27 June 2018

Veterans' Compensation and Rehabilitation Inquiry
Productivity Commission
GPO Box 1428
CANBERRA CITY ACT 2604

SUMBMISSION TO THE PRODUCTIVITY COMMISSION VETERANS' COMPENSATION AND REHABILITATION INQUIRY

Preamble

I have a friend who recently decided to establish a small business operating from home. Knowing that she would require Council approval, but not knowing exactly what was needed or the procedure to follow, she visited the local council office. There she received advice on what approvals were required, guidance on the information to be included in the submission, and assistance with the completion and lodgement of the forms – how novel and refreshing it would be if the Department of Veterans' Affairs (DVA) were to adopt a similar service model – to ACTUALLY ***assist*** *veterans in the submission of a claim! Rather, in its current guise, the veteran is left to negotiate a morass of confusing and overlapping regulations before submitting a claim. Sometime later, following an opaque process, the DVA advises of the outcome of its deliberations. There is no dialogue with the veteran to clarify matters or thoroughly investigate the issues at hand – instead, it is patently clear that the DVA modus operandi is to 'cherry pick' selected elements of the veteran's claim and service and medical histories more for the purpose of disallowing claims, rather than taking a more comprehensive, balanced and holistic view of the entirety of the claim and available evidence and objectively adjudicating the claim on its merits.*

I seek to make a submission to the Productivity Commission in regard to its inquiry into matters relating to veterans and the functions of the Department of Veterans' Affairs (DVA). In this submission I address two of the Commission's terms of reference, namely:

- The use of the Statements of Principles as a means to contribute to consistent decision-making based on sound medical-scientific evidence.
- Whether the legislative framework and supporting architecture delivers compensation and rehabilitation to veterans in a well targeted, efficient and veteran-centric manner.

At the time of preparation of this submission I have various claims before DVA, so have avoided citing specific examples.

The use of the Statements of Principles as a means to contribute to consistent decision-making based on sound medical-scientific evidence

The Statements of Principles (SOPs) are founded upon a reasonable basis of documenting recognised conditions and possible causes and linkages with generic examples extracted from Australian Defence Force (ADF) service conditions and working environments. As such, the SOPs can be useful in

streamlining straightforward claims. They embody, however, a form of administrative conceit in the assumption that they have documented both all possible causes of the particular disability or malady which may be related to ADF service, as well as all possible causative pathways or exposures arising from ADF service. Given the span and variety of potential exposures and subsequent medical conditions arising from ADF service, to assume the status of such definitive or comprehensive summary of ALL possible causes and linkages must be considered as ambitious, if not exceedingly unlikely. Nevertheless, the DVA assesses claims rigidly within the framework provided by the applicable SOP. If the claim does not fit the pre-determined 'mould' precisely, then it is rejected without further consideration, with no flexibility to entertain any other hypothesis, reasonable or otherwise. Furthermore, DVA delegates apply the SOPs 'as read', rather than making any apparent attempt to understand or apply the exposure examples presented in the SOP within the context of the history and conditions of service experienced by the subject veteran. This may provide for a neat package in legal and administrative terms, but is not contestable in terms of science and scientific probabilities and uncertainties, and does not provide for fair or justifiable outcomes in terms of claims by veterans.

The SOPs may, hypothetically, be capable of objective determination of 95%, or maybe even 99%, of all cases – but this does not mean that claims which do not nestle neatly within the SOP framework are not legitimate, especially if supported by other evidence available elsewhere in the literature and in the veteran's service history. Nevertheless, any claims which do not fit the SOPs precisely are arbitrarily rejected, and the 'review' process, in my experience, is somewhat farcical in that it only effectively reviews the process of application of the SOP, not the inherent merit and legitimacy of the underlying claim. Even when totally plausible cases of exposure / cause / effect are presented, and supported by the available scientific literature and service records, the claim is rejected out of hand if it does not strictly adhere to the SOP.

I am a scientist with post-graduate qualifications in environmental science and pollution control, and earn my living primarily by assessing and advising on matters such as risk assessment and management of human exposure to pollutants and other contaminants. As a scientist I understand the concepts of sources, exposures, reasonable likelihood, and causal linkages as opposed to spatial and temporal coincidence. In particular, I have knowledge and understanding of many of the factors and issues addressed by some of the SOPs I have dealt with. On the basis of my scientific training and experience, I can state that the SOPs I have reviewed are neither definitive nor comprehensive, and that a rational, informed, objective approach to the analysis and assessment of claims based upon the available science would be very different to the administrative 'box-ticking' process currently adhered to in the veterans' claim processes.

Testament to the fact that the SOPs are neither definitive nor comprehensive is that they are subject to periodic review, amendment or revocation. This is tacit acknowledgement that the SOPs do not present the degree of irrefutable certainty or perfection accorded to them by DVA in the assessment of liability claims, yet they are applied as if infallible (…… until the next amendment, anyway!).

Another deficiency of the SOP process is that it relies upon the veteran needing to provide documented medical evidence or record of specific exposures and resultant medical conditions, even in 'reasonable hypothesis' cases where the source and form of exposure may be irrefutable. In my case, my operational service was undertaken in a unit which deployed with neither medical officer nor medical staff. Obviously, there were no means available by which to document medical records during that period, nor to be diagnosed 'at time of onset', yet these reasons are relied upon by DVA to reject claims related to that period of eligible service. It is clearly inappropriate and inequitable for the construct of SOPs and the assessment of claims to be founded upon the flawed assumption that appropriate medical services are always available to ADF personnel – which is NOT the case – and then to disallow claims, to the obvious detriment of the veteran, based upon the absence of such

medical services. This is a very disingenuous situation where, on the one hand, the Commonwealth provides no or minimal means for documenting medical conditions during the veteran's service, and then on the other hand, penalises the veteran for not having any such medical evidence in support of a claim, furnishing the Commonwealth with an expeditious and convenient means by which to deny many claims.

I do not perceive any fundamental problem with having the two different standards of SOP, namely 'reasonable hypothesis' (RH) for periods of qualifying service, and 'balance of probabilities' (BoP) for other periods of service. I am not confident, however, that DVA consistently applies rational and objective assessments under either regime, with apparent inconsistencies in their application to individual cases and some decisions seemingly being applied in a manner more akin to the burden of proof pertaining to criminal cases – ie. the veteran needing to demonstrate causality 'beyond reasonable doubt'. Application of the different SOPs would often be improved if the two SoPs for any particular condition were better harmonised in all facets except for the differential standard of proof required.

In summary, the SOPs would be more useful and equitable if applied as 'guiding principles', but they are instead applied as rigid, unassailable and inviolable edicts. They are neither comprehensive nor definitive enough to assume such a mantle, and never could be. Given the dynamism and diversity of working conditions and working environments across the ADF, accentuated by the span of the many decades of veterans' service to which they are attempted to be applied, and compounded by the lack of full scientific knowledge of many medical conditions and their causes, to assume that any SOP could encapsulate all possible causative factors is not supported by the available science and defies logic.

Whether the legislative framework and supporting architecture delivers compensation and rehabilitation to veterans in a well targeted, efficient and veteran-centric manner

I should begin by stating that I have no particular truck with DVA in terms of services provided for accepted disabilities, and am grateful for the support available. Where I have particular cause for criticism, however, is in relation to DVA's treatment of claims for disabilities and, in my experience, the poor, superficial and uncaring service provided.

It is continually claimed that DVA adheres to its mission:

> *To support those who serve or have served in the defence of our nation and commemorate their service and sacrifice*.

Somewhat naively, I used to believe the publicity and the Departmental mantra myself, until I actually had cause to deal with DVA. Since then, in my experience, anybody who claims that the DVA faithfully fosters the interests of *those who serve or have served in the defence of our nation* is economical with the truth, delusional, or has simply not experienced dealing with the Department from the perspective of a veteran. Even if the Department perceives itself as trying to provide meaningful support to veterans, the reality is somewhat different.

I served in the Royal Australian Navy (RAN) until the early 2000s, before transferring to the RAN Reserve. It was only in early 2016 that I became aware that service which I had rendered several decades earlier had subsequently been recognised as designated operational service, due to a 2010 amendment of the *Veterans' Entitlements Act 1986*. This revelation came to me over five years after the legislative amendment, and only by the happy coincidence of 'stumbling' over the information during an unrelated internet search. This particular amendment only affected a relatively small number of personnel, all of which are detailed on lists held by DVA and the Department of Defence. It also related to relatively obscure service which is not widely discussed. My name and address

details have been known to DVA since the time I left the Permanent Navy, if for no other reason than I hold insurance policies with them, and the fact that I was a serving Navy Reservist means that Defence also had my contact details. So, although both DVA and Defence had my contact details, and both had me listed as a newly eligible veteran arising from service which they both knew draws minimal fanfare, both neglected to take any action to inform me of this legislative change. Apart from a clear abrogation of any duty of care, I think this is clear evidence that the veteran is NOT at the centre of DVA's concerns nor the focus for the conduct of its business.

Given the nature of my service, if I had not serendipitously discovered my eligibility on the internet that day, then my wife would also have been disadvantaged from any future support for which she may have otherwise been eligible, as I am precluded from telling anybody, including my wife, about the details of my service. Since becoming aware of this eligibility, I have spoken with a number of my former shipmates, many of whom similarly had no knowledge of our eligibility – this even included my Commanding Officer at the time of the applicable service. This would seem to be a very convenient situation for DVA – have a cohort of new 'veterans' but keep *shtum* and don't let them all know of their eligibility for veterans' services and entitlements! I understand that recent legislative amendments seek to rectify this deficiency, but it is too early to determine if this has been or will be effective.

Before becoming aware that I was an eligible veteran I had minimal knowledge of any access to coverage by DVA. In my own case, this five year gap between becoming eligible to be recognised as a veteran and actually becoming aware of it coincided with an operation (paid for by me) on a condition which I and my medical advisers believe is clearly related to my service. Also fortuitously for DVA, this operation possibly compromised some of the medical evidence which I may otherwise have been able to rely upon to support my claim.

As a newly minted 'veteran', many of my initial dealings with DVA were quite chaotic and led me to the conclusion that the organisation had to be inefficient, and/or dysfunctional, and/or incompetent, and/or deliberately obstructionist. To summarise, after realising that I was an eligible veteran following amendments to the VEA, I applied for and was provided with an official letter from DVA confirming my eligibility as a veteran. Nevertheless, my subsequent disability claims were then assessed by DVA on the basis that I was not an eligible veteran and without qualifying service. Over a period of several months and despite written submissions, telephone conversations and e-mail correspondence that my eligible service was being ignored when assessing disability claims, DVA refused to acknowledge their original letter confirming my service eligibility. Finally, seven months after one claim was submitted, DVA agreed with me (and themselves!) that I was indeed an eligible veteran. This would all be the basis for an amusing anecdote if it did not have serious implications for the assessment of my disability claims, and undermines any confidence that one may have in DVA being able to consistently, accurately, efficiently and effectively discharge its responsibilities in processing claims.

I have also been subject to a number of 'medical assessments' by the DVA – I use this term advisedly, as I am at a loss to understand how a medical professional can validly consider my medical condition and history without once actually speaking with me! It is also evident to me that these 'opinions' are formed without the *hindrance* of actually having to refer to medical records, given many of the opinions offered by DVA medical officers are clearly contradicted by the available records, and subsequently later retracted by DVA. I work as a professional consultant, and if my research and analysis were as piecemeal, slipshod, superficial, and at times, as plain inaccurate, as that furnished by DVA, then at best I would be destitute due to a lack of business, if not also subject to legal action for negligent professional conduct.

My experience has been that every time DVA reviewed one particular claim they changed their determination – ever so slightly – but always denying the claim. To summarise: despite having the

medical records available, at first they 'determined' that I did not contract the claimed condition until over a decade after I left the Permanent Navy; then on review they actually read my medical records and conceded that I did have a record of the condition while I was in the Navy. On the basis that as I was 'not an eligible veteran' (in their opinion), on the balance of probabilities they determined that there was no linkage of the condition with my service; then after finally conceding that I was indeed an eligible veteran and did have the condition while in the Navy, they decreed that the onset of the condition was merely a *coincidence* in time with my applicable service, and all without any apparent reasoning, justification or evidence to support their determination.

In lieu of DVA assessing claims fairly and objectively the first time around, the veteran is then compelled (dared!) to pursue escalating options via Section 31 review, the Veterans Review Board (VRB) and the Administrative Appeals Tribunal (AAT) – what the former Senator Lambie so eloquently described as a sequence of 'delay, deny, destroy'. This is an exhausting and exceptionally frustrating process, as the DVA counters additional evidence submitted in support of claims by seemingly forever resorting to brandishing some new, obscure or obtuse reasoning for rejecting the claim. Also during this process I was subject to commentary that implied, if not stated, that I was an opportunistic chancer just seeking to scam the Commonwealth for money, was 'wasting' the agency's time, questioned my service, and various other statements tantamount to accusing me of seeking to fabricate evidence to support my claim – I cannot be sure that it was not intended for me to be intimidated and humiliated by this conduct, but it was exceptionally dispiriting and confronting and not what I had been led to anticipate of the veterans' claim processes.

It is difficult to conclude otherwise than that the DVA's contortionist process of claims rejection is as much intended to test the stamina, commitment, resources and resolution of the veteran, as it is to apply the relevant legislation, or serve the cause of natural justice for the veteran. It would seem that DVA seeks to fatigue and frustrate the veteran, with the objective that he or she will simply give up as a result of exhaustion or exasperation. This approach inevitably consumes Departmental resources and taxpayer funds in the unproductive contesting of claims which often should have been approved on their merits earlier in the process. This must have a compounding, precipitative adverse effect upon the processing of other claims due to the distraction and misallocation of the finite DVA staff resources available, and must be considered as an inefficient means of conducting business.

I am also of the opinion that the standard DVA practice of requiring veterans to rely upon the support and assistance of advocates is flawed and unfair. I have nothing but praise for the efforts of the advocates I have dealt with, and their dedication to providing support to veterans. The fact of the matter is, though, that even with the training provided to some by the DVA, the volunteer advocate, typically with no formal background or professional training other than being a fellow veteran, is expected to expertly and effectively represent the veteran claimant in the face of the known complex and cumbersome mix of applicable legislation and procedures. In my experience, this imbalance is accentuated with the VRB, where the veteran is not permitted to have legal representation, yet the Board is primarily comprised of legal practitioners who, by procedure and culture, conform to legal norms. I am not sure what was actually intended when the VRB was established, but whatever that may have been, my observation is that it operates as a demi-legal tribunal where the claimant is prohibited from having legal representation – that does not seem to be equitable, nor consistent with the intent of the VRB to be a vehicle for independent review without the trammels of legal processes.

At the other end of the spectrum to the advocate lies the DVA delegate – making determinations on service conditions and working environments generally without any knowledge or experience of the matters upon which they are deliberating, and seemingly with scant interest or incentive, or Departmental initiatives or support, to gain any such understanding. Thus, people with no knowledge of the issues upon which they are adjudicating are making potentially life-changing decisions, sometimes with significant financial implications, to the detriment of the veteran claimant. This

situation could be improved if the delegates had greater understanding of ADF service, either by DVA recruiting more ex-ADF personnel, and/or by a structured training program.

In conclusion, in my experience I would suggest that the legislative framework for the support of veterans is reasonable in terms of its span and intent, but compromised by its complexity. I would also suggest that the supporting architecture for implementation *appears* to be sufficient. Regrettably, however, the reality is that DVA is antagonistic to veterans, and the adversarial and combative approach it pursues by default in assessing disability claims is far removed from what may be considered to be well-targeted or efficient and is definitely not veteran-centric.

Recommendations

The following recommendations are submitted:

- The use of SOPs be reformed from an approach of rigid, inflexible application to one where the SOPs are instead employed as guiding principles, and able to accommodate alternative hypotheses so long as they are plausible and consistent with the intent of the applicable SOP.
- In circumstances where the absence of specific medical records and service histories is due to ADF organisational matters or administrative procedures and thus beyond the control of the veteran, that the absence of such records be recognised as such and not used by DVA as a mechanism to deny legitimate veterans claims where corroborating evidence is also available.
- DVA retreat from its default adversarial position in relation to the assessment of disability claims, and instead works in a more collaborative manner with veterans in the formulation, submission, assessment and determination of claims. This approach would likely lead to greater organisational efficiencies by streamlining the claim and assessment process in parallel with reducing the need for and number of claims channelled to the review processes.
- Any medical reviews conducted by or on behalf of DVA include mandatory interview with the claimant, rather than have medical officers assessing claims, often erroneously and superficially, on the basis of incomplete knowledge and deficient records, and without the benefit of any actual discussion with the claimant.
- DVA improve the knowledge and understanding of its delegates of the circumstances and conditions of ADF service, in order that they may be able to more effectively and knowledgably review and assess disability claims.

Conclusion

I am proud to have served and given the opportunity would do so again. I do not mind, so much, that the legacy of this service is a medical condition which affects me every day of my life – what I cannot brook, however, is the abrogation of responsibility for this condition displayed by the Commonwealth via DVA, and the manoeuvring and maverick behaviour resorted to by DVA to avoid that responsibility.

Rather than supporting veterans, from my experience I would suggest in relation to disability claims that DVA presents itself as disorganised, inefficient, inconsistent and insincere at best – a less generous assessment would be that it conducts its business as an inimical, penurious surrogate for a niggardly, miserly and mean-spirited insurance company; one that is focused upon interests other than those of its policy holders who have faithfully paid their dues.