

13 February 2019

## **COMPENSATION AND REHABILITATION FOR VETERANS Submission on the Productivity Commission's Draft Report**

1. Thank you for the opportunity to comment on the draft report *A Better Way to Support Veterans* about the Department of Veterans Affairs (DVA).

### **Introduction**

2. This response is based on my dual experiences as: an administrative lawyer specialising in merits review and quality assurance (QA) of administrative decisions<sup>1</sup>; and an authorised representative assisting my war widow mother, who has a DVA Gold Card.

3. I comment on two matters. First, the draft report's discussion of, and linkages between, elements of administrative justice and QA. Secondly, the relationship between aged care and the Gold Card. I refer to veterans' dependents<sup>2</sup> who are not listed in the inquiry's terms of reference but are integral to the issues and are discussed in the draft report.

### **Summary**

4. In summary my comments are:

- I. The draft report seems to give the impression that Gold Card holders are "rotting the system". To counteract this I suggest the following:
  - a. State more clearly, and early, that not all Gold Card holders abuse their entitlements.
  - b. State more clearly, and early, that Gold Card holders are not responsible for the over servicing by the medical profession that is a contributing factor to costs.
  - c. Recognise specifically that, in Australia, middle class welfare is available to those who have not served their country.
- II. The report proposes change. I suggest early reassurance about the Commission applying standard principles including traditional legislative approaches to retrospectivity, grandfathering and careful consideration to ensure that generally no one is worse off under new legislation, policy and

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<sup>1</sup> Including as the former head of the MRT, Deputy President of the ALRC, member of the ARC and President of the AIAL.

<sup>2</sup> The draft report says there are currently 116,000 dependents and 166,000 veterans (p.2).

administration. For example, the recommendation proposing no change for current Gold Card holders is on page 587 (recommendation 15.1).<sup>3</sup>

- III. As the draft report recognises, a grateful nation honours its warriors. I question whether, in responding to the needs of younger current and future veterans, the draft report gets the balance right in also responding to the needs of older veterans and their dependents. Some Australians still have vivid memories of those who served in WW1 and some served in, and well remember, WW2.<sup>4</sup> The report also needs to respond appropriately to these groups, recognising that some may face different challenges, including the digital divide.<sup>5</sup> (Issuing the draft report just prior to Christmas with comments due at the end of the traditional holiday period added an extra degree of difficulty).
- IV. As the draft report recognises, the ongoing support of veterans and their dependents depends on volunteers and families, including voluntary organisations. I am not aware of an information request about what could be done to support them. I suggest recognition of Authorised Representatives (ARs) (para 5 recommendation V1 below).
- V. A focus of the report is reducing the cost (and stress) of the unacceptably high overturn rate of primary decisions. Based on my experience I suggest:
  - a. A more integrated description linking the elements of administrative justice that occur as a continuum from primary decision-making through internal and merits review to the courts. The draft report's consideration of these stages, and also quality assurance (QA) and research and statistics, is most welcome. Better linkages may show how the system of administrative justice can increase productivity, improve well-being and foster trust in government (see para 6 below).
  - b. Well-calibrated review and QA contribute to "right first time" primary decision-making, improved quality controls (including policy manuals and training) and enhanced legislation. Integrated data collection and feedback is part of a well functioning decision making system.
  - c. The role of oversight bodies such as the Ombudsmen in improving administration might be more clearly described as part of the administrative justice system (p.398). Recommendations from such bodies can be inserted into quality controls.
  - d. Primary decision-making might be presented in its own chapter. Right first time decision-making is core business of DVA. The important role played by DVA officers, who are dealing with a high volume of claims and complex legislation, might be given even greater emphasis. If internal (senior officer) review is to be provided (recommendation 10.2) - which I question<sup>6</sup> - it will give another source of data gathering for improving primary decision making and quality controls (see para

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<sup>3</sup> I suggest a sentence about this on p.4 before the heading "A Lifetime Approach".

<sup>4</sup> While it is true that there has been 'widespread interest' in WW1 in the last two decades (p.449) some Australians still live with the consequences of that war. For some, the 'interest' goes back longer than 20 years.

<sup>5</sup> For example, the National Library catalogue shows only an online version of the draft report available to readers. The Productivity Commission website says hard copies are available.

<sup>6</sup> See below para 6.17.

7.8 below). The link between the primary decision error rate (p.375), staffing arrangements (p.376), inadequate quality controls (p.377), complex legislation and data recording might be clearer.

- e. The lack of a central record of CDDA payments does not prevent errors identified in such cases being recorded (without identifiers) with the aim of improving quality controls (p.398).
- VI. The discussion of QA in the draft report might be expanded beyond acceptance of the current DVA QA model into discussion of the scope and value of QA and alternative QA models. I suggest that the opportunity to maximise the value of, and embed, QA should not be missed. Recent developments show what a valuable tool it can be for decision makers, managers and claimants when it is well used. I suggest that the current DVA QA system may be somewhat reactive and passive rather than dynamic and integrated into proactively improving primary decision-making. Recognising that there are only 13 staff doing QA, perhaps some could QA decisions of new decision makers? Are the 13 staff actively encouraged to participate in updating quality controls?. Could the numbers of QA staff be increased in the light of reduced review costs and in the interests of quality decision-making?
- VII. The continued isolation of the VRB from the amalgamated Commonwealth tribunals might be further questioned, and better justified, especially in light of its proposed new role and recent developments in Australia and overseas (para 6.9f below).
- VIII. The draft report might more comprehensively record the history of respected institutions that it is proposing to change, including DVA and the Veterans Review Board (VRB). It recognises the valuable role played by these national institutions in protecting the rule of law but might do more. For example, the VRB has been an integral part of Australian administrative law since 1985.<sup>7</sup>
- IX. The draft report might further explore culture and values in governance (Ch 11). There is a fear that the monolithic Defence Department will swallow up the smaller DVA agency with DVA services struggling for budget and attention.<sup>8</sup> Since my war widow mother entered residential aged care my dealings with DVA have been like a long glass of cool water on a hot day compared to the large Department of Human Services.<sup>9</sup>
- X. The draft report provides a useful outline of the health services DVA provides but does not, and perhaps cannot, untangle the inadequate resolution of the entitlements of Gold Card holders in residential aged care and the services provided to others in such care. I refer, in particular, to dental care. (para 8.1f below).

## **Changes to recommendations**

5. I propose for consideration the following amendments to draft recommendations and further recommendations:

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<sup>7</sup> Another additional historical reference might be the service of women in WW1, e.g. p.77.

<sup>8</sup> Recommendation 11.1.

<sup>9</sup> My submission to the Aged Care Royal Commission is that, in my experience, the government's administration of aged care – not the private sector's service provision - is its greatest shortcoming (see para 8.5 below).

- I. I suggest amending draft recommendation 9.3, which is that when the QA process identifies an excessive error rate, all claims in the batch should be recalled for reassessment. If this recommendation continues it might be improved by specifying outcomes designed to optimize learning for decision makers including:
  - The QA section provides a training session for decision makers;
  - The QA section identifies any common errors in the batch and further identify the reasons including whether they are due to: deficiencies in the manual, improper exercise of discretion, mistake of law, mistake of facts, Inadequate facts etc.;
  - Responsibility for improving manuals is assigned and monitored;
  - The QA section reviews a random sample after one year to check on progress.
- II. Draft recommendation 10.2 contains three important issues that are the responsibility of three different bodies. I suggest breaking them into three recommendations or sub recommendations. For reasons stated above I suggest separating the primary decision-making aspects into a separate recommendation.
- III. I suggest including a draft recommendation that the VRB and AAT roles be re-examined following the release of the findings of the Callinan Statutory Review of Tribunals Amalgamation.
- IV. Draft recommendation 10. 4 proposes further review in 2025. I suggest a broader recommendation that keeps open the possibility of the VRB, in its new role, being absorbed into the AAT as a first tier body (see para 6.17 below).
- V. I suggest a draft recommendation that aged care health services managed by DVA be re-examined following recommendations from the Aged Care Royal Commission.
- VI. I suggest a draft recommendation that a national card be issued to the recognized Authorized Representative assisting a veteran or their dependent so that the Representative no longer has to constantly prove their bona fides to every government agency with which they have contact (para 8.5(b) below).

## **Comments on Chapter 10**

- 6.1 This section of my submission contains comments on Chapter 10 of the Report and relate to administrative law. I refer to my previous comments on improving the discussion of right first time primary decision-making.

### ***Part 10.1 p. 390 Why Do Review Processes Matter?***

- 6.2 This question is answered in the paragraph at p.391 before Box 10 might appear at the start of Section 10.1 because it is more fundamental than the section's current starting point. I also suggest additional reasons why review processes matter include: proper stewardship of government assets; trust in government; and respect for citizens.

## **Box 10.2**

6.3 I suggest revising the contents of this box, notably:

- It cites the Administrative Review Council (ARC) as the source of the amalgamation proposal and both the Kerr and Bland Committees had previously recommended an amalgamated tribunal.<sup>10</sup>
- Reviewing the statement that “decisions” of review tribunals have been brought into the AAT. For example, decisions of the MRT are not reviewable by the AAT since amalgamation.
- For reasons given in the text it is not useful to compare VRB and AAT case costs.

## **Draft Finding 10.1**

6.4 Draft finding 10.1 is that decisions are overturned in a majority of cases reviewed. After over forty years’ years of review in Australia across jurisdictions this rate can be recognized as too high. An overturn rate of around one third or below is generally regarded as more normal.

6.5 Box 10.5 contains a useful summary of reasons for overturns and a welcome statement of the potential for merits review to meet one of its intended objectives of improving primary decision-making. In particular, reasons for overturns include legislative complexity, applicants “keeping their powder dry” until a later stage and inexperienced untrained decision makers.

6.6 The report might take other opportunities to endorse merits review of administrative decisions and explain the role of good decision-making. I suggest:

- At page 390 further elaboration on the negatives of a false positive could be included. While an avoidable cost to government is unfortunate there are other equally costly outcomes including horizontal equity issues and reduced trust in government. Recovering overpayments are a cost and a stress on veterans and officials. Decision makers, managers, trainers and others involved in the decision making process take pride in their work and false positives do not produce the professional satisfaction of a job well done.
- At page 391 a simple graphic depicting the flow described in Box 10.1 of primary decision -> internal review -> merits review -> judicial review might be useful.
- At page 391 in Box 10.1 the reference to QA as internal review may mislead. Recommendation 10.2 is for traditional internal review by a senior officer. While QA is a type of review it may be more helpful to describe it as a tool.

6.7 The VRB has a proud legacy as one of the main Commonwealth tribunals. It is discussed at p.415 but might appear at the start of the review section.<sup>11</sup> Its membership of the Council of Australasian Tribunals (COAT) and Heads of Commonwealth Tribunals could be cited.

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<sup>10</sup> e.g. see Creyke, Robin, "Better Decisions' and Federal Tribunals in Australia" [2004] ALRCRefJI 3; (2004) 84 ALRCRefJI10.

<sup>11</sup> Noting the reference in key points p.389.

- 6.8 The draft report recommends the continued isolation of the VRB from the amalgamated AAT (p.420). A new role for it in mediation is recommended (recommendation 10.2).
- 6.9 The draft report cites previous reports recommending VRB separation from the AAT because veterans need specialized review (p.398). Another justification given is lack of cost savings (Box 10.2).<sup>12</sup> Noting that the findings of the Callinan Statutory Review of the Tribunals Amalgamation Act 2015 have not yet been released by the government, it might be recognized that there are other reasons in favour of amalgamation apart from cost savings, including:
- Providing the invaluable optic of independence.
  - Economies of scale in training tribunal members and maintaining their awareness of the latest court decisions;
  - Economies of scale through administrative tasks being co-located. For example, when there is a whole of government initiative each federal agency is asked to respond. Rather than each small tribunal having to devote administrative resources there can be one response from the amalgamated tribunal. Other examples are shared library databases, office administration costs etc.
  - Sharing expertise and approaches to problem solving.
- 6.10 The report might also consider and record the following aspects of Australian administrative law:
- The original vision was for one federal body (Box 10.2).
  - The VRB has regularly participated in various federal tribunal collaborative fora (Box 10.2).
  - Australian States and Territories and the UK have amalgamated their tribunals. The benefits are generally thought to outweigh the disadvantages.<sup>13</sup> In particular, it is agreed that there is benefit in sharing information and training.
  - DVA clients currently attend Commonwealth government shop fronts where DHS, ATO and other services are provided. An AAT “shop front” providing SSAT, MRT etc. services is no different.
  - The VRB members deciding cases would still specialize in veteran’s issues.

### ***Draft Recommendation 10.1***

- 6.11 The draft report finds that when the VRB identifies an error in a DVA decision it should clearly state the reason for varying or setting aside the decision under review and DVA should ensure that successful reviews be brought to the attention of senior management. This is fundamental to QA and merits review decision-making.

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<sup>12</sup> In the short term co-location is expensive but in the longer term cost savings can be expected from computer upgrades, premises etc.

<sup>13</sup> Bertus de Villiers ‘The State Administrative Tribunal of Western Australia – Time to End the Inquisitorial/Accusatorial Conundrum’ 2014 *UW Law Review* p.194-5; Judge Kevin O’Connor ‘Appeal Panels in Super Tribunals’ (2013) 32(1) *UQ Law Journal* 31.

- 6.12 I suggest that participation of smaller tribunals in amalgamated tribunals reduces the scope for inappropriate idiosyncratic practices to develop.
- 6.13 The Council of Administrative Tribunals (COAT) has a Tribunal Excellence Framework based on an international standard against which Australian Tribunals are measured.

***Draft Finding 10.2***

- 6.14 The draft report finds that the VRB and AAT are not providing sufficient feedback from their review processes to DVA to better inform decision-making practice and DVA isn't incorporating what it does get. Draft Recommendation 10.1 also refers to DVA senior officers being responsible for passing on information about review decisions. I make the following comments on this:
- When decision makers are aware of how feedback helps their work and that of their team they are motivated to expend the effort on it. When the team knows how the integrated system works its value grows.
  - Liaison between DVA and the tribunals is a two way street. DVA will know best what it needs from the tribunals. When QA controls are working well and both DVA and the tribunals see value in feedback it works better.
  - When tribunals are co-located the opportunities for sharing best practice in integrated feedback are increased. For example, when there is a court decision on administrative law that affects all – or many – Commonwealth agencies there can be efficiencies in quick and accurate dissemination of accurate information.

***Information Request 10.1***

- 6.15 The Commission seeks further information on whether there are any decisions that are not reviewable, that should be reviewable.
- 6.16 Ideally administrators can initiate test cases, up to the High Court if necessary, to clarify the operation of legislation that affects a cohort of applicants. Ideally administrators are proactive in managing caseloads. A model for this is the system used in the Australian Taxation Office.

***Draft recommendation 10.2***

- 6.17 The draft report recommends increased internal review by senior officers in DVA. I suggest that resources be put into primary decision-making and then, if review is sought, proceed to external review. Aim for right first time decision-making. Get as many facts as possible at the start and apply the right legislation. An applicant may not have confidence in departmental decisions and external review provides fresh eyes. In my experience quality primary decision-making followed by quality external merits review and judicial review is the optimum model.

***Draft recommendation 10.4***

- 6.18 The Commission recommends further review in 2025. I suggest that the recommended review be broader in scope. While the suggestions in the recommendation are one possible outcome in 2025 it may be premature to suggest that the VRB should be absorbed into DVA. History and experience

in Australia and overseas suggests otherwise. Other suggestions might be to consider data including rates of overturn in internal review by senior officers, veterans' confidence in internal review and the VRB, handling of veterans' cases in the AAT and the possibility of the VRB being amalgamated with the AAT.

## Quality Assurance

- 7.1 This section of my submission comments on quality assurance.
- 7.2 Draft Finding 10.1 is that, on external review, the majority of decisions are overturned or altered. QA is described in Chapter 9 (p.373ff).
- 7.3 QA is essential for achieving correct, preferable, logical, rational and consistent decisions. It affects litigation outcomes and productivity, reduces cost and reputational risks, and increases trust in decision-makers in civil society.<sup>14</sup> Making quality decisions for veterans is important work and QA is a positive that helps decision makers by enabling quality controls that assist them to produce quality decisions. When they are assisted to make quality decisions and receive recognition and reward for this, they have more satisfaction in their work.
- 7.4 The draft report describes the DVA QA model of a monthly sampling of a random sample of decisions after they have been made (Box 9.7 at p.374). It describes a DVA primary decision maker as having their decision quality assured by one of the 13 quality assurance officers (QOAs). If the QOA finds an error the original decision maker has "appeal rights" against the finding. This suggests a "negative" QA finding is something to be avoided by a decision maker because it "counts against" them. It appears to mitigate against it being a learning experience. It doesn't sound conducive to a team working together to find the best way to reach a correct or preferable decision in individual cases.
- 7.4 I suggest that, with a change of culture, there are other ways to do QA for more productive outcomes. For example:
- QA decisions of new decision makers as part of training in decision making;
  - A decision maker could volunteer their decision for QA;
  - Decision makers could agree that a cohort of decisions is proving challenging and they need to work together to get a quality outcome by having teams providing QA on each other's decisions.
- 7.6 Through QA the team learns how their quality controls can be improved. Controls include policy manuals and training. For example, if decision makers are consistently misapplying a policy guideline then the policy manual may need to be amended to clarify how the law applies to the facts. There may also need to be further training.
- 7.7 As the draft report recognizes, merits and judicial review decisions can improve primary decision-making because they can show how the primary decision makers' QA controls need to be improved. Ideally this is done in a

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<sup>14</sup> Its links to review ("external scrutiny") are briefly noted at p. 374.

timely way. The draft report finding 10.2 that the VRB and AAT are not providing sufficient feedback from their review processes to DVA to better inform decision-making practice suggest that this aspect of the quality controls can be improved.

- 7.8 The draft report also finds that DVA is not incorporating the limited available feedback into its decision-making processes. It does not describe the general system for monitoring and updating QA controls, staff initiated suggestions for improving QA controls, the system for planning for QA rolls outs or rewards and recognition for promoting QA.

### ***Draft Recommendation 9.3***

- 7.9 The draft report's QA recommendation (p.379) is that when the QA process identifies an excessive error rate all claims in the batch should be recalled for reassessment.

- 7.10 If the existing model is to be retained I suggest further improvements to this recommendation to maximize the outcomes. They include:

- QA should provide a training session for decision makers;
- QA should identify any common errors in the batch and identify whether they are due to:
  - Deficiencies in the manual?
  - Improper exercise of discretion?
  - Mistake of law?
  - Mistake of facts?
  - Inadequate facts?
- QA should recommend any necessary changes to forms, manuals, policy and legislation;
- A review of implementation of changes should be conducted after six months and one year.

### **The Gold Card and Residential Aged Care including Resolving Entitlements of Gold Card Holders**

- 8.1 This section of my submission addresses health care for Gold Card holders in residential aged care facilities. I suggest that it is beyond the scope of the draft report to disentangle the interplay of their entitlements but perhaps some further work on this might be encouraged.

- 8.2 There are 39,000 Gold Card holders aged over 90<sup>15</sup> and many are in residential aged care. I note that some are still taxpayers and also contribute to their residential aged care as a result of the means test.<sup>16</sup> Many will have never abused their Gold Card status through seeking over servicing.

- 8.3 I understand the draft report's approach that the Gold Card is not means tested and does not promote a wellness approach.

- 8.4 In response to **Information Request 15.1** (p.582) I note that, since assisting my mother into residential aged care, I have been surprised at:

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<sup>15</sup> Draft report chapter 15.

<sup>16</sup> *Aged Care Act 1997* s.44-26C

- a) The lack of integration of federal government aged care programs, and
- b) How few advantages there are in having a Gold Card when in residential aged care. My mother has had the benefit of ambulance service, spectacles and dental care (although I contested the latter - see below). However in residential aged care she receives many free services, quite apart from the Gold Card, including medical attention, podiatry, massage, nail and other services.

8.5 I also note that the federal government administration of aged care needs improvement. DVA is largely exempt from this criticism although I have some suggestions below. I will suggest to the Aged Care Royal Commission:

- a. Keep clients informed of progress on how their applications and claims are progressing. For example, when my mother completed an Assets and Income Form (Form 457) I submitted it to DVA. They passed it to DHS without advising me. I waited for a response from DVA only to discover – when I pushed for an answer - that I was now in a new, and very different, world.
- b. Provide one federal government system for approval of an Authorized Representative (AR) to assist an elderly person. The system relies on ARs who act on behalf of family members and friends.<sup>17</sup> ARs should be given an approval that works for every government department. For example, although DVA recognize me as having a Power of Attorney for my mother,<sup>18</sup> they required me to prove my authority to book transport for her<sup>19</sup> which required me to attend the government shop front to prove my identity. (I do not include discussion of the proof required by other agencies).
- c. Integrate Gold Card entitlements and other services in residential aged care facilities.

8.6 My suggestion for reducing DVA expenditure on dental services and transport (Report p. 569) and improving the quality of life of Gold Card holders is to modify the agreement with the ACT government so that Gold Card holders can receive free dental service from the ACT Mobile Dental Clinic.<sup>20</sup>

- o The ACT Mobile Dental Clinic visits ACT residential aged care facilities and provides free check ups to all residents. This is funded by an agreement between the federal and ACT governments. It is a boon to residents, especially those with mobility issues. If a resident needs dental work there is a fee (except for White Card holders and some pensioners).
- o Gold Card holders are entitled to free dental services (Report p.569) but not in the ACT Mobile Dental Clinic because the ACT and federal governments haven't incorporated that into their agreement.

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<sup>17</sup> I note that the draft report recognizes the role of family members and volunteers in supplementing the health and aged care systems (p.91).

<sup>18</sup> After a system of proof.

<sup>19</sup> Necessary for external dental care – see discussion below.

<sup>20</sup> I am not aware of the details of similar arrangements in other States and territories.

- This means that the 268 Gold Card holders<sup>21</sup> in ACT residential aged care facilities must leave the facility and visit a private dentist who recognizes their Gold Card. They can have a free check up in the mobile dental clinic but have to pay for treatment or leave the facility to get free treatment. This will involve organizing someone to accompany them<sup>22</sup> and booking transport. The heat or cold of Canberra adds another degree of difficulty.
- The governments' inability to organize their funding arrangements causes additional costs, including transport costs, and is a burden to the elderly and their families.

9. I would be happy to provide further information on any aspect of my submission if required.

Yours faithfully

Susanne Tongue

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<sup>21</sup> Figure obtained under FOI June 2018.

<sup>22</sup> The facility is unlikely to be able to provide staff so this will be a family member or volunteer.