

A VICTIM OF DVA
SUBMISSION TO THE PRODUCTIVITY COMMISSION INQUIRY
On
Compensation and Rehabilitation for Veterans

TRIBUTE

For courage in standing up to an unlawfully acting DVA:
John Atkins - Paul Evans - Mick Quinn - Rod Thompson

ACKNOWLEDGEMENT

To the Royal Commission Into Institutional Response To Child Sexual Abuse for advising that DVA has been acting unlawfully for decades.

To those organisations seeking to unite all veterans in their stand against the unlawfully acting DVA and thereby improve efficiency.

To the Productivity Commission for its work in identifying the way forward.

Efficiency through Deterrents and Regulations

Productivity Commission Draft Report Overview Key Points p. 2

This submission addresses the key points below and other and focusses on the behaviour and ethics of individuals within the system.

“...it is poorly administered (and has been for decades) which places unwarranted stress on claimants”

“It is complex (legislatively and administratively)”

I draw to your attention that the finding of Judge McLellan of the Royal Commission into Institutional Responses to Child Sexual Abuse was that the legislation that was causing the problems for decades was not a complex piece of legislation but a basic piece of legislation that all compensation lawyers and others would have known.

This submission focusses on the need to change the ethics and misbehaviour of individuals within the system. The Productivity Commission focusses on the future and it is submitted that the future will change for the better if misbehaviour is deterred from occurring.

To date, the available deterrents have failed to be used to stop misbehaviour the end result has been suffering and pain for disabled veterans over many decades. The future will not be any better if the new employees are not deterred from misbehaviour; a mere change to policy and processes is irrelevant if there is no follow up to remove the abusers from the system.

Focus

The intent of this submission is to provide a “helicopter view” of the DVA and Defence systems and to raise concerns that need to be investigated.

It is submitted that an improvement of efficiency will come about with a Royal Commission into the activities of Department of Veterans Affairs (DVA) and into Department of Defence (Defence). (I draw to your attention, that this Productivity Commission’s investigation into the DVA stems from the findings of a Royal Commission and is a result of the findings of Judge McLellan.)

The impact of the inefficiencies of both Departments has affected the lives of tens of thousands of disabled veterans for decades. Veterans have been rewarded with pain and death for their service to the country.

The practice of employing former military officers by DVA is a significant reason for the inefficiencies of a toxic culture and mismanagement found within DVA. (The psychological mindset of the military officer has been introduced into the management culture of DVA.)

The Royal Commission Into Institutional Responses To Child Sexual Abuse has been successful in dealing with the problems of child sexual abuse in institutions. It is argued that a Royal Commission investigating DVA would achieve efficiencies by exposing the most serious of problems within DVA. After all, if it wasn’t for a Royal Commission the Productivity Commission would likely not be making this Inquiry.

Consideration

There are about eight thousand veterans that are homeless and it speaks for itself that many have had claims unlawfully declined by DVA.

There are likely hundreds of thousands of disabled veterans that have been unlawfully treated by DVA over the decades.

There are likely thousands of current and former DVA employees that have excellent superannuation plans/pensions and other that have not been dealt with unlawfully.

Many suicidal disabled veterans had their claims unlawfully declined and have subsequently committed suicide.

The Issues

Part A - General

Part B -Australian Government Investigation Standards Section 2.4

Part C – Management

Part D - Incitement of Secret Ops Vets

Part E - DVA Breach of Employment Right to record interviews with medical assessors.

Part F - Burden of Proof

Part G - Offences Against Public Justice

Part A - General

Introduction

1. Behaviour of government employees has been recognised for thousands of years as a problem. The following is from The Old Testament and was written over two thousand two hundred (2200) years ago:

“If you see the poor oppressed in a district, and justice and rights denied, do not be surprised at such things; for one official is eyed by a

higher one, and over them both are others higher still.” Ecclesiastes 5:8

2. It has long been recognised in legal circles that a change in behaviour can be accomplished to a large extent by deterrence methods.
3. David Lusty has written concerning misconduct in public office and argues for the prosecution of personnel. <https://www.accountabilityrt.org/wp-content/uploads/2015/02/Lusty-Revival-of-the-Common-Law-Offence-of-Misconduct-in-Public-Office-2014-38-Crim-LJ-337.pdf>
4. The Judicial Commission of NSW has stated the following:

“In *Harrigan v R* [2005] NSWCCA 449 at [47], the court endorsed the statement of McClellan J (as he then was) in the two-judge bench decision of *R v Giang* [2001] NSWCCA 276. In relation to an act intending to pervert the course of justice, McClellan J stated at [21]:

In every case the court has been concerned to emphasise the need to impose a sentence which not only punishes the offender but will deter others from a similar course of action.”

(Refer:

https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/public_justice_offences.html)

Turning Points

5. In August 2016 Defence admitted that it had not put in place a single safety measure to protect children in the Defence Forces since the Judge Rapke Report of 1971.
6. In September 2016 Judge McLellan of the Royal Commission into Institutional Responses to Child Sexual Abuse publicly that DVA had been acting unlawfully for decades.

DVA Expertise

7. Both Defence and DVA have large legal sections and have legal advice freely available.
8. DVA lawyers are aware of the criminal law and do not show mercy to whistle-blowers and advocates. DVA has been known to refer them to the police for criminal charges or using the police to intimidate:
 - i. Whistle-blower Paul Evans whose testimony is found in John Atkins Book “A Child in the Navy a Man Betrayed” tells of a visit by the AFP when Paul began his whistleblowing. They could have easily just sent Paul a lawyer’s letter telling of the potential risks of taking his position.
 - ii. Recently advocates Mick Quinn and Rod Thompson faced criminal charges due to a DVA complaint. I understand they were found innocent of the charges.
9. DVA refers the outsiders for investigation to the police but when it comes to investigation of their own they have failed miserably. The failure to properly regulate and deter employees means that the efficiency level will never be corrected.
10. Nevertheless, there are various processes outlined in government when there is a suspicion that a government employee breaches a duty. They range from APS Code of Conduct proceedings to actions under Work Health and Safety Law and to actions pursuant to the Criminal Law.
11. The *Australian Government Investigation Standards Section 2.4* makes it clear that some offences should be referred to the Australian Federal Police for investigation. In these circumstances it is the case that the civil law comes second to criminal law and that trials are stopped to ensure that there is no interference in a criminal investigation. The AFP need to provide an “all clear” before the AFP investigation is prejudiced by other legal action.

12. To my understanding, the DVA lawyers have made no attempt to refer the potential crimes of DVA employees to the police.
13. It is submitted that Judge McLellan's advice that DVA has been acting unlawfully for decades raises suspicions that there is potentially an element of criminality.
14. It is submitted that DVA lawyers and senior executives need to provide reasons why they failed to ensure compliance with the law. This can be achieved by a Royal Commission.

Nature of the Potential Offences

15. The types of potential offences for which DVA needs to be investigated are:
 - i. Manslaughter of suicidal claimants who subsequently commit suicide after unlawful rejection of their claims and/or unlawful delays in processing their claims. (ref Neil Foster Associate Professor of Law University of Newcastle publication "Manslaughter in the Workplace" <https://poseidon01.ssrn.com/delivery.php?ID=260116123082075092066127067112066089014010017032055005018070003097030065101010089124103017054013044015041122084075017068102080011074041011058084000123072117014023029054062017108119126023074087011080115115000126121064094071087024001000029113001125127&EXT=pdf>)
 - ii. Employment fraud where employees have contracted to do work and are failing to do so. My understanding is that Judge McLennan identified that DVA were unlawfully rejecting claims because DVA were acting contrary to a well-known piece of law that requires DVA to prove that the claim is not genuine; DVA was making veterans prove their claim. Those responsible for compliance and legal processes have failed in their duty.

- iii.* Incitement to commit a crime when DVA placed pressure on Secret Operations claimants to provide more information.
- iv.* Obstruction of veterans who wanted to record sessions with assessors. The law (e.g. *Surveillance Devices Act NSW Sect 7(3)(b)*) allows principals (such as claimants) to record all private conversations. DVA was required to uphold the right of claimants to record (APS Code of Conduct). In addition. Duress to make a person cede their rights is a breach of the Criminal Law. For Example, the Queensland *Criminal Code Section 359* (see also *R. v Zaphir - [1978] Qd R 151*)

Credibility of Department of Defence

- 16. For decades, DVA has been staffed by former senior officers of the Defence Force. It is submitted that it is this employment policy that has caused the culture of DVA to become as toxic and mismanaged as that of Defence.
- 17. My understanding is that some claims were not processed on the basis that Defence did not admit liability. To that extent this submission reflects on the credibility of Defence in its participation in the Veteran's compensation process.
- 18. Under threat of a Royal Commission, Defence admitted publicly that it had a "toxic culture and had mismanaged" many incidents (e.g. rape and assault of minors at its institutions.) It is difficult to see that the admission provided by Defence is not mere political speech as the mismanagement related to tens of thousands of criminal incidents.
- 19. In August 2016, Defence admitted that it had not implemented safety measures since the 1971 Rapke Report to protect children. (forty-five years of failing to comply with safety law that requires protection and remedy of any urgent and high risk within days of the findings of Rapke.)

20. The admitted “toxic culture” is an indicator that Defence is not a credible organisation to rely on. Defence did nought about kiddies being raped and assaulted. The public is horrified by the intentional abuse of kiddies and the failure of Defence to protect kiddies. That level of misbehaviour identifies Defence as an organisation that has little credibility.
21. The credibility of Defence is even further tested as the same sex rapes in Defence are about forty times higher than is found in civilian population. (The Defence Abuse Response Task Force Final Report reveals that 73% of victims were males raped by other males and the findings of the Royal Commission into Institutional Responses to Child Sexual Abuse were that 10% of rapists were women. As such at least 83% of rapes in the military were same sex rapes.). The Royal Commission into Institutional Responses to Child Sexual Abuse did not take into account the tens of thousands of sailors that were sexually assaulted on the ships during the crossing of the equator ceremonies and as such same sex rapes are likely to be much higher than the 83%.
22. Despite knowing of the high risk of rape and an obligation pursuant to safety law, Defence did nothing to provide inductions or warning of the workplace hazard.
23. The vulnerabilities of both males and females due to the “nature and conditions” in Defence is exacerbated as same sex rape is totally unexpected. In civilian circles it is rarely heard of and as such not expected by new recruits in Defence.
24. The expectation of women is that there is a chance that they could be raped by a man but that it is clearly unexpected that they could be raped by a female. In respect of males, they are totally unprepared as there is no expectation of being raped by a female and less expectation of being raped by a male. They were kept off guard by Defence who were compelled by law to provide a safe workplace for child recruits but refused to do so.
25. That Defence personnel who have their own children and brothers and such refused to lift a finger to assist these children and preferred to break the law is astonishing.

26. Further, the military police were also part of the criminal activities. When the testimonies of CJA and CJT are understood then it is clear that Defence is an organisation that needs to be investigated properly.
(https://www.childabuseroyalcommission.gov.au/sites/default/files/case_study_40_-_findings_report_-_australian_defence_force.pdf)
27. There is a place for admission of liability. The circumstances were such that Defence knew of the massive amounts of offences, the “nature and conditions” of its workplace, but still Defence made it difficult for claimants to succeed. Defence were bound by law to assist the claimants
28. It was never the place for Defence’s lawyers to cover up the guilt and liability of Defence except where it was a “military necessity”. It is hard for reasonable person to see that it was a “military necessity” for Australia’s defence to allow the rape and assault of children?
29. The seriousness of the misbehaviour of Defence is attested to by the fact that Defence has its own complete legal system that includes judges, prosecutor, regulators, lawyers and police.
30. The complete Defence judicial system allows it to keep from the public matters of an embarrassing nature or such other things as security issues/
In the case of *Anne Margaret White v Director of Military Prosecutions and Commonwealth of Australia*
(<http://www.hcourt.gov.au/assets/publications/judgment-summaries/2007/hca29-2007-06-19.pdf>) the public was kept out of the loop. In this case charges were laid against the defendant in relation to sexual offences against five junior ratings but the results were never available to the public.
31. The ability to keep things out of the public eye begs the question of “why didn’t the legal officers prosecute the defendants as Defence had the ability to “keep it all hushed up” without causing Defence “embarrassment”? Instead Defence, chose a toxic culture and deprived victims of their rights to justice.

32. It is submitted that the astonishing failures of Defence that are so far out of step with the law and morality that it supports the view that Defence does not have credibility when it comes to providing evidence in relation to the claims of veterans.
33. (Note: Defence and DVA are very quick to retaliate against whistleblowers and others. Yet when it comes to their own they unlawfully do nothing.)

Suitability of Defence Personnel

34. Former Defence personnel have been regularly employed by DVA.
35. Defence personality types have been trained not in compassionate techniques but in terms of “attacking of the enemy”. It is submitted that these personality types are unsuitable for DVA.
36. That career military officers with decades in the military have filled the higher positions at DVA purely because of their high position at Defence has been a terrible mistake. These personalities have brought to DVA a very disturbing style of management concepts.
37. The decades long experience in the military causes the viewpoint to be set in place and makes it very difficult for the older military officer to change to the different mindset required at DVA.
38. The Defence personality is one that believes that Defence comes first as an organisation and that the individual matters little. That concept may be valuable in a military context but in a compensation and rehabilitation concept it is completely wrong.

(Note: At the blind dogs training program they disqualify attack dogs and get kind dogs to do the job. At a security training program they disqualify kind dogs and get the attack dogs to do the job.)

39. The Defence personality is one that believes that it is entitled to do anything and is justified in doing so on the basis of military necessity. That philosophy is one that should not be brought to DVA.
40. The Defence senior officer's personality is one that believes that all orders of the senior officer need to be followed. The reality is that the senior officers have forgotten that orders in Defence need to be lawful. As such they have caused the creation of the "toxic culture" of illegal and unlawful behaviour.
41. In the case of DVA there should have been an emphasis that the department needs to comply with the law despite the orders of the senior officer/manager. The decision to behave lawfully should have been made at the senior level. It is submitted, that due to the staffing of DVA with former senior military officers there was no way that the need to comply with the law could have come into operation.
42. It is submitted that many of the problems of the "toxic culture" of DVA have been brought to DVA by former high ranking officers. These officers with their military personalities have been responsible for the decades of "toxic culture and mismanagement" in the Defence department.
43. It is submitted that the failure of the high ranked officers in Defence means that they should be excluded from all positions of management within government. The rewarding of managers who created a toxic culture in Defence by providing them with senior executive roles in other government departments is a huge mistake and will continue to reduce efficiency.

Military Necessity

44. Defence has a self-entitlement view of "military necessity" where it excuses itself for all kinds of unlawful behaviour. The doctrine of "military necessity" was never intended to be an "excuse for every sin under the sun".

45. The issue of the law of “military necessity” needs to be discussed as it has the potential to cause significant delays and pain for DVA disabled claimants. For example, the military have been known not to release documents and to take excessive time to provide documents. In some cases, such as Ewan Donaldson, Defence released forged documents in an attempt to defeat Donaldson’s claim.

https://www.huffingtonpost.com.au/2016/02/05/evan-donaldson-lambie_n_9145574.html

46. There are a number of incidents of public exposure that have caused the military to speed up its processes. Even the Rapke Report came into being after a mother of a victim went public. (This speeding up of the process due to public outing infers that Defence could have easily sped up its responses without the public exposure.)

47. Defence relies regularly on the defence of “military necessity” to commit all kinds of the most horrible acts and atrocities (One of the witnesses at the Royal Commission into Institutional Responses to Child Sexual Abuse testified that babies were kept in cages for experimentation purposes at Holdsworthy Army Base).

(Note: The defence of “military necessity” was developed from the Canadian case of “Orlikow” (reference *Orlikow v. United States*, 682 F. Supp. 77 (D.D.C. 1988) where experiments were conducted on non-consenting individuals.)

48. It is open to question why Defence failed to provide protection to children but their only defence is “military necessity”. Otherwise, Defence needs to be investigated for the failure to provide protection and justice for children who were raped. The failure means that Defence has committed an atrocious crime. Defence lawyers need to be investigated as they were involved in the Rapke report and have had access to it. Defence’s legal system failed to prosecute both the perpetrators and those who failed to put in place the safety measures.

49. The failure of Defence to prosecute and thereby deter further offences and improve efficiency meant that the hazardous workplace environment,

where children were raped, remained hazardous for over forty years. The inefficiency occurred for decades.

50. The ADF has a substantial legal department and safety specialists and has for over forty-five years refused to implement safety laws and processes in respect of the rape of children in its institutions.
51. The toxic culture has caused a romantic belief that Defence can do as it likes and that “military necessity” means that Defence cannot be regulated or even prosecuted. It is this delusional culture that has caused extreme difficulties in obtaining proper outcomes for disabled veterans

(NOTE: On that extreme view of “necessity”, Defence could quite easily take into custody and arrest a judge and do all kinds of experiments on that judge without any repercussions.)

Restrictions on Military Necessity

52. It is submitted that “military necessity” does have restrictions. For example, the military and its personnel can be prosecuted for breaches of the Geneva Convention.

(Note: The recent signing in 2017 of the Optional Convention Against Torture (OPCAT) means that a remnant of the “kids in the cages” now needs to be rehabilitated as retention in custody will amount to torture.)

53. Further limitation of the behaviour of Defence is found in the OHS Act where Defence is obliged to comply except where it is reasonably necessary for the defence of Australia.
54. In the case of *Groves v The Commonwealth* (1982) 150 CLR 113 4 May 1982 the judge refers to a distinction in the kinds of service that a serviceman and/or servicewoman can provide. The strong inference of this is that there are restrictions on how the military can treat its service men and women/

55. Another limitation on “military necessity’ is found in *Orlikow* where the government was required to provide a reason for its actions. In *Orlikow* the government indicated that military necessity requiring “experimentation” on people was a “necessity” to combat the Korean brainwashing program. Further support is found in the ruling of *R v Rogers (1996) 86 A Crim R 542* that:

“...the accused bears the evidentiary onus of establishing a basis for a defence of necessity and, thereafter, the Crown bears the onus of negating the defence beyond reasonable doubt”

Submission

56. It is submitted that the defence of “military necessity” is limited. Yet, the “toxic culture” of Defence has meant that the doctrine has been applied without constraint, without deterrence and without limitation thereby frustrating claims by disabled veterans.

57. It is submitted that Defence is not a credible organisation based on its history of unlawful behaviour. In addition, if there really was a “military necessity’ as an excuse then Defence would still not be a credible witness to the truth of a matter as it would be covering up the facts to the detriment of a genuine claimant.

58. It is suggested that where Defence is slow to respond to a claim, there should be an inference that the documents will be favourable to the claimant. In that case, Defence can retain its “military necessity’ without prejudicing the claimant as it will not be required to provide documents. In any case, DVA would be required to pay the claim as DVA cannot discharge its burden of proof that the claimant is wrong.

Secret Ops (SOP) Claims

59. SOP disabled veterans have had their claims frustrated because they are limited by law requiring them to not disclose secret information.

60. That a simple tiny piece of information released into the wrong hands could change the course of the war is a well-known historical reality (During WWII the allies found an enemy procurement order for bearings and deduced the amount of machines and tanks that the Germans were using. Needless to say, the Germans were defeated.)
61. The pressure of DVA to require more information from a SOP veteran can amount to incitement. (Clearly DVA personnel are aware that SOP personnel are restricted in the info that they can provide. In any case, such extra info is only to DVA's advantage and not to the veteran's. DVA are seeking for anything to reject a claim.)
62. Veteran claimants have been placed in a "hands tied" situation unlawfully by DVA. Veterans have been in the "back-foot" for decades as they retain their loyalty to Australia and security. Yet, DVA with its disregard for the law, who have been acting unlawfully for decades continues to punish and torture genuine veterans
63. The unlawful behaviour of DVA has potentially meant that they do not see the boundaries either as a security risk or as a breach of the law. The blame for this must be directed at the senior former military officers and the lawyers at DVA.

Submission

64. "Military necessity" has been used to Defence advantage and to give itself permission to do atrocious acts. There is no reason why it can't be used to the mutual advantage of Defence and the SOP disabled veteran.
65. The use of "military necessity" to prevent disclosure of secrets could take the form of simply accepting the claim of the SOP veteran. In that way even the tiniest of information would be held securely.
66. For example, there are claimants who are prejudiced by the secret nature of the "Onslow Incident". DVA could not prove that the "Onslow Incident"

did not happen. Therefore, the claims of the SOP on the Onslow should immediately be accepted.

Pressuring Disabled Claimants

67. It speaks for itself that DVA pressuring disabled SOP veterans with a mental condition is the most absurd, illogical and discriminatory process imaginable. (see *Yu and Comcare [2010] AATA 960; 121 ALD 583*)
68. For example, placing pressure on a mentally ill disabled SOP veteran means that there is a high risk of that claimant seeking assistance elsewhere and in so doing disclose secrets to a friend, minister, psychologist, counsellor or other who does not have security clearance.
69. The absurdity of DVA doing those things, raises the question of what value were those high ranked former serving officers who got jobs at DVA. With all that experience, an ordinary person is left asking “how could those former Defence officers have allowed DVA to cause such a security breach for decades?”
70. That DVA has been pressuring disabled military veterans for about a century with no consideration that it could cause the divulgence of secrets is astonishing. After all there have been many former high ranked military officers engaged by DVA over the decades.
71. It is a testimony to former Minister of Defence that he raised the possibility of a Royal Commission into Defence and DVA that likely spurred a change. Certainly the departments were pressured into taking actions regarding the deaths of suicidal veterans.
72. Further, the competence of the former senior military officers is revealed in the vetting scandal a number of years ago (2011) where the response to the whistle-blowers who provided eye-witness evidence of the huge security breach was that the three eye witnesses “...could not substantiate their evidence.” (It only takes one eye-witness to get a conviction. In any case, witnesses don’t need to substantiate their evidence.)

73. The mindset of former military officers is unsuitable to be part of DVA .they had allowed the pressuring of suicidal veterans who knew secrets.

Conflicts of Interest

74. Most employers are kept at arms length from the insurer.

75. In the case of DVA it is too closely connected with Defence.

76. It is submitted that DVA should not be affiliated with Defence but with another suitable government department. Perhaps CommSuper, or, Attorney-General or other.

Recommendation

77. To ensure efficiencies are produced at the highest level:

- i. A Royal Commission be convened into the criminal behaviour of DVA and its personnel.
- ii. Adequate deterrents must be used.
- iii. Follow through is required to prosecute those who have acted unlawfully even the failure to prosecute should be followed up.
- iv. Adequate compensation should be provided to disabled veterans who have been unlawfully cheated of their entitlements.
- v. Bans should be placed on the wrong personality types from working at DVA e.g. no more former Defence officers.

- vi. Time limits for responses should be imposed on Defence and DVA; and the consequences for failure to perform within time limits must favour the claimant.
- vii. DVA lawyers both present and former need to be investigated and potentially have their right to working in the legal profession and government removed

Part B

Australian Government Investigation Standards Section 2.4

1. There is policy and guidelines already in place to prevent the misbehaviour experience by disabled veterans at the hands of DVA; on such policy is the *Australian Government Investigation Standards*.
https://www.google.com.au/search?rlz=1C1CHBF_enAU768AU768&q=australian+government+investigation+standards+2015&oq=australian+government+investigation+standards+2015&gs_l=psy-ab.3..0.26264.27593.0.28959.5.5.0.0.0.384.929.0j3j0j1.4.0..2..0...1.1.64.psy-ab..1.4.928...0i22i30k1.0.WJwaHe9aN5Q
2. In response to Judge McLellan's advice the following occurred:
 - i. Senator Kakoschke-Moore had mentioned (September 2016) the public statement of McLellan in parliament during questions without notice:

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansards%2F16daad94-5c74-4641-a730-7f6d74312148%2F0047;query=Id%3A%22chamber%2Fhansards%2F16daad94-5c74-4641-a730-7f6d74312148%2F0000%22>

- ii. Defence Minister Marise Paine's response was to review to seek a change in policy where the AGIS section 2.4 requires the matter to be referred to the AFP.
3. The actions of government and DVA did not follow the requirement in the AGIS.
4. There requirement that DVA refer matters to the Australian Federal Police (AFP) causes problems and conflicts of interests. Where the people who are compelled to refer matters to the police are the same as those offending then there needs to be an alternate referral route that is respected by the AFP.
5. The following is a sample of what an AGIS 2.4 submission could look like and what is noticeable is that the decision-maker in this case is the possible offender. (Clearly a Conflict of Interest that has developed into unlawful acts for decades.)

----- **SAMPLE BEGINS**-----

- i. *The Australian Government Investigation Standards Section 2.4 (AGIS)* that require matters to be referred to the Australian Federal Police.

"If a matter is considered by the agency as a serious crime or complex criminal investigation it must be referred to the AFP in accordance with the AFP referral process published on the website www.afp.gov.au, except where:"

- ii. The exposure by the Royal Commission into Institutional Responses to Child Sexual Abuse in September 2016 confirms that the offences committed over decades were in potentially serious criminal offences as per the description in the AGIS. The AGIS states:

"A serious crime is a crime:

- which involved a significant degree of criminality on the part of the offender

- the Commonwealth or the community expects will be dealt with by prosecution which is conducted in public before a court and usually carries the risk of imprisonment
- produced significant real or potential harm to Commonwealth or the community, or
- is of such a nature or magnitude prosecution is required to deter potential offenders.”

a. These offences are serious because:

- Most significantly the offences are serious as they led to death and suicide to a number of veterans and others had attempted suicide.
- Significant harm to the community was and is found in the effect that such psychologically unfit and injured personnel could actually harm the community and a case in point is that of Julian Knight who was abused in the military. Many vets suffer from psychological conditions that went untreated for decades due to the unlawful/criminal conduct of the DVA and its lawyers.
- The Royal Commission into Institutional Responses to Child Sexual Abuse exposed that it was of such a nature and magnitude that the behaviour occurred for decades.
- Furthermore, the offenders in non-compliance with the law have harmed the Commonwealth’s reputation as the APS Code of Conduct required employees to uphold legislation and the employees at DVA did not do so.

iii. The AGIS states:

“A significant degree of criminality can be evidenced by the crime involving certain factors, including and not limited to:

- criminal behaviour by corrupt Commonwealth officers
- multiple offenders acting together in an organised way to perpetrate the crime
- the repeated commission of deliberate offences over a number of years.”

a. It is submitted:

- The lawyers and others who were compelled to ensure that compliance with the law did not do so and perpetuated the crime over decades. Their crime was fraud as they were paid to do a job and refused to do it. Their personal gain was promotion and favourable performance appraisals. This was not mere mismanagement as the law that was broken in thousands of instances was not obscure but a common knowledge law.
- The positions over forty years was filled with multiple offenders who did not change the process The offence was committed on tens of thousands of claimants over the decades.

iv. The AGIS states:

“A significant harm to the community can be evidenced by the crime involving certain factors, including but not limited to:

- the threatening of the integrity of the Commonwealth, Commonwealth officers or important Government institutions
- impact on the economy, resources, assets, environment or well being of Australia or Australians
- significant or potentially significant monetary or property loss to the Commonwealth, or
- bribery, corruption or attempted bribery or corruption of a Commonwealth employee”

a. It is submitted:

- They threatened the integrity of the Commonwealth by refusing to comply with the requirement of the Code of Conduct to uphold legislation.
- There was a significant impact on the well-being of Australians as many injured vets were deprived of health and treatment and a substantial number of vets committed suicide due to the behaviour of the DVA employed solicitors and legal personnel.
- There was a potentially significant monetary loss to the Commonwealth in terms of legal action. The payouts for intentional torts includes aggravated damages. In any case at least two cases have cost in excess of twenty million dollars recently. The payments in accordance with the DVA

requirements would have been far less than the legal costs that these legal personnel have exposed the Commonwealth.

v. The AGIS states:

“The existence of any one of the following factors is an indication that the matter is a complex investigation:

- a serious breach of trust by a Commonwealth employee or contractor of a Commonwealth agency
- use of sophisticated techniques or technology to avoid detection where investigation of the matter requires specialised skills and technology
- elements of a criminal conspiracy
- known or suspected criminal activity against more than one Commonwealth agency
- activities which could affect wider aspects of Commonwealth law enforcement (e.g. illegal immigration, money laundering)
- the possibility of action being taken under the *Proceeds of Crime Act 2002*, or
- conflicts of interest and/or politically sensitive matters.”

a. It is submitted:

- There are elements of a criminal conspiracy as the offences have been committed over decades by many people and have been handed down from one head of legal department to the next. All of these highly trained and qualified lawyers should have or did know that the behaviour was unlawful.
- Criminal activity in referring advocates and whistle-blowers to the police without proper reason.

-----**SAMPLE ENDS**-----

Part C

Management

1. I draw to your attention that the DVA has its own experienced legal team and is well educated in the law and has been for decades. There is no

reason for the Department's personnel to act in the ways in contradiction of their employment agreement and other law.

2. Apart from potential employment fraud there are other potential breaches that are far more serious:
 - i. Manslaughter of Veterans.
 - ii. Disclosure of secrets and incitement of mentally disturbed Secret Ops claimants to disclose their secrets to DVA personnel (the incitement may cause the mentally disturbed veteran to disclose the secrets to others. (It is submitted that the prosecution of mentally ill victims for disclosure of secrets will fail due to their mental state. Prevention of disclosure can be accomplished by simply granting the veteran the claim according to legal doctrine of military 'necessity' (refer *Orlikow*.)
 - iii. Breach of the veteran's right to record assessments. Breach of Commonwealth procurement rules, APS Code of Conduct and Criminal Code)
3. Neil Foster's work "Manslaughter in the Workplace" clearly shows that there needs to be an investigation into the deaths of military servicemen and women who committed suicide after they had been unlawfully denied treatment by DVA.
4. I submit that if legal officers knew the law and refused to change the DVA system those legal officers should be investigated in relation to the deaths of the veterans who committed suicide after having their claim unlawfully refused.
5. Bear in mind, it was a simple piece of law that all compensation lawyers know; yet, the most experienced of lawyers in charge at DVA had been acting unlawfully for decades.

Lawyers

6. Not all government lawyers have practicing certificates but jurisdictions do have legal professional rules that can prohibit even non-lawyers from working within the legal industry.
7. The NSW Law Society has published the document:
“A Guide to Ethical Issues for Government Lawyers”
<https://www.lawsociety.com.au/sites/default/files/2018-03/Ethical%20issues%20for%20Gov%20lawyers.pdf>
8. A government lawyer does not work for the Department but works for the Crown as such the government lawyer is to place the Commonwealths law above the wishes of the Head of the Department and of the Minister. Where a government lawyer does not hold a practicing certificate the government lawyer still has an obligation to uphold legislation and to not act unlawfully. (APS Code of Conduct)
9. It needs to be investigated as to whether and why lawyers at DVA failed for decades to use their independence and failed to report the unlawful behaviour to any or all of the following for investigation:
 - ii. Attorney- General (Commonwealth and/or State)
 - iii. Governor-General or Governor
 - iv. Police (Federal, State or Territory)

Part D

Incitement of Secret Ops Vets

Introduction

1. It speaks for itself that secrets cannot be divulged to those who have not been cleared under any circumstances and that it is a gaolable offence to do

so. But, vets injured in secret operations are required to make claims though DVA. Secrets legislation prevents these claimants from divulging the full details and facts of their claim.

2. Yet, Judge McLellan's advice should be applied in circumstances where DVA requests more details from these vets and refuses to process claims and arguing that DVA needs more information.
3. The legislation on incitement is a clear limitation by the Crown to prevent DVA from asking questions. DVA is employed by the Crown.

Definition

4. The common law definition in *R v Eade*, Smart AJ said the following in regards to the offence:

“In *Young v Cassells*... Stout CJ, in an oft quoted passage said: “The word ‘incite’ means to rouse; to stimulate; to urge or spur on; to stir up; to animate.” In *R v Massie*... Brooking J A, with whom Winneke P and Batt JA agreed said of “incite”, common forms of behaviour covered by the word are ‘command’, ‘request’, ‘propose’, ‘advise’, ‘encourage’ or ‘authorise’”. Whether in a particular case what was said amounts to incitement depends upon the context in which the words were used, and the circumstances.”

5. I draw your attention to the softer meanings of incitement “request, “propose” and “advise”.
6. Again, the word “stimulate” would also include non-verbal behaviour in terms of placing pressure on a vet to disclose secrets.
7. Stimulate, definition - raise levels of physiological or nervous activity in (the body or any biological system).

Circumstances

8. In the case of a vet making a claim through DVA it would be usual to inform the DVA that the injury occurred during secret ops.
9. DVA is experienced in matters of a secret nature and has legal advisors. It is not an obscure thing to understand that secrets cannot be requested from vets in secret ops nor can vets be stimulated (pressured) to divulge secrets.
10. Even the tiniest piece of information can lead to the unravelling of top secret plans.
11. Yet, if DVA unlawfully insisted on requesting more information it would have frustrated the claims of disabled veterans causing them extreme hardship and deprivation
12. The unlawful behaviour of DVA is highly unusual as they have regularly employed the most senior of former military officers who should have or must have known that the DVA was acting unlawfully.
13. These issues need to be investigated properly due to the extreme hardship suffered by disabled veterans.

Breach of Security

14. For DVA to “request” details and put any question to a secret ops vet that could reveal details of the secret ops amounts to a criminal offence.
15. The allies found a list of Germans requested supplies of bearings in WW!! And from that tiny obscure piece of information they were able to the amounts of tanks vehicles and other resources that the Germans had and the Allies could accurately work out what the required resources were to defeat the Germans.

Actual Reality

16. Veterans could be pressured to divulge secrets by DVA with such statements as:
 - i. DVA cannot process a claim without the further information.
 - ii. The vet's failure to disclose will delay the claim
 - iii. DVA needs the information
 - iv. Other
17. A simple statement such as "we can not process your claim until you give us these further details" comprises:
 - i. A request for secrets; and
 - ii. Stimulation to reveal.

Burden of Proof

18. It is the duty of DVA to prove that the claimant is wrong.
19. It is not the duty of the claimant to prove that the circumstances happened to such an extent that secrets are disclosed.
20. In the case of vets injured during secret ops the Commonwealth limits the information required to be assessed for the claim and then the DVA is required to assess whether or not they can disprove the claim on the basis of the evidence that they are legally required to have as per their employer's (Commonwealth) instructions.
21. In further support, the professional ethics legislation in each of the states requires legal representatives to comply with the instructions of their employer.

22. In the NSW Law Society publication “Ethics for Government Lawyers” it makes it an offence for government lawyers to contradict government policy in the public arena.

Military Necessity and Efficiency

21. The doctrine of “military necessity” is regularly used by Defence to justify right to break the law.
22. The case that is referred to most often is the *Orlikow* case (https://en.wikipedia.org/wiki/David_Orlikow)
23. The limitation of the evidence required by DVA is a matter of reasonable necessity to protect the security and interests of Australia.
24. DVA would need to prove that its questions were necessary to overcome the charge of incitement and to obtain the details from the veteran.
25. In *Yu and Comcare [2010] AATA 960 (1 December 2010)* it’s clear that something is “unreasonable” if it is illegal, absurd, illogical or if it discriminates.
26. It is submitted that:
 - i. That a restraint on the DVA’s collection of evidence would be reasonable.
 - iii. A DVA request for further information has a potential to be “unreasonable” due to being illegal.
27. It is submitted that it would be absurd and illogical for a defence of “necessity” to succeed where the information would potentially place at risk many hundreds of lives of serving military and divulge secrets of events occurring under cover.

28. It is also submitted, that it is a necessity for DVA not to request information even if it suspects a veteran of fraud. Afterall, the government applies the doctrine of necessity to justify all types of atrocities that are usually called “crimes”.
29. It may be that a veteran needs to maintain secrets by embellishing a story.
30. Just because the proposed limitations on disclosure on the one hand benefits a veteran at the expense of DVA that does not mean that the advantage to the veteran is wrong. Afterall, the boss of DVA is the Crown and the higher priority of the Crown is to ensure that secrets are not disclosed.

Summary

31. The Crown employs DVA and the Crown has legislated against incitement and against divulging secrets.
32. Officers at DVA are compelled to comply with the Crown’s instructions.
33. The APS Code of Conduct requires that employees uphold and do not act unlawfully legislation and therefore policy does not usurp the law on incitement.
34. DVA needs to accept the legislation that has been enacted by its employer and simply accept the claims of those veterans who were injured in secret ops.
35. Where veterans are pressured to reveal secrets those incidents need to be referred to the AFP for prosecution.

Part E

DVA Breach of Employment Right to record interviews with medical assessors.

Introduction

1. There are many reasons why a person may want to record a conversation including circumstances where the claimant has mental issues and they will be assisted by having a recording to review as to what actually occurred during the assessment process.
2. Many claimants from Defence and DVA have been asked to attend assessments by medical assessors.
3. At least one medical assessor has demanded that veterans waiver the right to record the assessment. This waiver has been with the knowledge of DVA.
4. Veterans have been wrongly informed that they can not record by Defence, DVA and the assessor.

Surveillance Devices Legislation

5. Most states, if not all, have legislation that allows a person to record a private conversation where it is in the reasonable legal interests of the party or that it will not be published. That is conditional upon the consent of one of the Principle parties to the conversation.

(Note: It is a moot point whether the Principle party has a right to record his or her own conversation in every case, but, a legal position could be taken by simply stating that the Principal party gave himself or herself permission to do so.)

6. In New South Wales the *Workplace Surveillance Devices Act* prohibits an employer from using the devices or requesting an employee to use a surveillance device.
7. The right to record is one that has been given to individuals who are principal parties to a private conversation. The principal parties can not allow their employer or anyone else to listen to the conversation unless it is for their own personal interests.
8. A claimant can not allow others except their lawyer to listen to the recording. The recording can be used as evidence in Court.
9. It has been well advertised by Whistleblowers Australia in their publication “The Whistle” that there are many unscrupulous assessors.

APS Code of Conduct

10. The APS Code of Conduct required that legislation be upheld. I understand that it has been altered to the requirement that employees do not act unlawfully.
11. Contractors are required to uphold the APS Code of Conduct.
12. An assessor’s insistence to sign a waiver undermines the right of employees etc. to record the assessment. It also discriminates against disabled people who have mental issues.
13. When an assessor refuses to do the assessment if a claimant declines that can cause duress.
14. The placement of duress upon an individual violates amongst other things the APS Code of Conduct.

Duress

15. The case of *R. v Zaphir - [1978] Qd R 151* discusses the criminality of placing duress upon a person to cede their employment rights.

16. The *Criminal Code (Qld) 1899 Section 359* makes it an offence to place duress on someone to cede their rights.

Submission

17. Where claimants are met with a refusal to allow them to record; a complaint may be made to the police.
18. (It is submitted that the mere request to sign a waiver is sufficient to cause duress to a claimant.)
19. A claimant can decline (without penalty) to attend DVA endorsed assessors on the basis that the claimant does not want to cede the legal entitlement.
20. Potentially available legal remedies include such actions for such things as misfeasance malfeasance and nonfeasance litigation. (refer <https://www.accountabilityrt.org/wp-content/uploads/2015/02/Lusty-Revival-of-the-Common-Law-Offence-of-Misconduct-in-Public-Office-2014-38-Crim-LJ-337.pdf>)

Part F

Burden of Proof

1. The following is information to assist in understanding the nature of the law in relation to compensation and should thereby assist the claimants in improving the efficiency of their claims.

2. In *Sellar v Transfield Services (Australia) Pty Ltd [2012] SAWCT 16 (3 May 2012)* it was ruled:

“The worker is required to prove that he has noise-induced hearing loss and that he has been employed in work involving exposure to noise. The burden of proof then shifts to the Corporation or an exempt employer, as the case may be. I shall refer only to the Corporation. It must prove that the hearing loss could not have arisen from the employment. In the case of employment involving only minimal noise such as employment in a library or some other quiet place, in the absence of any extraordinary circumstances, that task should be discharged without difficulty. In other cases, the task may be difficult, but if it cannot be discharged, the policy of the legislation is that the benefit falls to the worker. That position accords with fairness and commonsense as the conditions of the workplace at relevant times may be expected to be more easily established by the employer, and therefore the Corporation, than the employee.”

3. In *Jawanda V Rail Corporation NSW [2011] NSW WCC 488 (29 December 2011)* the acoustic technician’s report indicated a low level of noise at the workplace of the applicant. But, the applicant had provided details that demonstrated that the environment tested was different from the actual circumstances of the applicant who could provide evidence that could not be rebutted by the acoustic report. In the *Jawanda* case, evidence of the employee was considered to prevail over that of the technician. The weakness in the technician’s report and measurement was clearly that it could not measure the exact circumstances of the employee’s exposure. The worker’s evidence included such things as construction work existing during a period of time and that noise was capable of causing the hearing loss.

Reasonable

4. *Yu and Comcare [2010] AATA 960 (1 December 2010)*

“As can be seen, the exclusion is subject to two tests of reasonableness – the reasonableness of the particular administrative action and the reasonableness of the manner in which the action was undertaken. The plain meaning of the word ‘reasonable’ as set out in the Oxford Online Dictionary conveys, generally, what is meant: proportionate; not irrational, absurd, or ridiculous; just, legitimate; due, fitting; within the limits of what it would be rational or sensible to expect; not extravagant or excessive; moderate. A number of relevant principles can be distilled from the settled cases. For the particular action to be reasonable it must be lawful.[6] There must be nothing untoward.[7] It must be attended by circumstances of fairness.[8] The emotional state and psychological health of the employee are relevant considerations.[9] Furthermore, the reasonableness of the particular action must be objectively assessed in the context of the circumstances and knowledge of those involved at the time.[10]”

Necessity

5. The following is copied from the Judicial Commission of NSW <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/necessity.html> :

“[6-350] Introduction

The common law defence of necessity operates where circumstances (natural or human threats) bear upon the accused, inducing the accused to break the law to avoid even more dire consequences. There is, thus, some overlapping with the defence of duress. In R v Loughnan [1981] VR 443 at [448] it was held that the elements of the defence were that —

(i) the criminal act must have been done in order to avoid certain consequences which would have inflicted irreparable evil upon the accused or upon others whom he or she was bound to protect;

(ii) the accused must honestly have believed on reasonable grounds that he or she was placed in a situation of imminent peril; and

(iii) the acts done to avoid the imminent peril must not be out of proportion to the peril to be avoided.

In R v Cairns [1999] 2 Crim App Rep 137, it was held that an accused will have a defence of necessity if —

(i) the commission of the crime was necessary, or reasonably believed to have been necessary, for the purpose of avoiding or preventing death or serious injury to himself or herself, or another;

(ii) that necessity was the sine qua non of the commission of the crime; and

(iii) the commission of the crime, viewed objectively, was reasonable and proportionate, having regard to the evil to be avoided or prevented.

The accused bears the evidentiary onus of establishing a basis for a defence of necessity and, thereafter, the Crown bears the onus of negating the defence beyond reasonable doubt: R v Rogers (1996) 86 A Crim R 542, a case in which necessity was taken away from the jury. The suggested direction for Duress [6-150] may conveniently be adapted to the rare case in which the defence of necessity is raised.”

Part G

Offences Against Public Justice

https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/public_justice_offences.html

This information on Public Justice produced by the Judicial Commission of NSW will identify issues that should be raised at a Royal Commission. These issues should also be considered when making changes to improve efficiency.