

A Better Way to Support Veterans
Draft Report

Legal Aid NSW submission to the
Productivity Commission

February 2019

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 in response to *A Better Way to Support Veterans, Draft Report*. Should you require any further information, please contact:

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Introduction

The work of the Veterans' Advocacy Service

The Veterans' Advocacy Service (**VAS**) sits within the Civil Law Division of Legal Aid NSW. It is a state-wide specialist service providing legal advice, assistance and representation to people who have served in the Australian Defence Force and their dependants. 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 provides advice on veterans' matters by phone, at face-to face appointments and fortnightly advice outreach clinics held at the Liverpool Legal Aid NSW office, which is near the Holsworthy base, and in St Marys in collaboration with the Vietnam Veterans' Association of Australia.

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 facilitating referrals to other specialist and general legal services within Legal Aid NSW. Veterans and their dependants 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 role in merits and judicial review proceedings

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 (**AAT**), 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, and also in the Administrative Appeals Tribunal (**AAT**). In accordance with Legal Aid NSW policies and guidelines, for representation at the AAT 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.

Our submission

We welcome the release of *A Better Way to Support Veterans, Draft Report* (**Draft Report**) and the opportunity to provide comment. Our submission puts forward a number of proposals for consideration, which are summarised on page 4. Our submission focuses on the following sections of the Draft Report:

- Chapter 10: Reviews
- Chapter 12: Compensation

Summary of proposals

1. The Veterans' Review Board should remain an independent statutory tribunal with decision-making powers, given the specialised nature of the veterans' jurisdiction.
2. If the Veterans' Review Board is only able to make recommendations:
 - a. The Department of Veterans' Affairs should indicate whether it consents to the Veterans' Review Board recommendation within 14 days.
 - b. If the Department of Veterans' Affairs does not respond to a recommendation within 14 days, the matter should be referable to the Administrative Appeals Tribunal.
 - c. The Department of Veterans' Affairs should provide adequate reasons for a decision to not consent to a Veterans' Review Board recommendation.
3. The Department of Veterans' Affairs must implement all Veterans' Review Board recommendations it consents to within 14 days.
4. The current ability of an applicant to engage any representative, including a legal practitioner, at the Alternative Dispute Resolution stage of Veterans' Review Board proceedings should be maintained.
5. Veterans who cannot return to work due to accepted conditions should not receive less in compensation than pre-injury earnings (indexed). In such circumstances, compensation for incapacity for work under both the DRCA and MRCA should amount to the difference between the veteran's invalidity pension and pre-injury earnings (indexed).
6. In appropriate circumstances, the Department of Veterans' Affairs should be able to exercise discretion concerning the application of the adjustment percentage when undertaking retrospective reviews of compensation and calculating overpayments.
7. In the absence of fraud and where the payment is received in good faith, the amount of any overpayment the Department of Veterans' Affairs can recover should be limited to the amount of overpayment made in the preceding 28 days.
8. Correspondence from the Department of Veterans' Affairs notifying of an overpayment decision should, as a matter of course, include information on the veterans' right to seek a write-off or waiver, and the effect of each option.

Chapter 10: Reviews

Merits Review – brief background

The Veterans' Review Board (**VRB**) forms part of the system of merits review for decision-making by the Australian Commonwealth. Merits review occurs where a person or body other than the primary decision-maker reconsiders the original decision and determines the correct and preferable decision.¹ The Australian Government significantly expanded merits review in the 1970s and 1980s following the report of the Commonwealth Administrative Review Committee (the Kerr Committee),² which led to the creation of the Administrative Appeals Tribunal (**AAT**) and other reforms.

As part of the merits review system, the VRB has played a significant role in providing access to justice by enabling applicants to challenge government decisions without undue cost and formality. Individuals affected by decisions under the *Veterans' Entitlements Act 1986* (Cth) (**VEA**) and the *Military Rehabilitation and Compensation Act 2004* (Cth) (**MRCA**) have the right to apply for review by the VRB. As an external merits review tribunal, the VRB has provided a quick, just, economical and final resolution of legal problems involving access to benefits and entitlements under veterans' and military compensation legislation.

Draft Recommendation 10.3 – Changes to the Veterans Review Board

At 10.3, the Draft Report recommends that:

The Australian Government should amend the rules and procedures of the Veterans' Review Board (VRB).

Rather than making decisions under the legislation, it would serve as a review and resolution body to resolve claims for veterans... A single board member could recommend the correct and preferable decision to be made under the legislation, and the Department of Veterans' Affairs and the claimant could consent to that final decision being applied in law.³

The proposal involves amending the legislation in a way that would remove the power of the VRB to make decisions. This would fundamentally alter the role of the VRB, as it would

¹ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589 and 591 per Bowen CJ and Deane J.

² J Kerr 1971, *Report of the Commonwealth Administrative Review Committee*, Canberra: Government Printer.

³ Productivity Commission 2018, *A Better Way to Support Veterans*, Draft Report, Canberra (**Draft Report**) p 419.

no longer be able to provide meaningful merits review involving a binding determination of the facts and issues in the case.⁴

While the Draft Report's stated objective of streamlining the merits review process is a laudable one, in our view, the drawbacks of removing the VRB's decision-making powers far outweigh any perceived benefits.

Added financial and emotional burden on veterans

The process of reviewing Department of Veterans' Affairs (**DVA**) decisions is already often lengthy and stressful for our clients. The Draft Report drew attention to reports of instances where, even where there was a favourable VRB or AAT decision, the DVA failed to implement the decision in a timely manner, requiring the veteran to follow up with the DVA to ensure compliance with review decisions.⁵

The proposal to remove determinative powers from the VRB would heighten these difficulties. Without the ability to make decisions, the review process at the VRB would lack finality. As noted in the Draft Report, the impact of this proposed change would be an increase in the number of veterans having to apply to the AAT. Requiring veterans to apply to the AAT for a binding decision after already participating in the VRB process would create an additional burden on applicants and on the AAT. It would also contribute further to the delay already inherent in the current system of decision-making and review.

The VRB has established a level of trust among veterans and their families, and operates effectively as a low-cost, informal avenue for dispute resolution and determination. It also has specialist expertise, which is particularly important given the inherent complexity in the veterans' jurisdiction. While we acknowledge that the existence of multiple review processes can present some complexities, the benefits of the current model should not be overlooked solely in the interests of creating a single pathway. We suggest that it would be more cost effective and less harmful for the Commission to consider ways to streamline the review pathway without removing the possibility of finality at each step of the process.

The VRB's review role will be critical at a time of significant reform

The Draft Report recommends a broad suite of changes to improve the quality of DVA processes and decisions. In the short term, it is foreseeable that the DVA will enter a period of adjustment as a result of these reforms, which may result in additional delays for those awaiting veteran support decisions. Removing the finality that comes from VRB determinations would exacerbate these delays.

Throughout a period of significant change and reform, it will be important to ensure that revised processes and procedures within the DVA are operating as intended and that systemic improvements result in fairer outcomes for veterans. During this period, we

⁴ *Australian Broadcasting Tribunal v Bond* (1990) 21 ALD 1, per Mason CJ at 11.

⁵ Draft Report p 404.

suggest that it would be prudent to ensure review mechanisms are as accessible and user-friendly as possible, by maintaining the current role of the VRB.

In the longer term, we are hopeful that improvements to the DVA's decision making processes will result in fewer applications for merits review. It would be preferable to consider any necessary changes to review processes after a sufficient period of time has passed to assess the impact of the proposed reforms on the number and nature of review applications. As such, we suggest that the 2025 review of VRB processes that is proposed in recommendation 10.4 be reframed as an opportunity to consider the impact of the current reform package, and the need for changes to the merits review pathway.

Comparable models are problematic

The NSW Housing Appeals Committee reviews certain decisions made by Family and Community Services (Housing) and other social housing providers. The Committee has only recommendatory powers. It provides recommendations to housing providers, who then make a final determination. Our experience with the Committee has not been positive. In our experience, there are often substantial delays in implementing the Committee's recommendations. In many cases, housing providers do not act on a recommendation until the affected person complains or contacts an agency like Legal Aid NSW to advocate on their behalf.

Given reported issues surrounding the DVA's compliance with determinations of the VRB and AAT,⁶ we are concerned that similar problems would arise following a recommendation of the VRB. In our view, rather than replicating flawed models, it is appropriate for the veterans' review process to be modelled on the social security jurisdiction. Like the VEA, the *Social Security Act 1991* (Cth) is beneficial legislation. Social security applicants have access to two tiers of external merits review at the AAT. Until the recent amalgamation of small tribunals, the first level of review was conducted by the specialist Social Security Appeals Tribunal (**SSAT**). Maintaining the decision making powers of the VRB would ensure veterans, like participants in other comparable schemes, continue to have access to two tiers of independent merits review.

A reduced role for the VRB would require safeguards

It is our strong preference to maintain the VRB's power to make decisions binding on the DVA. However, if this is not adopted and the VRB is only given the power to make recommendations, certain safeguards should be implemented to reduce undue expense and inconvenience to the parties and delays in the process. At a minimum, we suggest that:

1. The DVA should be required to indicate whether it consents to a recommendation within a strict time period. This would allow a veteran to obtain meaningful merit review at the AAT without further time being wasted.

⁶ Draft Report p 404.

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2. If the DVA does not consent to a recommendation, it should be required to provide reasons in sufficient detail to explain why.⁷ This would allow a veteran the opportunity to make an informed decision before applying to the AAT, and provides the AAT with further information about the DVA's position.

Proposal 1 The Veterans' Review Board should remain an independent statutory tribunal with decision-making powers given the specialised nature of the veterans' jurisdiction.

Proposal 2 If the Veterans' Review Board is only able to make recommendations:

- a. The Department of Veterans' Affairs must indicate whether it consents to the Veterans' Review Board recommendation within 14 days.
- b. If the Department of Veterans' Affairs does not consent to a Veterans' Review Board recommendation, or does not respond within 14 days, the veteran may apply to the Administrative Appeals Tribunal.
- c. The Department of Veterans' Affairs must provide adequate reasons for its decision to not consent to a Veterans' Review Board recommendation.

Proposal 3 The Department of Veterans' Affairs must implement all Veterans' Review Board recommendations it consents to within 14 days.

Draft Recommendation 10.4 – Future of the Veterans' Review Board

Recommendation 10.4 of the Draft Report proposes that:

The Australian government should conduct a further review in 2025 on the value of the continuing role of the Veterans' Review Board, once significant reforms to the initial claim process for veterans are established... If the review finds that the Board is no longer playing a substantial role in the claims process, the Australian Government should bring the alternative dispute resolution functions of the Board into the Department of Veterans' Affairs or its successor agency.

This recommendation is of significant concern to Legal Aid NSW. We submit that draft recommendation 10.3 would, if adopted, diminish the value and role of the VRB. In

⁷ *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43, at [55].

combination with recommendation 10.4, we are concerned that the VRB is effectively being set up to fail.

As we have noted above, we suggest that the proposed 2025 review be reframed to consider the impact of the current suite of reforms, and to determine whether any changes to the existing review process are required at that point. This would enable the VRB to continue in its current form, while acknowledging that simplification may be required in the future, after other reforms have had time to become embedded.

Representation at Alternative Dispute Resolution

The VRB's Alternative Dispute Resolution (**ADR**) process is an effective means of conducting and resolving reviews of decisions under the VEA and MRCA. This was noted in the Draft Report, which provided that *"in 2017-18, 83% of cases referred to an ADR process were finalised without the need for a hearing. ADR cases were finalised, on average, around four and a half months from lodgements."*⁸ Part of the success of the current ADR process can be attributed to the ability of a veteran to choose whom they wish to represent and support them, including a legal practitioner.

Legal Aid NSW has extensive experience with ADR at the VRB, offering representation subject to a merit test. Representation is provided by an in-house lawyer or advocate through Legal Aid NSW's Extended Legal Assistance (**ELA**) service. 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.

Much of the work that Legal Aid NSW carries out at the VRB involves advising and representing clients during ADR through its ELA service. Legal Aid NSW lawyers and advocates make a significant contribution in ADR, assisting clients and the VRB to identify and clarify issues in the case. As part of conducting ADR proceedings as a representative, we assist clients to obtain relevant evidence and provide written submissions on relevant issues, all with the aim of resolving matters during ADR.

The Draft Report states, in describing ADR:

*'[t]raditional legal processes involve both parties preparing submissions on their position in a dispute, and appearing for a formal hearing in front of a judge or tribunal member. By contrast, the ADR process is intended to be **facilitative**...'*⁹ (emphasis added).

The involvement of lawyers as representatives during ADR at the VRB does not increase the level of formality or cost. On the contrary, lawyers are able to quickly identify the issues

⁸ Draft Report pp 392-393.

⁹ Draft Report p 391.

in dispute and point to evidence leading to a conclusion on those issues,¹⁰ thus promoting the facilitative purpose of ADR. Contemporary legal practice involves the kinds of skills required to take part in ADR processes, and not only traditional adversarial and litigation skills. Lawyers undertake formal training and conduct significant areas of their practice in ADR arenas. For example, ADR and related processes such as mediation and conciliation have become key components of legal work in areas including employment law, insurance and consumer disputes, workers compensation and in other areas of federal administrative law such as the National Disability Insurance Scheme (**NDIS**).

Proposal 4

The current ability of an applicant to engage any representative, including a legal practitioner, at the Alternative Dispute Resolution stage of Veterans Review Board proceedings should be maintained.

Chapter 12: The compensation package

Offsetting, the adjustment percentage and overpayments

Legal Aid NSW endorses the Drafts Report's recommendation 12.2 to streamline the administration of superannuation invalidity pensions and veteran compensation.

Offsetting is required to prevent a veteran from receiving more than his or her pre-injury earnings or being compensated twice for the same incapacity. However, sometimes offsetting causes inequity to veterans, such as when it is applied to veterans who are not able to return to work due to accepted conditions. As such, offsetting may not always be appropriate. The superannuation offsetting example provided in the Draft Report in Box 12.9 highlights the inequity that may result to veterans who are not able to return to work.¹¹ In that example, Frank's incapacity payments are fully offset by his invalidity pension after 45 weeks. However, this results in Frank receiving around \$140 less per week than his pre-injury earnings.

Veterans who are unable ever to return to work due to accepted conditions should not be disadvantaged by the offsetting arrangements such that they end up receiving less than their pre-injury earnings (indexed). Compensation for economic loss is inadequate if it does not fully compensate the veteran to the level of his or her pre-injury earnings. The intention of the adjustment percentage was to provide a financial incentive to return to work.¹² However, this incentive is redundant if the veteran simply cannot return to work. Indeed, for these veterans it is a punitive measure, which undermines the beneficial

¹⁰ PB Toose 1975, *Report of the Independent Enquiry into the Repatriation System*, Canberra: Australian Government Publishing Service, vol 1 p 251.

¹¹ *Draft Report*, p 504

¹² See s 19(3) *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* and s 131(2) *Military Rehabilitation and Compensation Act 2004*; *Military Rehabilitation and Compensation Bill 2003*, Explanatory Memorandum page v.

purpose of the scheme. In those cases, compensation for incapacity for work under the DRCA and MRCA should amount to the difference between their invalidity pension and their pre-injury earnings (indexed).

There is benefit in providing an incentive to undergo rehabilitation and return to work for those veterans who have some capacity for work. This can be achieved by using an adjustment percentage. However, the adjustment percentage may cause inequitable outcomes for veterans employed in seasonal or casual work whose weekly earnings fluctuate depending on demand. This creates an onerous responsibility for veterans to provide weekly updates to the DVA about their working hours and earnings. While veterans have a responsibility to ensure that the 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 at a social or economic disadvantage. For veterans engaged in seasonal or casual work, a failure to notify the DVA of a change in working hours and earnings for the week can result in a substantial overpayment of compensation when a review is undertaken, retrospectively, once the correct information has been provided. In appropriate circumstances, the DVA should also be able to exercise discretion in the manner in which the adjustment percentage is applied when undertaking retrospective reviews of compensation and calculating overpayments.

Special rules should also apply to overpayments of compensation that are made through no fault of the veteran and are received in good faith. We often see cases where overpayments are made because of delay on the part of the DVA in processing new information or a failure to quickly identify an error. We have encountered cases where such failures continued for extended periods of time, resulting in large overpayments being made to veterans.

Veterans are under an obligation to report changes to their financial circumstances as soon as possible, especially changes relating to pay and employment. Compensation payments are made fortnightly. We submit that any reported changes should be processed by the DVA within a reasonable time, and certainly within 14 days, so that relevant payments can be adjusted. Consequently, the amount the DVA is be able to recover, in the absence of fraud and where the payment is received in good faith, should be limited to any overpayment made in the preceding 28 days. This provides an incentive for the DVA to process updated financial information quickly and to then make a timely and accurate adjustment.

Finally, we suggest that DVA letters notifying a veteran of an overpayment should, as a matter of course, include information on the veteran's right to seek a write-off or waiver, and the effect of each of these options.

Proposal 5

Veterans who cannot return to work due to accepted conditions should not receive less in compensation than pre-injury earnings (indexed). In such circumstances, compensation for incapacity for work under both the DRCA and MRCA should amount to the difference between the veteran's invalidity pension and pre-injury earnings (indexed).

Proposal 6

The Department of Veterans' Affairs should be able to exercise discretion concerning the application of the adjustment percentage when undertaking retrospective reviews of compensation and calculating overpayments.

Proposal 7

In the absence of fraud and where the payment is received in good faith, the amount of any overpayment that the Department of Veterans' Affairs can recover should be limited to the amount of overpayment made in the preceding 28 days.

Proposal 8

Correspondence from the Department of Veterans' Affairs notifying of an overpayment decision should, as a matter of course, include information on the veteran's right to seek a write-off or waiver, and the effect of each option.