

Compensation and Rehabilitation for Veterans

Legal Aid NSW submission to the
Productivity Commission

July 2018

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

Our Veterans Advocacy Service is a state wide service providing legal advice, assistance and representation to people who have served in the Australian armed forces, including veterans and their dependants.

Legal Aid NSW welcomes the opportunity to make a submission to the Productivity Commission's Inquiry into Compensation and Rehabilitation for Veterans. Should you require any further information, please contact:

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Introduction

The Veterans' Advocacy Service

The Veterans' Advocacy Service (**VAS**), within the Civil Law Division of Legal Aid NSW, is a state-wide specialist service providing legal advice, assistance and representation to people who have served in the Australian defence forces and their dependents. The service is also available to current, serving members of the defence forces.

Through its VAS, Legal Aid NSW advises, assists and represents veterans regarding their rights and entitlements under the *Veterans' Entitlements Act 1986* (Cth) (**VEA**), the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (Cth) (**DRCA**) and the *Military Rehabilitation and Compensation Act 2004* (Cth) (**MRCA**). This area of law is commonly described as 'veterans' law'.

Within this legislative framework, the VAS assists clients to obtain a range of benefits including the Disability Pension, Service Pension, War Widow's Pension, medical treatment costs, compensation for permanent impairment and compensation for incapacity to work.

The VAS assists veterans to:

- complete and lodge claims for pensions
- obtain records, medical and other evidence to support their claim and
- complete forms, questionnaires and written statements.

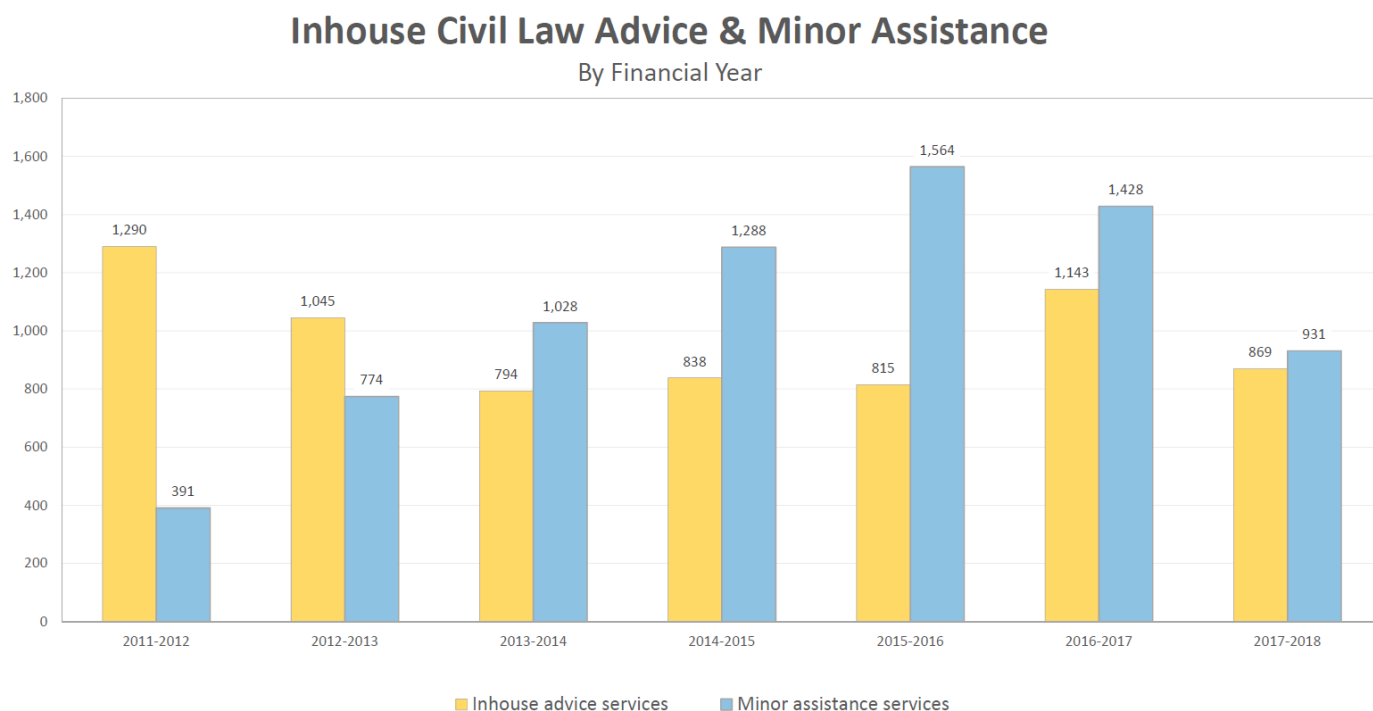
The VAS has a team of advocates and solicitors who represent veterans in applications for merits review to the Veterans' Review Board (**VRB**) and the Administrative Appeals Tribunal, and in matters in higher courts including the Federal Court. The team's work involves case preparation and representation in proceedings, including hearings and alternative dispute resolution processes such as conferences and conciliations.

The VAS offers representation in all applications to the VRB subject to a merit test. Representation is provided by an in-house lawyer or advocate through Legal Aid NSW's Extended Legal Assistance (**ELA**). ELA includes funding of up to \$500 per case for disbursements, such as any necessary expert reports. ELA for this service is not means tested and is only provided on an in-house basis.

Legal Aid NSW provides representation through a grant of legal aid for veterans' law cases in the Administrative Appeals Tribunal in accordance with Legal Aid NSW policies and guidelines. A merit test applies, and in some matter types, a means test also applies.

Where grants of legal aid are made for representation at the AAT or court, matters are conducted either 'in-house' by the VAS or assigned to private legal practitioners on the Legal Aid NSW panel for veterans' law.

The VAS provides advice on veterans' matters by phone, at face-to face appointments and a fortnightly advice outreach clinic held at the Liverpool Legal Aid NSW office, which is near the Holsworthy base. The VAS also provides advice clinics in regional NSW, and has recently held outreach clinics in Lismore and Gosford. The following table summarises advice and minor assistance services provided by the VAS from 2011-2012 to 2017-2018.



In addition, in 2017 - 2018 the VAS provided 30 ELA services.

The VAS engages in CLE activities with ex-service organisations through the Australian Veterans' Law Advocacy Network and organises and hosts some of these activities. The VAS also engages in stakeholder relations, in particular with ex-service organisations which are a source of referrals.

As well as offering expert help in veterans' law the VAS supports clients by making warm referrals to other specialist and general legal services within Legal Aid NSW. Veterans and their dependents frequently contact the VAS about other legal problems and the VAS is able to make effective referrals on a range of issues including consumer and debt problems, fines, employment and family law.

Our submission

Our submission focuses on the following issues raised in the Issues Paper:

- The complexity of the veterans' support system.
- Barriers in the claims and appeals processes.

- The exclusion of legal representatives from proceedings in the Veterans' Review Board.
- Issues in connection with the governance of the veterans' review process.
- Improving the use of Statements of Principles.

The complexity of veterans' support

Questions from Issues Paper

- What are the sources of complexity in the system of veterans' support? What are the reasons and consequences (costs) of this complexity? What changes could be made to make the system of veterans' support less complex and easier for veterans to navigate?
- Can you point to any features or examples in other workers' compensation arrangements and military compensation frameworks (in Australia or overseas), that may be relevant to improving the system of veterans' support?
- Is it possible to consolidate the entitlements into one Act? If so, how would it be done? What transitional arrangements would be required? How might these be managed?
- Are there approaches, other than grandfathering entitlements, that can preserve outcomes for veterans receiving benefits or who may lodge a claim in the future?

The law governing veterans' entitlements continues to be burdened by the most cruel of ironies. Those who serve in our armed forces face dangers like no other members of society. They should have access to fair and adequate compensation. Most informed observers would also quickly realise that serving and former members of the defence forces who have been injured in their military service are often unable to tackle officialdom in pursuit of their rights. Why then are these very people faced with a compensation system so complex that even George Orwell might have struggled to imagine its nightmarish details.¹

Veterans support is complex for the following reasons:

- Veterans' law is governed three separate, lengthy and complex statutes, as well as many regulations, determinations and Statements of Principles.
- There are significant inconsistencies between the three statutes and eligibility for compensation is governed by different rules under each of the three statutes.
- The claims processes under each of the statutes are inconsistent and complex.

¹ Professor Mathew Groves, book review of *Veterans' Entitlements and Military Compensation Law* by Robin Creyke and Peter Sutherland (2016) *Australian Journal of Administrative Law* 24 (2017) p 204.

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- Decision making by Department of Veterans' Affairs (**DVA**) is not always transparent, which leads to applications for review.

The VEA consists of four volumes, comprising a total of 1,566 pages of law. Sections 23 and 24 of the VEA alone, which concern the highly contested eligibility requirements of the disability pension at the *intermediate* and *special rate*, run over 20 pages.

In *Smith v Repatriation Commission* [2014] Rares J stated:

The conditions specified in each of ss 23 and 24 are bedevilled with bewildering complexity. Regrettably the fog of the drafting style of this, like many Commonwealth Acts, has created a nearly impenetrable shroud over the meaning that the Court is expected to attribute to the intention of the Parliament. The cost to the community of this obscurity must be enormous. Two days of hearing by this Court were largely devoted to an attempt to make sense of key entitlements provided in the Act to persons who have been injured in war conditions in service of this nation. Perhaps it suffices to say that s 23 commences on page 187 of the first volume of the latest reprint of the Act. The Commission properly offered to submit to an order that it pay Mr Smith's costs whatever the outcome of the appeal. However, in the event, he is entitled to such an order because his appeal succeeds.²

The necessary contribution by service to an injury or disease for an entitlement to arise differs between the DRCA and the VEA and MRCA³. Each statute provides, either in the Act itself or by delegated legislative instruments, complex formulas for calculating the amount of compensation payable to a veteran due to a service-related injury or disease.

In addition, there are various legislative instruments such as regulations, determinations and Statements of Principles to consider when preparing and lodging claims for pensions or compensation under each of the Acts. A quagmire of legislative and other instruments delegated under each of the Acts governs a wide range of matters such as:

- The types of service constituting operational or qualifying service under the VEA.
- The types of allowances that are pay-related allowances under the MRCA.
- The criteria for assessing causation of an injury or disease by way of Statements of Principles.
- The criteria for assessing the degree of incapacity and level of impairment arising from an injury or disease under each of the Acts.

² [2014] FCAFC 53 at 26.

³ For example, the required level of contribution by defence service to an injury or disease under by the VEA and MRCA is a contribution to a 'material degree'. However, under the DRCA, the required level of contribution to a disease, which also constitutes an injury, is a contribution to a 'significant degree'. This 'means a degree that is substantially more than material': section 5B(3) of the DRCA. Contrast with ss 8, 9, 70 and 196B of the VEA and ss 27, 28, 30 and 340 of the MRCA.

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- The prescribed addresses for the electronic lodgement of claim forms under the VEA. A claim is not legally received by DVA if it is sent to another DVA email or facsimile address.

The volume and complexity of the legislation has a significant impact on the ability of veterans to understand their rights and entitlements, and the work of advocates and lawyers working in the area of veterans' law. It results in significant cost to the community because of the time taken by courts, tribunals, lawyers, advocates and DVA delegates to interpret and apply the law.

Recommendation

- 1. The legislation governing veterans' compensation and rehabilitation should be simplified by consolidating all three Acts, simplifying the wording of the legislation, and adopting one contribution test for entitlements, being the contribution by defence service to a material degree to an injury or disease.**

Claims for compensation are covered by different Acts, depending on the time and/or nature of service. Veterans with injuries governed by more than one of the Acts must strategically opt for one Act over another in order to receive the most beneficial outcome for their particular circumstances. This is a daunting task, particularly for veterans with no legal training, or prior knowledge of the intricate, labyrinthine network of laws that govern this area of compensation.

Case Study 1

A veteran who has a lower limb condition claim under the VEA, and a lower back condition claim under the MRCA contributing to her lower limb incapacity, would have her lower limb incapacity arising from each condition apportioned across both Acts. In these circumstances if she chooses to continue with a claim for a disability pension under the VEA she will be disadvantaged because her entitlement to a disability pension will be reduced to reflect the apportionment of incapacity across both Acts, even though her injuries were caused during service.

The veteran would likely be prevented from claiming the *intermediate* or *special rate* of pension because she technically suffers from a *non-accepted condition*⁴ under the VEA and would thus fail the 'alone' test under section 23(1)(b) or section 24(1)(b). Under the VEA, the 'alone test' requires that only accepted conditions under the VEA may prevent the veteran from working part-time, or more than 8 hours per week, in order for the veteran to be entitled to the *intermediate rate* or *special rate* of disability pension. The *intermediate* and *special rates* of pension are the two highest rates of pension available to veterans. The *special rate* is available where a veteran cannot work for more than

⁴ See section 13(6A) of the VEA. See also the meaning of 'non-accepted condition' in the Introduction to the *Guide to the Assessment of Rates of Pensions* (GARP V), page 2, which is the prescribed legislative instrument under section 29(1) of the VEA to assess the degree of incapacity suffered by veterans due to accepted conditions.

eight hours a week, and the *intermediate rate* where a veteran can only work part-time for less than 20 hours a week.

When a *non-accepted condition* under the VEA⁵ (in this case the MRCA condition) contributes to the veteran's incapacity in any way, the veteran is not entitled to the *intermediate rate* or *special rate* of disability pension under the VEA. The apportionment of incapacity might also mean that she is not eligible for a Gold Card.

We suggest that a simpler and more efficient way to administer compensation would be to enable the applicant, or DVA, to deem all conditions suffered by a veteran as arising under one scheme. In the above case study, the condition under the MRCA could be deemed as a condition under the VEA so as not to reduce the veteran's disability pension, or prevent the veteran from claiming the *intermediate* or *special* rate of disability pension.

Alternatively if all three schemes are consolidated there should be no distinction made between injuries that occur at different times where they were caused by the same type of service.

Recommendations

2. **Veterans with potential claims under more than one scheme should be able to claim under one scheme.**
3. **If all three schemes are consolidated, no distinction should be made between injuries that occur at different points of time that are caused by the same type of service, except where recommendation 16 would apply, and the injury occurred in training that involved the use of real life scenarios.**

The claims and appeals process

Questions from Issues Paper

- How could the administration of the claims and appeals process be improved to deliver more effective and timely services to veterans in the future?
- Are there diverging areas of the claims and appeals process under the different Acts that could be harmonised?
- Are there aspects of the claims and appeals process that result in inequitable outcomes for veterans, such as limitations on legal representation?
- Are advocates effective? How could their use be improved? Are there any lessons that can be drawn from advocates about how individualised support could be best provided to veterans?

⁵ VEA section 13(6A). See also the meaning of 'non-accepted condition' in the Introduction to the *Guide to the Assessment of Rates of Pensions* (GARP V), page 2, which is the prescribed legislative instrument under section 29(1) of the VEA to assess the degree of incapacity suffered by veterans due to accepted conditions.

Lodgement of claims

DVA has prescribed the electronic addresses that may be used for the lodgement of claims, applications, requests and other documents.⁶ For claims and applications relating to disability pensions, the prescribed electronic addresses for lodgement are facsimile numbers only. A veteran may also complete an application online using DVA's website, but no provision is made in the instrument for the lodgement of claims and applications by email. Consequently, claims or documents that have been transmitted to any of the various other email or facsimile addresses belonging to DVA are not treated as having been validly lodged.⁷

In addition the claim form for *Disability Pension and/or Application for Increase in Disability Pension* does not include the details of the prescribed electronic addresses for lodgement.⁸ Only DVA's general telephone number, its mailing address and the addresses of DVA's State offices are mentioned in the claim form. Accordingly, veterans or their representatives who would prefer to lodge claims by electronic means for various reasons, including convenience and to generate a record of lodgement, are not informed about the prescribed electronic addresses for lodgement. This can lead to adverse consequences for veterans who might assume that any fax number or email address belonging to DVA will be acceptable. Given that the earliest date that a disability pension can be paid depends on the date of receipt, a claimant who lodges their claim at a non-prescribed address is disadvantaged because their claim is treated as not being validly lodged.

Electronic lodgement of claims and applications is now widely accepted and is the preferred practice in many courts and tribunals. A simpler and more effective way of lodging claims by electronic means for veterans would be to have a single email address that applies to all three statutes, in addition to the prescribed facsimile numbers.

We note that DVA is undertaking a modernisation program that will include new online system, MyService, for making claims. This modernisation program is welcomed by Legal Aid NSW, but it does require that an advocate or legal representative have the login details for a client. We suggest that also permitting lodgement by email is consistent with the modernisation program's objective of adopting systems that focus on veterans.

Recommendation

- 4. Legal Aid NSW recommends that claims under all statutes be accepted through one single email address.**

Decision making by DVA

DVA has a statutory duty to provide written reasons for its determinations made under the VEA, DRCA and the MRCA.⁹ In our experience some determinations do not adequately

⁶ *Veterans' Entitlements (Electronic Lodgement Approval) Instrument (No 2) 2016*.

⁷ VEA section 5T(4).

⁸ The claim forms under the DRCA or the MRCA do not disclose such information either.

⁹ VEA section 34, DRCA section 61, MRCA section 346.

show the actual path of reasoning used by the decision maker to reach the decision, or include all of the material relied upon by the decision-maker. As a result, veterans and their legal representative or advocate often find it difficult to understand how the decision-maker arrived at the decision, and whether mandatory relevant considerations have been taken into account. The issue is illustrated by the following case study.

Case Study 2

Legal Aid NSW assisted a veteran seeking compensation for permanent impairment caused by major depression. The determination from DVA for the claim lodged by the veteran referred to an opinion contained in a specialist medical report, and a rating provided by a Contracted Medical Advisor (DVA's in-house advisor). The delegate determined on the basis of this medical opinion that the veteran's impairment did not meet the threshold of 10% whole person impairment (WPI), and that he was therefore not entitled to any payment.

The delegate's reasons did not address all of the criteria set out in the Comcare Guide relevant to the veteran's claim. The determination only took into account evidence regarding the veteran's requirement for supervision of direction in Activities of Daily Living due to the condition, and did not consider other criteria prescribed by the Comcare Guide, such as whether the veteran suffered:

- reactions to stresses of daily living with minor loss of personal or social efficiency
- a lack of conscience-directed behaviour without harm to others or self or
- a minor distortion of thinking.¹⁰

The reasons for decision provided to the veteran did not include copies of the two medical reports used by the delegate to reach the decision and Legal Aid NSW was not able to ascertain whether the determination was correct. When Legal Aid NSW requested copies of the reports, we were directed to make a separate request for them which took several weeks.

Once the reports were received, the errors in the determination were clear and we lodged an internal review on the veteran's behalf. The veteran was successful in his internal review and received a substantial amount of compensation for permanent impairment.

¹⁰ Table 5.1 of the Comcare Guide.

In *Wingfoot Australia v Kocak* the High Court held, in the context of a statutory requirement for a medical panel to give written reasons in connection with a worker's compensation claim, that the actual path of reasoning of the decision maker should be explained in sufficient detail to enable a court or tribunal to see whether the decision contained an error of law.¹¹

Commenting on the decision in *Wingfoot*, Ronald Sackville, Acting Judge of Appeal, Supreme Court of New South Wales, stated:

*The decision in Wingfoot is significant for all administrative decision-makers and tribunals required by statute to give reasons for their decisions. The High Court has made it clear that there is no single test that determines whether a decision-maker has given reasons that satisfy the statutory requirements. The nature and extent of the obligation is a matter of statutory construction, having regard to the scope and purpose of the legislation and the role to be performed by the particular decision-maker.*¹²

We believe that written reasons provided by DVA should include the actual path of reasoning because veterans' law, like workers compensation, is beneficial legislation. The duty to give reasons is particularly important in determinations regarding compensation for incapacity payments, which involve complex formulas under the legislation. In our experience DVA usually provides a figure for the overall weekly compensation amount without providing the actual path of reasoning in sufficient detail, including how the formulas were applied, how DVA arrived at the values for the components in the formulas, and the evidence in support of those values. This creates significant barriers for veterans and their representatives to assessing whether the calculations by DVA are correct.

Recommendations

- 5. DVA should be required to explain the actual path of reasoning in its determinations in sufficient detail so that veterans and the tribunals may ascertain whether its determinations contain an error of fact or law.**
- 6. In determinations regarding compensation for incapacity for work DVA should outline the figures for normal earnings, actual earnings, pay-related allowances, the adjustment percentage, reserve earnings, the civilian component of earnings, the exact indexing that has been applied, how DVA has arrived at these figures, and the evidence that supports these figures.**

In our experience, DVA does not provide a copy of all of the evidence relied on by the delegate in making a determination. Case Study 2 also illustrates this issue. Often, the delegate relies upon the interpretation of DVA's in-house medical adviser but does not provide the claimant with a copy of the report or 'memo' from the medical adviser. Nor does DVA attach any other medical report or evidence relied upon when making a

¹¹ *Wingfoot Australia v Kocak* [2013] HCA 43, at [55].

¹² Ronald Sackville, "The evolution of the duty of decision-makers to give reasons" *Australian Journal of Administrative Law* (2016) 23(3) 128 at page 140.

determination. Consequently the applicant is unable to assess whether DVA has correctly interpreted the evidence or whether DVA has taken relevant considerations into account.

Further, when the veteran or the representative requests the material that was expressly relied upon by the decision-maker in the determination, they are directed to make a formal application under the *Freedom of Information Act 1982* (Cth) or other relevant provisions in the DRCA or MRCA. This causes further unnecessary delay and stress for the veteran.

Recommendation

- 7. DVA should be required to provide a copy of all of the evidence used to make a determination.**

Calculation of earnings

When calculating normal earnings under the DRCA or MRCA, DVA usually issues Defence with a questionnaire to complete regarding rank, pay grade etc. The questionnaire is usually referred to by DVA as a 'DEFPAC questionnaire' (we understand this is an acronym for Defence Pay and Conditions Questionnaire) and it is usually completed manually in handwriting by a contact in Defence.

This method is vulnerable to errors, particularly if the applicant was discharged many years ago. Legal Aid NSW is currently acting for a veteran in the Administrative Appeals Tribunal where it is contended that the DEFPAC questionnaire was completed incorrectly by Defence, which has resulted in a substantial underpayment of compensation to the veteran over many years. It is possible that such an underpayment has occurred in other cases given the number of claims for compensation for incapacity for work made under DRCA and the MRCA each year. According to DVA's annual report 2016-17, the number of veterans in receipt of incapacity payments under the DRCA and MRCA in 30 June 2017 was 1,792 and 3,218, respectively, or a total of 5,010 recipients.¹³ If in each case DVA is relying upon a handwritten DEFPAC questionnaire to determine the amount of compensation for these 5,010 recipients, it is possible that a significant number of veterans may not be receiving their correct entitlement. Legal Aid NSW would suggest that more reliable and accurate methods be used, such as use of wage records and the Australian Defence Organisation Service Record.

Recommendation

- 8. DVA should adopt a more accurate process to identify a claimant's normal earnings, such as using wage records and the Australian Defence Organisation Service Record.**

Issues in relation to overpayments

Legal Aid NSW has encountered several veterans who have had a debt raised against them by DVA due to an alleged overpayment of compensation for incapacity for work. The debt is usually in the tens of thousands of dollars and, in our experience, tends to be raised

¹³ DVA Annual Report 2016 -2017 17.

several years after the initial error occurred. The error tends to be identified after a review is undertaken of the veteran's entitlements over a retrospective and ongoing period. DVA can recover an amount of compensation that 'should not have been paid'.¹⁴ A decision to recover the debt is not an original determination under the MRCA,¹⁵ nor a determination under the DRCA,¹⁶ and is therefore not reviewable. However, under the MRCA, the amount of the alleged overpayment may be reviewed.¹⁷

While veterans have a responsibility to ensure that DVA is updated about changes in their working status, the DVA approach to overpayments should also recognise the challenges faced by vulnerable veterans when adjusting to life after service. Those challenges may include ongoing health problems, searching for employment, and other legal problems commonly experienced by people experiencing social or economic disadvantage.

Reasons for the overpayment may vary and include, among other things, incomplete information in the beginning about the veteran's actual earnings for the week, or an error by DVA in calculating the amount of compensation. However, in most of the cases we have encountered, the overpayments seem to have been exacerbated by undue delay or oversight by DVA in identifying the error despite numerous file reviews, or by using the interchangeable definition of actual earnings retrospectively to the severe detriment of the veteran. The latter issue seems to be more prevalent in matters where veterans are engaged in seasonal or casual work, as their earnings may fluctuate on a weekly basis according to demand. Therefore, the veteran's actual earnings under the legislation may alternate between a hypothetical amount that the veteran is able to earn in suitable work (based on skills, qualifications, experience etc) and the actual amount earned for the week. The higher of the two amounts is taken to be the veteran's actual earnings for the week.¹⁸

The interchangeable definition of actual earnings can cause severe inequity for veterans, particularly those employed in seasonal or casual work, once all the information about their earnings for the period has been obtained by DVA. This is due to the adjustment percentage that effectively penalises veterans in the weeks they are unable to work.¹⁹ If the veteran is not working during a particular week, his or her pre-injury earnings are discounted to 75% which reduces the compensation payable for economic loss for that week. However, for seasonal or casual workers, the reason for not working may be outside of their control. Accordingly, once DVA is able to ascertain the weeks that the veterans did and did not work over a prolonged period of time, the relevant adjustment percentage for those weeks is corrected retrospectively, which usually results in a significant overpayment for the weeks that the veterans were not engaged in any work.

Therefore, veterans who are willing to work but are unable to do so for reasons outside of their control can be severely prejudiced by the adjustment percentage under the MRCA or the DRCA. The intention of the adjustment percentage was to provide a financial

¹⁴ DRCA section 114, MRCA section 415.

¹⁵ MRCA section 345(2)(i).

¹⁶ DRCA section 60(1).

¹⁷ MRCA section 345(2)(i).

¹⁸ MRCA section 132(10) and DRCA section 19.

¹⁹ MRCA 131(2) and DRCA section 19(3).

incentive to return to work.²⁰ However, under the MRCA the adjustment percentage focuses on whether the veteran is or is not working for the week.²¹ It does not consider whether veterans are willing to work but are unable to do so for reasons outside of their control. Accordingly, the financial incentive to return to work that was intended by the adjustment percentage can actually cause inequitable outcomes in a supposedly beneficial system.

A veteran with an overpayment is able to request that the debt be waived or written off under the legislation. A waiver of the debt is a permanent bar to the recovery of the debt by the Commission and the debt effectively ceases to exist.²² However, if the debt is written off the debt still exists and may later be pursued.²³ In either case the decision is discretionary. This means that even if the veteran has a compelling case, DVA may nonetheless decline to waive or write off the debt. These decisions may be subject to judicial review but the cost of court proceedings are likely to be greater than the debt, particularly if the veteran fails to establish legal error in the decision and is required to pay the costs of DVA. In any event the prospect of legal proceedings against DVA in the Federal Court of Australia is often enough, of itself, to deter most veterans from considering this option.

In our experience, DVA does not notify veterans in the overpayment determination about the options of write off and waiver that are available under the legislation, or the considerations involved in these options. Many veterans are therefore unaware of their right to seek a waiver or write off. If the debt is written off, DVA may decide at any time in future to recover the debt, particularly if the veteran becomes entitled to lump sum compensation for permanent impairment as a result of his or her injuries. Rather than paying the lump sum entitlement, which would greatly assist the veteran, DVA may instead direct it toward the recovery of the debt.²⁴

Recommendations

- 9. Consistent with recommendation 5, determinations made by DVA about compensation for incapacity for work should contain the actual path of reasoning in sufficient detail so that the veteran may ascertain the figures that DVA has calculated for the components in his or her compensation for incapacity for work (normal earnings, actual earnings, pay-related allowances, the adjustment percentage, among others), and the evidence DVA has relied upon to arrive at these figures.**
- 10. When an overpayment has arisen, DVA should notify the veteran of the options to request a write off or waiver, and the consequences of the two options.**

²⁰ *Military Rehabilitation and Compensation Bill 2003* (Cth) Explanatory Memorandum page v.

²¹ MRCA section 131(2).

²² MRCA section 429 and DRCA section 114D.

²³ MRCA section 428 and DRCA section 114C.

²⁴ DRCA section 114(2) and MRCA section 415(4).

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- 11. The MRCA and DRCA should be amended to remove the adjustment percentage. In the alternative, the legislation should be amended to permit DVA to have a discretion as to its application in every case, particularly for seasonal or casual workers and when a review of payments is undertaken retrospectively over a prolonged period.**

Legal Representation at the Veterans' Review Board

Legal Aid NSW believes that the exclusion of legal representation in proceedings before the VRB adversely affects the availability and quality of representation in VRB proceedings. This restriction has been in place since 1929. Concerns about the availability of advocates for veterans in VRB proceedings, the quality of representation by advocates and training for advocates have been raised at a number of inquiries:

- The *Independent Enquiry into the Repatriation System* conducted by the Honourable Mr Justice Toose in 1975 recommended that veterans should be permitted to have legal representation before the Tribunal (as it was known at that time) because it would improve the availability of representation in proceedings before the Tribunal, and assist the decision making of the Tribunal.²⁵ However this recommendation was not adopted as part of the subsequent *Repatriation Act Amendment Act 1979*.
- The Administrative Review Council's *Review of Pension Decisions under Repatriation Legislation* in 1983 (**ARC Report**) recommended that no restrictions should be made on legal representation in proceedings in the VRB.²⁶ The Council was told about poor standards of advocacy and lack of appropriate training for advocates.²⁷ It concluded that claimants should be properly represented, and that permitting legal representatives would assist claimants as well as the reviewing authority. However, the Administrative Review Council's recommendation was rejected by a further report of the Advisory Committee on Repatriation Legislation Review, and was not implemented. The Committee cited concerns that legal representation would not be in the best interests of veterans or the decision maker.²⁸
- Most recently, the Senate Foreign Affairs, Defence and Trade References Committee (**the Senate Committee**), in its inquiry into suicide by veterans, concluded that the universal prohibition on legal representation should be independently reviewed because it does not reflect the full range of circumstances of veterans before the VRB and cannot be described as 'veteran centric.'²⁹

A detailed history of the attempts to reform this aspect of veterans' law is contained in Annexure A. Since the Toose Report and the ARC Report there have been continual

²⁵ Volume 1 at page 251.

²⁶ Recommendation 12 at page 61.

²⁷ At page 37.

²⁸ The report of the Advisory Committee on Repatriation Legislation Review (1983) at pages 17-18.

²⁹ Senate Foreign Affairs, Defence and Trade References Committee, *The Constant Battle: Suicide by Veterans* (2017), at page 153.

amendments to the legislation and further jurisprudence increasing the complexity of veterans' law. Questions regarding the quality of advocates and availability of legal representation at the VRB are more relevant than they have ever been.

Legal Aid NSW is also concerned about the availability of advocates, and the quality of assistance provided by some advocates. For example, in one case we encountered an advocate who said he was advised and trained by DVA that a claim for an injury or disease could not be made under the VEA if there is no Statement of Principles (**SOP**) for the condition.³⁰ In another case, Legal Aid NSW was told by an advocate that he had withdrawn a claim on advice from a delegate of DVA because similar claims had been rejected by DVA. In 2017 Legal Aid NSW conducted recruitment for an advocate for the VAS and did not receive any applications from candidates who met the requirement that they not have a law degree.

Based on our experience in advising and assisting veterans, we believe that permitting legal practitioners to represent veterans in the VRB in complex matters would assist the VRB and support veterans with complex cases to engage more effectively with the VRB. Permitting legal representation in the VRB in complex matters would also address the problem of the lack of advocates with appropriate experience in matters under the DRCA and the MRCA. We suggest that the VRB should be permitted to grant leave for a veteran to be represented by a legal practitioner in circumstances where the case involves complex law or facts, or where the veteran is particularly vulnerable.

If legal practitioners are permitted to appear at the VRB they should not be required to undergo accreditation or register as a veterans' lawyer in order to appear at the VRB or represent veterans. Legal Aid NSW points to current developments in migration law which propose to remove unrestricted legal practitioners from the regulatory scheme that governs migration agents. The rationale for this proposal is that lawyers are already subject to stringent professional regulatory schemes and practice in a range of complex areas of law.³¹

We do not agree with the view that permitting legal representation in VRB proceedings for complex matters would prolong proceedings or increase costs. Rather, legal practitioners will be able to improve the efficiency of the VRB by assisting to define the issues and identify relevant evidence. There is no cogent reason to treat representation in the VRB differently to representation in the Administrative Appeals Tribunal, as both tribunals are intended to provide fair, economical and informal review of administrative decisions. To address concerns about fees that may be charged by lawyers for work undertaken in matters before the VRB, we suggest that the VRB should remain a no costs jurisdiction

³⁰ A claim may be lodged under the VEA even if a SOP for the condition does not exist. It means that DVA must determine liability based on the whole of the evidence without reference to specific criteria prescribed in a SOP. However, DVA is prevented from determining liability for a condition when the Repatriation Medical Authority (**RMA**) has notified that it intends to carry out an investigation of a non-SOP condition, or when the RMA has declared that certain clinical conditions are not injuries or diseases under the VEA or MRCA, or are not able to related to service: section VEA section 120B(4).

³¹ *Migration Amendment (Regulation of Migration Agents) Bill 2017* (Cth) Second Reading Speech.

and regulations be introduced to prescribe a scale of fees for work undertaken by lawyers in connection with VRB proceedings.

Notwithstanding our concerns about some advocates, we believe that advocates who are well trained and supported have an important role in assisting veterans. Our experience is that legal practitioners and advocates can work together effectively to provide a high quality and responsive services for veterans.

We suggest that DVA should not continue to be responsible for training advocates. We consider that the current arrangements give rise to a perceived conflict of interest, and may inadvertently promote a culture of deference to, and compliance with, the views of DVA delegates in the conduct of claims and appeals by advocates. We also suggest that it is in the best interests of veterans that advocates undertake a mandatory period of supervised practice. The supervision should be structured so that entry-level advocates can acquire, develop and consolidate the knowledge, skills and experience necessary for unrestricted work as an advocate.³²

Recommendations

- 12. The VRB should be permitted to give leave for a veteran to be represented by a legal practitioner in complex cases or where the veteran is particularly vulnerable. However legal practitioners should not be required to undergo accreditation, or register as a veterans' lawyer, in order to appear at the VRB.**
- 13. The VRB should remain a no costs jurisdiction and a fee scale be introduced for work undertaken by lawyers in connection with VRB proceedings.**
- 14. Advocates should be trained by an independent body, with assistance from lawyers and advocates with experienced in veterans' law, and undergo a mandatory period of supervised practice.**

The proposal for a 'Bureau of Veterans' Advocates'

In its report on suicide by veterans, the Senate Committee proposed 'the establishment of a Bureau of Veterans' Advocates modelled on the Bureau of Pensions Advocates in Canada'. This proposal is also being currently addressed by DVA in its Veterans' Advocacy and Support Services Scoping Study. The Senate Committee also proposed that the Bureau be allocated with a budget to commission legal aid to assist veterans with appeals.³³

Our view is that advocates should be institutionally separate from DVA, and that the VAS provides the best model of advocacy services for veterans. The VAS provides a range of flexible services for veterans and is integrated with other legal services that can assist with the full range of legal problems that may be experienced by veterans. The VAS trains its own advocates and contributes to community legal education about veterans' law. In its

³² As suggested in the submission by the Law Council of Australia dated 11 May 2018 regarding the *Efficacy of current regulation of Australian migration agents* at paragraph 18.

³³ Senate Foreign Affairs, Defence and Trade References Committee, *The Constant Battle: Suicide by Veterans* (2017) page 152.

report on Access to Justice Arrangements the Productivity Commission concluded that Legal Aid NSW ‘*exemplifies leading practice with its civil division and services.*’³⁴ Legal Aid NSW would therefore support the enhancement of funding to legal aid to assist veterans, particularly if the exclusion of legal practitioners from VRB proceedings is lifted or modified.

Conduct by DVA in VRB proceedings

Legal Aid NSW has concerns that DVA does not always act in accordance with the Commonwealth’s Model Litigant Guidelines, including the obligations to act promptly and not cause unnecessary delay, to pay legitimate claims without litigation and to act consistently in the handling of claims and litigation.³⁵

In one case where Legal Aid NSW was representing a veteran in proceedings before the VRB the veteran, who suffered from significant psychological conditions, was contacted directly by a Review Support Officer at DVA. The officer informed the veteran that his matter was not going to succeed at the VRB and that he should withdraw his application. This was despite the veteran being represented in his proceedings by Legal Aid NSW. The officer then emailed the veteran a withdrawal form, which the veteran completed and returned.

Shortly after, the veteran contacted Legal Aid NSW to notify his representative about what had happened. A copy of the email from the DVA officer to the veteran was forwarded to Legal Aid NSW. A letter was then sent by the CEO of Legal Aid NSW to DVA to complain about the conduct of the DVA officer. In May 2018, a letter was received from the Assistant Secretary of Primary Claims and Reconsiderations at DVA, which stated that *‘[w]hilst DVA is not able to release specific details of the investigation due to privacy considerations, I am satisfied with the findings and can assure you that the situation arose out of an **administrative error**’* (emphasis added).

We recommend training for DVA decision makers on the Commonwealth Model Litigant Guidelines.

Recommendations

- 15. Additional funding should be made available for legal aid to assist veterans in proceedings in the VRB.**
- 16. Advocacy services for veterans should be independent from DVA.**
- 17. DVA should be trained on the Commonwealth’s Model Litigant Guidelines.**

³⁴ Productivity Commission, Access to Justice Arrangements, Report 73, pages 722 – 723.

³⁵ Legal Services Directions (2017) Appendix B - *The Commonwealth’s obligation to act as a model litigant* clauses 2(a) (b) and (c). The obligations apply to Commonwealth Government agencies engaged in litigation in courts, tribunals as well as alternative dispute resolution.

Statements of Principles

Questions from Issues Paper

- Have the Statements of Principles helped to create a more equitable, efficient and consistent system of support for veterans? Are there ways to improve their use?
- What is the rationale for having two different standards of proof for veterans with different types of service? Are there alternatives to recognise different groups of veterans? What would be the costs and benefits of moving to one standard of proof for all veterans (for example, would it make the claims process easier)?

Legal Aid NSW notes the submissions made by other stakeholders to the Senate Committee regarding the application of the Statements of Principles (**SOPs**) during its inquiry into veteran suicide.³⁶ Legal Aid NSW supports modifying the application of the SOPs in a way that would allow a degree of flexibility in their application.

Legal Aid NSW has acted for veterans in matters where the rigid application of SOPs has resulted in inequitable outcomes for veterans, particularly where the wording of the SOP excludes a particular class of veteran for no apparent reason. For example, in the SOP concerning cervical spondylosis (No. 67 of 2014), helicopter aircrew other than the *pilot* are prevented from relying upon factor 6(k) of the SOP, which refers to '***piloting** a helicopter for a cumulative total of at least 1 000 hours within the 25 years before the clinical onset of cervical spondylosis*' (emphasis added).

However, as the aircrew are necessary to assist the pilot in the helicopter, among other things, they suffer the same turbulence and movements as the pilot and thus the same risks concerning cervical spondylosis. Therefore, the exclusion of aircrew from factor 6(k) in the SOP appears to lack any justification, is unjust and could prevent a significant number of veterans from claiming cervical spondylosis due to defence service.

The wording of the SOP concerning *Posttraumatic Stress Disorder (PTSD)* (No. 82 of 2014) is another example of how the rigid application of the SOPs can result in inequitable outcomes for veterans, particularly the definition contained in the SOP for a *category 1B stressor*. The definition includes, among other things, '*viewing corpses or critically injured casualties as an eyewitness*'.³⁷ This means that if a veteran has viewed a corpse rather than *corpses* or a critically injured casualty rather than *casualties*, he or she would not meet the definition of a category 1B stressor. However, a veteran could be traumatised by viewing *one* corpse or casualty. Therefore, the requirement in the SOP that the veteran must have viewed multiple corpses or multiple casualties in order to meet the definition of a category 1B stressor appears to lack any justification and could prevent a significant number of veterans from claiming PTSD.

³⁶ Senate Committee on Foreign Affairs, Defence and Trade References, *The Constant Battle: Suicide by Veterans* (2017), pages 62 to 69.

³⁷ Page 5 of the SOP.

In some cases, veterans are injured in training for deployments to areas that are 'warlike or non-warlike'. The training for such deployments or anti-terrorism training can replicate real-life scenarios and it is somewhat artificial in those circumstances to distinguish 'warlike and non-warlike' injuries from 'peacetime' or 'defence service' injuries.

The SOPs for warlike or non-warlike service, or operational service, may contain factors that are less onerous to satisfy than the SOPs for peacetime service. For example, the SOP concerning *Depressive Disorder* (No. 83 of 2015) for warlike or non-warlike service, or operational service, allows much longer time frames for the clinical onset of depressive disorder following a 'stressor' than the SOP concerning *Depressive Disorder* (No. 84 of 2015) for peacetime service.³⁸

Further, the SOP concerning *Lumbar Spondylosis* (No. 62 of 2014) for warlike or non-warlike service, or operational service, contains less stringent factors than the SOP concerning *Lumbar Spondylosis* (No. 63 of 2014) for peacetime service.³⁹

Recommendations

- 18. Delegates should not be completely bound by the SOPs when making a determination and they should be applied flexibly, consistent with the beneficial objective of the compensation schemes.**
- 19. In circumstances where an injury is connected with training that replicates real-life scenarios the more beneficial SOP should apply.**

³⁸ Five years following a Category 1A and 1B stressor for warlike or non-warlike service, or operational service, compared with two years for peacetime service.

³⁹ For example, compare factors 6(h),(j),(k) and (m) in SOP No. 62 of 2014 with factors 6(g),(i),(j) and (l) of SOP No. 63 of 2014.

Annexure A – Legal representation before the VRB

The provenance of the prohibition on legal representation appears to be the Australian Soldiers' Repatriation Act (No. 14 of 1929). Section 45R of that Act stated that '[a]ny appellant shall be entitled... to be represented, at his own expense, at the hearing by a person other than a legal practitioner'.

However, on the question of legal representation, the *Independent Enquiry into the Repatriation System*, June 1975, by the Honourable Mr Justice Toose (**the Toose Report**) found the following:

No discussion appears to have taken place in 1929 as to why legal representation was not permissible. But at its 1928 Congress the Returned Services League resolved:

'That all appellants shall have the right to be represented by the Returned Services League and/or in person;

That neither party shall be represented by a barrister or solicitor'

This view still remains the view of the League. Other ex-service associations were of the view that there should be legal representation, with the qualification that such representation should be provided free of cost. This was the view also of many individuals. Some individuals expressed a concern that proceedings would be lengthened and would become a contest with the Commission if legal representation was granted. An argument supported by many was that the member was at a disadvantage in not being permitted legal representation, because the Chairman of a Tribunal was a lawyer. It was pointed out that in workers' compensation cases, parties were entitled to legal representation

Other arguments were that advocates who appeared before Tribunals were few in number, and in some cases were poor in quality. Advocates appeared in some instances to have little knowledge of their cases, and not time to interview their clients. In some cases summaries were seen by advocates at the last minute although in fact they were available to be seen some days before the hearing. If appeals were heard outside capital cities, advocates in general were not available.

The criticism that appeals would be lengthened in hearing if legal representation were permitted, appears to be based on the wrong premise that appeals are adversary proceedings. In any event, it has been found in areas such as industrial jurisdictions, where lay as well as legal representation is the order of the day, that it is not the legal practitioner who causes undue time to be spent.

The evidence did not suggest that lay representation had given entire satisfaction to the ex-service population. It should be said that many members

have been well served by their organisation in that those organisations have provided lay advocates at their own expense. Similarly, widows have been well served by the provision of advocates by Legacy. But the numbers of advocates have been small and the choice limited.

Other classes of advocates have been members of Parliament, who have given a great deal of their time; and medical practitioners. **In fact, any person can be an advocate, unless he is a legal practitioner.**

With the provision of legal aid by the Australian Legal Aid Office for ex-servicemen, the question of cost to a member in presenting and processing a claim does not arise. In fact, in the past the Legal Service Bureau, the forerunner of the Australian Legal Aid Office, has assisted members in presenting claims and has provided lay advocates. As legal practitioners were not permitted to appear, these advocates of necessity were untrained men. No doubt the Legal Aid Office will carry out these duties in the future:

In Canada the Bureau of Pensions Advocates provides on request:

- (a) a counselling service for veterans;
- (b) assistance to veterans in the preparation of applications; and
- (c) representation of veterans by legal practitioners at hearings.

This service is highly regarded by those desiring to make claims and obviously greatly facilitates the determination of claims and appeals.

As reasons now have to be delivered by Entitlement Appeal Tribunals, appearance before them of legal practitioners would be of assistance to Tribunals. Legal practitioners are accustomed to define issues and to point to evidence leading to a conclusion on those issues. Legal practitioners would be readily available in centres outside the capital cities.

Conclusions

I am of the view that a member should be permitted legal representation before a Tribunal, and that Section 72 should be amended accordingly.

I am of the view also that where a question of credibility arises, the determining authority should interview the member concerned before making its determination on the question of credibility. There would be no requirement for a member to have the right of representation at this interview.

The Act should be amended accordingly.

*If my recommendation in part 8.13 as to appeals to a Court in certain circumstances is adopted, legal representation should be permitted both to a member and to the Commission.*⁴⁰ (**emphasis added**)

The Toose Report was considered by the Government and ex-service organisations, especially the RSL and the Australian Veterans' Defence Services Council, prior to the drafting of the *Repatriation Acts Amendment Bill 1979*⁴¹.

However, despite the recommendations of the Toose Report regarding legal representation, the ex-service organisations, especially the RSL and the Australian Veterans Defence Services Council, *'were very much opposed to that type of representation. The informality of the tribunals has always been appreciated. Also, of course, that feature has made it a cheap and efficient procedure for appellants. It has prevented the tribunals from becoming the right of the rich man only'*⁴².

As a result, the recommendations of the Toose Report regarding legal representation were not adopted in the *Repatriation Acts Amendment Act 1979*.

In 1983, not long after the Toose Report in 1975, questions regarding legal representation and the quality of advocates were raised again by the Administrative Review Council (**ARC**) in its Report to the Attorney General (Report No. 20), entitled *Review of Pension Decisions under Repatriation Legislation*, 16 September 1983.

Among other things, the ARC's report stated:

*'In a significant percentage of cases coming before the RRT [Repatriation Review Tribunal], an applicant is at present represented by an advocate employed by an ex-service organisation such as the RSL or Legacy. Some advocates have accumulated considerable practical expertise over the years, but advocates do not normally possess formal qualifications in either law or medicine. **The capacity of advocates to assist the Tribunal varies greatly.***

*In the submissions received by the Council, considerable support was received for the propositions that the standard of advocacy before the final review authority should be improved and that it is desirable for persons who do appear before this authority to be adequately trained. **The Legacy Co-ordination Council maintained that the standard of advocacy 'could be improved' and Mr I.H. Davies, an advocate for more than twelve years, referred to 'the known incompetency of some paid advocates and the consequent disadvantage to the claimant'.** The desirability of a training scheme for advocates was referred to by both the President of the RRT and Mr LJ. Hogan, a repatriation advocate. The*

⁴⁰ *Independent Enquiry into the Repatriation System* (June 1975) Honourable Mr Justice Toose, at page 250-251 of Volume 1.

⁴¹ Second Reading Speech, House of Representatives, Wednesday 7 March 1979, Hansard page 727.

⁴² Mr Adermann, Fisher - Minister for Veterans' Affairs, Second Reading Speech, Wednesday 7 March 1979, Hansard page 727.

Council was informed by Brisbane Legacy that 2 courses of instruction have been conducted in Queensland with a view to raising the standard of advocacy.

The existing process whereby advocates acquire expertise by way of training 'on the job' is manifestly inadequate. Nor is it appropriate that the RRT be used as a means of instructing advocates in those skills which they should already possess. The Council believes that claimants should be adequately represented and that representatives should not only assist their client but also render all possible assistance to the reviewing authority. A case which is adequately prepared and presented is of benefit to both a claimant and a decision maker. An adequate standard of advocacy should also contribute to a reduction in the number of appeals.

It is the Council's view that a claimant should be free to choose his own representative - including the right to choose a legal practitioner. The Returned Services League of Australia stated in its submission to the Council that, while it had opposed in the past the idea of legal practitioners acting as advocates, it is now "apparent that with the increased legalisation of the system advocates with legal training who could act in an honorary capacity would improve the quality of advocacy before the determining authority"' (at page 37) (emphasis added).

The ARC then stated:

'The Council has emphasised the important role to be performed by the VAB [Veterans' Appeals Board] as an intermediate review authority in reducing the number of claims proceeding to the final review tribunal. Just as the holding of interviews and hearings will assist in disposing finally of many claims at this level of review, so too will be the ability of the claimant to be represented at such an interview by a person of his own choosing, whether legally qualified or not. It has already been emphasised that it is not envisaged that the Board will generally conduct formal hearings. The presence in appropriate cases of a representative - whether legally qualified or not - may assist the Board to reaching speedier determinations by clarifying certain aspects of a claim. Moreover, the presence of an experienced representative may assist the Board in applying difficult provisions of the repatriation legislation, such as those provisions dealing with the onus of proof which have been the subject of considerable litigation in the past.

RECOMMENDATION 12 (ARC's emphasis)

For the purposes of the Veterans' Appeals Board's jurisdiction, no restrictions should be placed on the claimant's or applicant's freedom to be represented, if he wishes, by a person of his own choice' (at page 60-61) (emphasis added)

The ARC's report subsequently underpinned the *Repatriation Legislation Amendment Bill 1984*. The purpose of this Bill '[was] to provide for the restructuring of the repatriation determining system **following the Government's consideration of Report No. 20 of the Administrative Review Council tabled in the Senate by the Attorney General (Senator Gareth Evans) on 16 November 1983**'⁴³ (emphasis added).

One of the changes proposed by the *Repatriation Legislation Amendment Bill 1984* (later enacted as the *Repatriation Legislation Amendment Act 1985*) was the replacement of the Repatriation Review Tribunal (**RRT**) with the Veterans' Review Board (**VRB**).

However, despite the recommendations of the ARC that '*no restrictions should be placed on the claimant's or applicant's freedom to be represented, if he wishes, by a person of his own choice*', the Government in 1983 decided against legal representation for veterans at the VRB.

In doing so, the Government said '*[it] has considered this recommendation in the light of the views expressed by the **Advisory Committee on Repatriation Legislation Review**. At page 18 of its report, the Committee expressed the view that legal practitioners should not appear before the Veterans' Review Board. The Government accepts that view and the Bill provides that a claimant or the Commission may not be represented before the Veterans' Review Board by a legal practitioner or by a person who has a degree in law*'⁴⁴ (emphasis added).

The report of the Advisory Committee on Repatriation Legislation Review, which was relied upon by the Government to depart from the recommendation of the ARC regarding legal representation at the VRB, stated:

'It has been the long held view by ex-service organisations that legal representation should not be allowed in the Repatriation determining system. ARC proposes in recommendation 12 that an applicant or claimant be represented by a person of his own choice. This would enable legal practitioners to represent at the [VRB] level. The Committee believes the introduction of legal representation at the early stage would not be in the interests of the determining system or the great majority of claimants or applicants. It was suggested to the Committee that a compromise may be that legal practitioners should be allowed if both parties agree or at the request of the [VRB]. However, the Committee feels that there is opportunity in the proposed system for legal representation at the AAT stage and does not support legal practitioners in this early stage of the determining system. In discussing the question of representation the Committee is aware of problems with the existing provisions of Repatriation legislation which exclude only legal practitioners from appearance before the RRT. The Committee considers that the provisions of the legislation should be

⁴³ Minister for Aboriginal Affairs, Mr Holding, Second Reading in the House of Representatives, 23 August 1984, Hansard page 300.

⁴⁴ Ibid page 301.

amended to exclude any person who is enrolled as a legal practitioner of the High Court, the Federal Court, or the Supreme Court of a State or Territory or who has obtained a degree in law. The Committee considers that such an interpretation would reflect the spirit of the existing legislation and would prevent people who have obtained degrees in law but have not sought admission to practise, from being advocates in Repatriation cases⁴⁵ (emphasis added).

Despite the recommendations of the Toose Report in 1975 and the ARC in 1983 to allow a free choice of representation, whether legally qualified or not, the Advisory Committee on Repatriation Legislation Review recommended an *extension* of the prohibition to include anyone with a law degree. There appears to have been no discussion as to why this prohibition was extended.

Further, that the recommendation by the Advisory Committee on Repatriation Legislation Review appears to have been based on ‘*the long held view by ex-service organisations that legal representation should not be allowed in the Repatriation determining system*’ without, it seems, further analysis of whether that view remained appropriate in 1983, particularly in an increasingly legalistic and complex jurisdiction such as veterans’ law, and the recommendations of the Toose Report and the ARC, was perhaps incautious and short-sighted. Indeed, the fact that questions have since continued to resurface about the quality of advocates and whether legal representation should be allowed confirms as much.

In August 2017, following its inquiry into suicide by veterans, the Senate Committee on Foreign Affairs, Defence and Trade stated the following in respect of legal representation at the VRB:

‘...[T]he committee holds a concern regarding whether the established practice of excluding veterans’ lawyers from the VRB is appropriate in all cases. A number of examples were provided where vulnerable veterans felt underrepresented or unable to fairly engage with VRB proceedings...

*...However, given the long-term future of veterans in in the balance, and the structural barriers involved in making an appeal to the AAT, veterans should be able to achieve the fairest hearing possible. A universal prohibition on legal representation may not reflect the ranges of circumstances of veterans before the VRB, nor can it be described as “veteran centric”. In the view of the committee, it is time that representation before the VRB is independently reviewed to assess if it is still appropriate for all veterans*⁴⁶.

⁴⁵ The report of the Advisory Committee on Repatriation Legislation Review, 1983, page 17-18.

⁴⁶ Senate Foreign Affairs, Defence and Trade References Committee, *The Constant Battle: Suicide by Veterans* (2017) page 153.