by NTA, Government should rectify the error. In that connection it was a matter for LR.

* Since the early 1990’s, the Counter Conveyancing Service has been taken over by Lands D.

9. Against this background DLO consulted LR in 2007. LR advised that the Land Registration Ordinance, Cap. 128, does not empower the Land Registrar to delete documentary records on land registration.

10. DLO sought in-house legal advice again. DLO was advised that in the absence of a copy of the Assignment, it could not be sure if the error appeared only on the Memorial and whether the lot had ever been wrongly assigned to others. Since Government was not a party to the Assignment, DLO could not rectify the error; the complainant would have to take legal action himself to put the matter right. DLO replied to the complainant's lawyer accordingly.

Lands D's Response

11. Lands D indicated that it would find ways to rectify the error if the complainant could prove that the lot had been wrongly included in the Assignment. In the meantime, if the complainant could contact the parties to the said Assignment and ask them to confirm in writing that they had no legal title to the lot, he might instruct his lawyer to register such confirmation with LR.

12. In 2008, DLO informed the complainant of the above suggestion. As four persons had been named on the Memorial as owners, the complainant would need to contact them all and obtain their written confirmation that they had no legal title to the subject lot.

LR's Response

13. Under the Land Registration Ordinance, LR is mainly responsible for maintaining a Land Register and is not empowered to rectify or delete any error in registration documents. LR stated that it had not received the complainant's request for rectifying the error in 2000.

14. Upon our intervention, LR carefully reviewed the complainant's case. LR considered that although the complainant could himself apply for a court order to change the records, the procedures would be cumbersome. As the error had been made by NTA, Government as a whole should be responsible for rectifying it.

15. In the absence of any legal basis or authority to amend the Assignment, LR took an unprecedented step and registered a statutory declaration as an annotation to the said error in the Memorial. In effect, the Land Register was rectified to indicate the complainant as the owner of the lot.

Our Comments

For Lands D

16. In view of the complicated legal issues involved, it was justified for DLO to take time to clarify matters. However, between 2004 and 2005, the complainant's lawyer had made four written requests to DLO for action and progress report. Yet, DLO did not seek legal advice until January 2006. We considered that an inordinate delay and hence, maladministration.

17. Moreover, the lot in fact belonged to the complainant but the land title had been altered without his knowledge. He had already spent much time and efforts on the issue. We consider it unreasonable of DLO to ask him to take legal action himself to have the records rectified. Whether there was also an error in the Assignment, the Memorial and the land records were both incorrect. This was unfair to the complainant and had caused him much concern. The Administration should be responsible for rectifying the error made by NTA staff. Lands D ought to have acted promptly and positively to assist the complainant in finding a solution with LR.

18. Against this background, The Ombudsman considered the complaint against Lands D **substantiated**.

For LR

19. Although LR had neither the authority nor the responsibility to rectify an error in registration documents, it eventually adopted a novel approach to help the complainant. While LR did not produce an instant or total solution, it had taken the extra step to bring relief to the complainant. Above all, it recognised that Government is one entity and did not leave the matter to Lands D.

20. The Ombudsman, therefore, considered the complaint against LR **unsubstantiated**.

Recommendations

21. The Ombudsman recommended that Lands D :

- (a) promptly confer with LR on future cooperation in handling similar cases to avoid delay and injustice to the parties involved ; and
- (b) instruct its staff to handle requests from the public positively and actively, assisting them as far as possible to resolve their problems.

22. Lands D accepted our recommendations.

Office of The Ombudsman
October 2009

EXECUTIVE SUMMARY

Direct Investigation Granting of Disability Allowance and Processing of Appeals by Social Welfare Department

Background

The Disability Allowance (“DA”) scheme under the Social Welfare Department (“SWD”) provides non-means-tested and non-contributory financial assistance to severely disabled persons, irrespective of their employment status.

2. To ascertain whether the scheme is administered in accordance with its purpose and in a fair and consistent manner, The Ombudsman initiated this direct investigation to examine, *inter alia*:

- (a) the eligibility criteria for DA;
- (b) the procedures and practices for processing applications for DA and appeals; and
- (c) the role of SWD as administrator of the scheme and that of its Director as vote controller.

Eligibility Criteria

3. There are two types of DA: Normal Disability Allowance (“NDA”) and Higher Disability Allowance (“HDA”). A person assessed by a doctor of the Department of Health (“DH”) or the Hospital Authority (“HA”) to be in a position broadly equivalent to 100% loss of earning capacity according to the First Schedule of the Employees’ Compensation Ordinance (“ECO”), Cap. 282, is eligible for NDA. The person must also meet certain residence requirements. To be eligible for HDA, a person has, in addition to being eligible for NDA, to be certified to be in need of constant attention.

Medical Assessment Form

4. The doctor is to indicate the condition of the applicant by completing the Medical Assessment Form (“MAF”), which details the eligibility criteria for DA.

5. The doctor is required to assess the applicant against a list of specified conditions adapted from those in the First Schedule to the ECO and another category “*any other conditions resulting in total disablement*”. In assessing “other conditions”, the doctor is to refer to the guidelines in the MAF.

6. According to the guidelines, “*any other conditions resulting in total disablement*” means the applicant has significant restriction or lack of ability or volition so that he/she needs substantial help from others in one or more of the following ways:

- working in the original occupation and performing any other kind of work for which he/she is suited;
- coping with self-care and personal hygiene;
- maintaining his/her posture and dynamic balance;
- expressing his/herself, communicating and interacting with others.

7. For applicants for HDA, the doctor is to indicate whether the applicant requires intensive attention and supervision, to the extent that HDA is recommended.

Processing of Applications

8. **Referral.** Applicants are first interviewed by Social Security Assistants (“SSAs”) or Senior Social Security Assistants (“SSSAs”) at SWD Field Units or by medical social workers in hospitals, before referral to DH or HA for medical assessment.

9. **Medical Assessment.** The MAF is meant to be self-explanatory. The doctor assesses eligibility by ticking the box(es) in the MAF that best describe(s) the applicant’s condition and makes a recommendation for or against DA grant.

10. **Vetting and Authorisation.** Upon receipt of a completed MAF, an SSA or SSSA checks the applicant’s status for residence in Hong Kong and receipt of any other social security benefits (for prevention of double benefits). The SSA or SSSA is also to vet the MAF for inconsistencies or ambiguities in the doctor’s assessment according to SWD’s internal guidelines. An application considered in order will be passed to a Social Security Officer II (“SSOII”) or Social Security Officer I (“SSOI”) for approval.

Changes to Criteria and Procedures

11. Over the years, the Administration has adjusted the scheme in response to requests from HA, professional bodies and patients organisations. However, some issues remain outstanding.

12. Since April 2007, HA has repeatedly urged SWD to review the eligibility criteria and the MAF, as doctors have difficulty assessing whether an applicant needs substantial help in “*working in the original occupation and performing any other kind of work for which he or she is suited*”. HA has also asked SWD to re-examine the misleading reference “100% loss of earning capacity” in the eligibility criteria. HA’s requests have not been taken on board.

Consistency of Assessment

13. Despite the SWD’s internal guidelines (**para. 10**), there is no system to check that applicants with similar condition and circumstances are given consistent assessment. Meetings between SWD and HA on individual cases and other operational aspects are sporadic and not documented. There also seems to be a fundamental lack of consensus between SWD and HA as to who should be primarily responsible for ensuring consistency of assessment.

Appeal

14. DA applicants aggrieved by SWD's decision may appeal to a Social Security Appeal Board comprising non-officials.

15. For appeal against a medical assessment, the Board will arrange for the appellant to first attend a Medical Assessment Board and will then make a decision on the basis of the Assessment Board's recommendation. The Appeal Board's decision is final.

16. The Appeal Board is not obliged to give reasons for its decision. In fact, in most of the cases studied, no detail about the deliberations of the Appeal Board or the Medical Assessment Board is given in the notification letters to appellants. Consequently, neither the appellants nor the doctors making subsequent assessment were apprised of the rationale for Appeal Board decisions.

Our Observations

17. The above and our case studies in **Chapter 4 of the Report** show:

- problems with the eligibility criteria;
- SWD's shirking of responsibility for deciding on DA applications; and
- lack of transparency of deliberations on appeals.

Eligibility Criteria

18. At the inception of the scheme in 1973, the only rough and ready "guide" to disability was in relation to workmen's compensation. Having regard to the change of time and circumstances, particularly the clear irrelevance of employment to the scheme, there is a case for a thorough review of the criteria.

19. **(1) "Any Other Conditions"** – Whether an applicant requires substantial help from others in "*working in the original occupation and performing any other kind of work for which he or she is suited*" is a social and environmental consideration as well as medical factor. Despite doctors' expressed difficulty in assessing this, SWD maintains that doctors are fully competent to make all necessary assessments prescribed in the MAF and that SWD staff are not in a position to challenge a medical assessment. This has left a void in the assessment of this eligibility criterion. This raises the question whether this criterion has actually been taken into account in assessments.

20. Furthermore, the design of the MAF does not facilitate consistency and verification. The doctor is not required to state whether he has taken into account the four areas in the Checklist, whether they apply to the applicant or not and why. As a result, there is no record of the basis for recommending DA to people under "*other conditions*".

21. For clarity of record and consistency in assessment, SWD should revise the MAF, in consultation with HA and DH, so that doctors must indicate on the MAF the specific qualifying condition for making a recommendation to facilitate clear, precise and specific indication of the basis of the recommendation.

22. **(2) “100% Loss of Earning Capacity”** – This reference in the eligibility criteria for DA is misleading and quite irrelevant. The original design of the scheme was intended **not** to take into account applicants’ employability. Moreover, the concept of “earning capacity” cannot apply to some people, e.g. children. This makes it all the more difficult for doctors to make consistent and objective assessment on such people. This reference should, therefore, be removed from the eligibility criteria.

23. **(3) Crude and Outdated Classification** – The MAF lacks concrete guiding principles for assessment of such categories as “mental impairments” and “visceral diseases”. The only guidance given to doctors on these categories is whether it “produces a degree of disablement broadly equivalent to a person with a 100% loss of earning capacity”. Meanwhile, the MAF does not adopt generally accepted grading systems, such as that for “mental retardation” into mild, moderate and severe. SWD should try, in consultation with HA and DH, to refine the DA criteria to facilitate objective assessment.

24. Furthermore, the classification of diseases has been evolving. Realistically, SWD should review the categories of eligible disabling conditions to keep abreast with the times.

25. **(4) Unclear Areas** – Two aspects of the DA scheme require clarification from the Administration:

- (a) whether the availability of rehabilitation or mechanical devices which compensate for loss of functionality should be taken into account when a doctor makes an assessment for DA; and
- (b) whether and why there are different criteria for DA and other schemes, e.g. the Registration Card for People with Disabilities. This bears publicity and consideration of renaming the “Disability Allowance” as “Allowance for the Severely Disabled”.

Role of SWD

26. SWD confines its role to vetting of purely non-medical criteria: residence requirement and receipt of other social security benefits. Our case studies illustrate that the passive and mechanical approach adopted by SWD has resulted in failure to spot even blatant discrepancies and self-evident inconsistencies in DA grants.

27. DSW as vote controller is by law the guardian and administrator of funds for the DA scheme. The Director has to be satisfied that an appropriate system for monitoring and control is in place for economy, efficiency and effectiveness in the disbursement of public funds. However, SWD’s current system for monitoring and control is inadequate.

28. **(1) Lack of Measures for Consistency** – There is no evidence of a proper system for checking medical assessment for inconsistencies, in particular among different applicants with similar disabling conditions. The appeal system can solve only part of the problem as individuals already granted DA by doctors’ mistakes or misunderstanding of the eligibility criteria are not likely to appeal.

29. HA and DH must ensure that doctors have clear and adequate guidelines for making assessment, within the confines of the eligibility criteria in the MAF. For change, divergence of

views and difference in understanding or practice between HA/DH and SWD, it is SWD's responsibility as administrator of the scheme to initiate consultation and to consolidate consensus.

30. **(2) Need for Clarification** – SWD's guidelines require staff to clarify with the doctor when a medical assessment is found self-contradictory or inconsistent. However, our case studies show that they rarely do so, not even in case of obvious discrepancies in medical assessment.

31. **(3) Staff for Processing Applications** – At present, the SSA grade primarily handle DA applications. However, the SSA grade equates with those for providing clerical support in processing applications. It is not reasonable to require SSAs or SSSAs to vet applications; nor realistic to expect them to question doctors' assessments. These duties require professional training and knowledge not available in the SSA grade. We consider that complicated cases should be escalated to their supervisors i.e. SSOII and SSOI. SWD should refine the staff guidelines accordingly.

32. **(4) Notification of Result** – SWD's standard letter to notify applicants of refusal of grant of DA gives little or no explanation. Applicants are deprived of the right to know the reason(s) for refusal. This should be rectified.

Appeals – Transparency of Deliberations

33. The lack of transparency of the deliberations of the Social Security Appeal Board and the Medical Assessment Board does not assist subsequent assessment of the applicant. Without any idea of the Board's rationale, doctors making subsequent assessment have no focus for review.

Recommendations

34. In sum, The Ombudsman recommends that SWD, in consultation with HA and DA as appropriate:

- (a) review the eligibility criteria for fine-tuning;
- (b) review and revise the layout, format and contents of the MAF to enable clear documentation and to facilitate doctors' systematic assessment;
- (c) arrange regular audit of cases to spot systemic irregularities and deficiencies;
- (d) clear discrepancy in views and practices with HA and DH;
- (e) refine guidelines for staff, specifying the circumstances under which to clarify with doctors and the circumstances under which to escalate to senior officers;
- (f) revise the notification letter to applicants, giving specific reason(s) for refusal of DA;

- (g) record in some detail the deliberations of the Medical Assessment Board and the Social Security Appeal Board; and
- (h) consider an overall review of the DA scheme, covering the eligibility criteria, the roles of medical doctors and SWD as well as the assessment mechanism.

**Office of the Ombudsman
October 2009**