KCI
LAWYERS

ABN 35 490 214 100

Partners
Michael A Carbonaro B.A., LL.B.
Greg Isolani B.A., LL.B.

Level 5
488 Bourke Street
Melbourne, Vic 3000
DX: 488 Melbourne

Ph: 03 8673 5888
Fax: 03 8673 5899
gregisolani@kcilawyers.com.au
www.kcilawyers.com.au

Our Ref. GI:lg:130094

15 September 2015

Committee Secretary
Foreign Affairs, Defence and Trade Committee
Department of the Senate
PO Box 6100
Parliament house
Canberra ACT 2600

By fax (02) 6277 5818

Dear Sir/Madam,

RE Veteran's Affairs Legislation Amendment (2015 Budget) Bill

I refer to the above and attach my submission for your consideration

If you have any quires please do not hesitate to contact Greg Isolani.

Yours faithfully,

Greg Isolani
KCI LAWYERS

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Our Ref. GI::JR

Veteran's Affairs Legislation Amendment (2015 Budget) Bill

1. Relevant Legal Background

(a) I am a legal practitioner practising in the Commonwealth compensation jurisdiction continuously since 1992. I initially represented Commonwealth employees covered under the Comcare scheme pursuant to the Safety Rehabilitation and Compensation Act 1988 (SRCA). During that time and as a consequence of the first 'no win – no fee' adverting campaign by the national law firm where I was working, I was referred defence members and their families also covered by the SRCA.

(b) In 2001 I established "KCI" Lawyers specialising in Military Compensation and civil litigation claims for current and former ADF members now covered under three compensation schemes i.e. the *Military Rehabilitation and Compensation Act 2004 (MRCA)* the *Safety Rehabilitation and Compensation Act 1988 (SRCA)* and the *Veterans' Entitlement Act 1986 (VEA)* together with Comsuper claims i.e. MSBS and DFRDB Act claims.

(c) Throughout that time I have been a legal representative to a number of Ex Service Organisation's (ESO's) and their members. I have participated widely in Senate and Commonwealth Committees and legislative reviews. I have litigated 100's of Administrative Appeals Tribunal – AAT cases on behalf of Veterans and have at least 70 or more reported AAT decisions, Federal court, and Full Federal court decisions including 3 High Court Special leave Applications.

(d) I believe I have relevant experience and insight into the impact of the Schedule 2 amendment and issues arising by limiting appeals to the Veterans' Review Board – VRB and Veterans' losing the right to request reconsideration. The impact of this amendment limits a Veteran's ability to access justice by proceeding to the *Administrative Appeals Tribunal* – AAT as they will no longer have the right to payment for their legal costs and disbursements.

2. Background to the Proposed Legislative Amendment

(a) At the outset, I note the Committee is only looking at Schedule 2 of the amendment and not Schedule 1 or 3 which I have no concerns or issues as to what is proposed.

(b) Additionally, I am not asserting that advocates do not have a place in the VRB or, that the VRB should be abolished. I have worked with advocates and appeals from the VRB to the AAT in *Veterans' Entitlement* Act claims for over 15 years

and understand fully the nature of the VRB appeal and, like other Tribunals, it excludes lawyers in order for there to be a less legalistic approach to the issues at hand.

(c) However the Minister attempted to quietly bring in this amendment to the MRC Act on the 7th of September known as the 'Single pathway model', without consideration as to the actual details of how it would impact on Veterans' rights. Additionally whether the VRB as it currently operates, has the support of the Ex Service Organisation's – ESO's as asserted although this has not been the subject of any recent consultation and confirmation of the ESO position.

(d) The amendment was blocked by Senator Lambie, who, together with the ALP had limited opportunity to consider the implications of the proposal and its impact on Veterans' right to be legally represented to the same level they currently have.

(e) In response to the considered measure taken by Senator Lambie and the ALP to enable consultation into the proposed amendments and the implications, the Minster produced a Media Release on the 8th of September announcing the proposed amendment as being blocked using this theme;

"LABOR SNUBS VETERAN COMMUNITY AND SUPPORTS LAWYERS OVER VETERANS"

(f) The Media release attempts to describe the position taken by Senator Lambie and the ALP as essentially taking a stand at the "*behest of compensation lawyers*". Given that I provided a response to the proposed amendment to Senator Lambie, I am one of the "compensation lawyers" and welcome the inquiry to enable reasonable input and debate from all relevant parties i.e. not just so-called "compensation lawyers" but ESO's relied upon by the Minister to draw support for the proposal.

3. Practical Effect of the 'Single Pathway"

(a) The internal review path currently available means a Veteran is entitled to legal representation through the whole appeal process with the right to payment of most, if not all legal costs and disbursements if the decision is overturned at the AAT stage.

(b) Additionally, and as I emphasis to Veterans with respect to not appealing to the VRB but using the internal review i.e. reconsideration, it eliminates the risk that anything they say at the VRB may inadvertently be considered a concession of sorts, or qualifies the condition in some way or is misinterpreted. This 'evidence' can be used against a Veteran as the VRB produces a transcript that is used in the AAT.

(c) The practical effect of removing the reconsideration appeal path is to deny a Veteran a quicker system of review that is currently available together with the cost advantages of this appeal pathway by having the right to payment of their legal costs and disbursements relating to the AAT appeal (assuming there is one).

(d) Essentially, I advise Veterans that I can request reconsideration, provide reasons in support of the appeal and if unsuccessful appeal to the AAT and subject to the merits of the appeal and evidence available, settle the AAT case before the Veteran would have their case determine by the VRB.

(e) The proposed Schedule 2, "single pathway", removes the internal review and substitutes it with clever language whereby an internal review is still undertaken by DVA, but, this is not the same as the current internal review i.e. reconsideration undertaken.

(f) The practical effect of the amendment is that whilst Veteran can still proceed to review to the AAT for a review of the decision, that if the decision is overturned either through mediation or by judgement during the AAT process, the Veteran cannot have these legal costs and disbursements reimbursed. This is in total contrast to current appeal path of going through the reconsideration i.e. 'internal review' and successfully overturning the decision at the AAT that allows a Veteran to have their legal costs and disbursements reimbursed.

(g) Under the Schedule 2 proposal, a Veteran will be required to fund their legal costs, which includes paying for the disbursements without the benefit of having those reimbursed i.e. medical reports, barristers' fees. Plus, they would be liable for legal costs calculated on an hourly rate or as calculated in accordance with the AAT scale (75% of the Federal court scale) irrespective of the outcome of the case.

(h) The current appeal process allows for Veterans to have the disbursements i.e. the cost of the medical reports of the witnesses to attend court and give evidence, to be paid by DVA and reimbursed to the Veteran. When lawyers have to engage barristers, we can do so on a contingency basis if they believe the case has a reasonable prospect of success. This means the barrister will be paid by DVA and not the Veteran. The lawyers' reasonable costs for the work done in the AAT are paid by DVA and NOT the Veteran.

(i) The AAT is unlike the VRB review model as it requires the examination and cross-examination of witnesses, including medical and other experts. Whilst proceeding before the AAT is not like appearing in a court, it is still a formal legal process. The AAT is not bound by rules of evidence although at the AAT and unlike the VRB the (legal) representative, usually a barrister is likely to engage in technical legal argument, examine and cross examine witnesses and so forth. There is the need to engage in the interpretation of not simply the Act(s) but potentially many cases that have analysed the relevant sections of the Act(s). Plus there is the AAT practice direction to be complied with.

Case Study 1 – Matthew Jensen AAT [2014] AATA 807 and [2015] FCA 209

(i) The abolition of the reconsideration path and the single appeal pathway means the high likelihood of a Veterans' being self represented, like Matthew Jensen, a current client. Matthew went to the VRB after challenging a decision by DVA denying any income support after an injury whilst rending Army reserve service. His advocate at the VRB did not explain to him prior to electing to appeal to the VRB, the cost/benefit analysis of going to the VRB as opposed to the internal review and having the potential for having legal costs paid if successful.

(ii) As he was unsuccessful before the VRB and wanted to appeal to the AAT, he could not afford lawyers as he would have to pay all the costs irrespective of outcome. He was ineligible for a grant of Aid due to the type of service rendered i.e. peace time.

(iii) He was self represented in the Queensland AAT as RSL Queensland refused a request for his VRB advocate to represent him before the AAT. A legal maxim for being self-represented is referred to as having a 'fool for a client'. I.e. not appreciating the complexity of running your own matter and having some objectivity when arguing the case.

(iv) DVA engaged a private law firm, Moray Agnew for the entire AAT preliminary process leading up to the hearing and attended the AAT hearing with 2 staff members. Moray Agnew used a barrister with over 20 years' experience, with the DVA lawyers sitting opposite him to manage the case. Mr Jensen sat there on his own and did the best he could to argue technical points of law and pleaded his case for income support as he no longer could work due to his injury.

(v) Mr Jensen was dissatisfied with the AAT outcome and lodged an appeal to the Federal court (himself).He successfully overturned the AAT decision on appeal which meant going back to the AAT for a re-hearing in accordance with the Federal court's direction and findings. As is it turned out, DVA has accepted Mr Jensen's original argument for back pay of incapacity payments based on the National minimum wage from date of injury despite their argument through the AAT and the Federal court that he was disentitled to it.

(vi) With respect to DVA's legal costs, the barrister would get say $2,500 per day to prepare and appear, perhaps $7,500.00 for 3 days in total i.e. preparation, attendance at the AAT and time spent with Moray Agnew. The private law firm would get at least $10,000.00 to $15,000 to run the case. All up DVA would spend $17,500 – to $22,500.00 for the AAT case.

(j) Mr Jensen's experience is not an isolated example and it will become the norm in DVA's plan to reduce 'compensation lawyers' from being involved in the AAT review process. There are more AAT cases that are examples of DVA versus the unrepresented Veteran.

Case Study 2 - <u>Cameron Brough</u> AAT ref [2014] AATA 879

(i) In another matter for a client who I acted for in the AAT, an Afghanistan Veteran, Cameron Brough, a member of 2 Commando Company. He sustained multiple fractures to his thoracic and lumbar spine due to a parachute accident (during peace time service so he was ineligible for a grant of Legal Aid) resulting in his hospitalisation in a full body cast for 6 weeks.

(ii) Whilst DVA accepted liability for some of the fractures within certain levels of his lumbar spine, they did not accept a disc bulge at another level of his lumbar spine. Additionally DVA denied liability for permanent damage to the "accepted conditions" of the lumbar spine as he only had 8 and not 10 impairment points.

(iii) The AAT appeal was necessary as Mr Brough faced the potential that any future medical treatment involving essentially a similar area of his lumbar spine but not the "accepted" part by DVA would not be accepted. Additionally and assuming the assessment for permanent impairment was assessed at a minimum 10 impairment points (which it was assessed at 8 points), it would be reduced by taking into account the "non-accepted impairment" being the disc bulge below the area where his spine had been fractured.

(iv) The AAT case involved a two day hearing that required a barrister and to call expert orthopaedic evidence called on behalf of Mr Brough. The reality was that Mr Brough could not fund the appeal if he had to pay the barristers' fees, the expert evidence to be called and our professional fees to prepare and appear at the AAT. Our office, together with the barrister considered the circumstances of the case and we proceeded to a hearing before the AAT.

(v) The AAT set both decisions aside i.e. denial of liability for the total damage to the lumbar spine due to the parachute accident and, assessed his impairment at 10 impairment using the available evidence. This is an outcome that Mr Brough would not have achieved if we were not able to act on a contingency i.e. no win - no fee basis.

(vi) Again it needs to be made clear that Mr Brough has not paid for the barrister to prepare and attend a two day hearing (the fees exceed $7,000) nor the cost for our office to prepare and proceed to hearing (in excess of $15,000) or for the orthopaedic specialist to give evidence.

(vii) Assuming Mr Brough had to pay as he only had the 'single pathway' model he would have been requested to pay over $23,500.00 including the medico legal report that would be deducted from his lump sum ie approximately $35,000.00.

4. Understanding the Impact of Schedule 2 Amendment

(a) It appears from a response by the Government's own colleagues, Mr Keith Pitt, Federal Member for Hinkler, to a constituent that the Government may have miss understood the fundamental impact of the proposed amendment reducing the Veteran's right to legal representation due to the fact they will have to pay for their own, legal costs.

(b) The response by Keith Pitt MP, notes;

" *It is the Department's intention, consistent with the discretionary nature of the provision,* to conduct an internal review of the primary decision whenever a VRB application is received and before the VRB actions the application to it. This will mirror the operation of section 31 of the VEA,*

This is in fulfilment of the accepted MRCA Review recommendation 17.2. The MRCC and the Government agreed to the internal review process being a first step in the process of review of a primary decision.

The proposed changes have the enthusiastic and unanimous support of the veteran community and ex-service organisations who, have long advocated for MRCA appeals to follow the model set by the VEA. (*Emphasis added.)*

(c) Firstly, the current internal review pursuant to s349 (5) of the MRC Act is not discretionary i.e. an internal review must be undertaken when requested unlike the proposed change. Secondly, where did the 'enthusiastic support' come from after 2009 when the 'single appeal path" was recommended that the Government now relies on given the lack of broad consultation before announcing the amendment.

(d) Finally, the member for Hinkler failed to mention or did not understand that Veterans will lose something they currently have under the appeal path; the right to paid legal representation for appeals leading up to and including the AAT (subject to success) with those costs largely being paid by DVA and not the Veteran under the proposed changes.

5. ESO Support for the Amendment

(a) The Minister relies on this ESO support from the *Military Review of Military Compensation Arrangements in 2009* i.e. more than six years ago yet there appears to not to have been wide consultation with the ESO's as to whether the single path i.e. the review to the VRB is functioning efficiently and at a level to deal with an increase in its work load. A reasonable process prior to introducing the Schedule 2 amendment would be to consult with the ESO's as to whether they had capacity for an increase of work to the VRB with their current level of funding and advocates available.

(b) Whilst the Minister referred to the recommendations stemming from the review of *Military Compensation Arrangements in 2009*, it failed to take note or ignored the report that the VRB, *"will take up to 418 days to hear an appeal "*as opposed to *the internal review that will take will take up to 127 days* to consider the reasons for reconsideration. (See - *Review of Military Compensation Arrangements – Vol 2 DVA February 2011 – Chap 17.35*).

(c) It was noted in the *Military Compensation Arrangements in 2009* review relied upon by the Minister to bring in the single pathway appeal, that the trending of the appeals to the VRB was going up i.e. the number of appeals as was the number of days to hear the appeal. Presumably, these figures reflected the inherent and substantial delays associated with case preparation and availability of VRB members to hear the appeals and the growing workload as appeals from the MRCA began to increase.

(d) In response to the VRB delays and essentially the formal process for case preparation and hearings, the VRB trialled *alternative dispute resolution (ADR)* in New South Wales and the ACT for matters lodged on and after 1 January 2015. Therefore it is the ESO advocates who prepare and appear before the VRB i.e. non lawyers have in many ways the most insight and experience as to how the VRB –ADR process is dealing with the applications.

(e) A letter from the VRB to ESO's sent in early September 2015 made reference to the new ADR process and the number of applications it progressed to finalisation without the need for a hearing. Whilst the numbers appear 'impressive' at first blush, there was nothing said as to the quality (as opposed to the quantity) of

decision-making i.e. as to what finalisation actually meant. Were the ESO advocates happy with the system? What about some feedback from Veterans?

(f) The *"quantity over quality"* of the statistics from the VRB could conceal more than it reveals (as statistics so often do). For example, a Veteran withdrawing their VRB application at the outset of the proceedings i.e. the ADR is implemented shortly after the appeal is lodged and not at the end of the investigation phase of the VRB process. This process can lead to a Veteran accepting a compromise without the benefit of having the evidence tested (or at least obtained?) and have the full benefits paid by proceeding to hearing. It is usual in the most courts and even the AAT process for ADR i.e. mediation to normally occur at the end of the case preparation and not at the beginning.

Attached and marked with the letters **GI-1** is a copy of the letter from the VRB.

(g) With respect to how the VRB and in particular the ADR process was functioning, the practising ESO advocates in New South Wales convened a meeting on 20th of August 2015 noted as the "***Practicing ESO Advocates Meeting NSW VRB Registry".*** The advocates in attendance who, on behalf of their respective ESO's, represent a substantial number of Veterans before the VRB. I.e. RSL, Legacy, Vietnam Veterans Peacekeepers and Peacemakers Association, Illawarra Veterans Advocacy service, Vietnam Veterans Federation – Far North NSW, NSW legal Aid Advocacy service and so forth.

(h) The Minutes of the meeting make it abundantly clear that, amongst other things there were, ***"serious concerns about the content and implementation of the policy and guideline document being used for the 12 months trial".*** The meeting was convened due to the concerns the ESO advocates held. It goes into small detail of the substantial issues and concerns they have due to their experiences with the VRB and specifically the ADR process.

(i) The Minutes were unsolicited by anyone and generated prior to the Schedule 2 announcement by the Minister. It provides timely insight into why the VRB should undergo substantial reform before it can be the "single pathway" appeal available to the Veterans.

Attached and marked with the letter **GI-2** is a copy of *the "Practicing ESO Advocates Meeting NSW VRB Registry" practising ESO advocates meeting dated 20th of August 2015.*

(j) There must be a serious attempt by DVA to work with the VRB to make it more efficient. In the interim, Veterans should not have to wait and hope that the VRB does in fact becomes, *"economical, quick, and informal"* since it has slowly come to a near grinding halt due to excess work load with the inception of the MRCA. There are also fewer resources within DVA plus reduced advocates due to DVA reducing the level of funding for ESO's through BEST grants and the closing of regional or VAN networks to work with this model.

(k) This Inquiry will provide the Minister with a detailed response as to the proposal and how it currently fits within the ESO community, including what needs to be done in order to improve the proposed "single pathway of appeal" to the VRB which should not occur in its current iteration. Such a profound amendment of this nature, largely through stealth, will impact on Veterans and their right to access justice.

6. The Practical Effect of the Amendment and DVA's Use of Lawyers

(a) DVA use private lawyers from the panel firms that totalled $6.244m and $.586m on counsel i.e. barristers and special counsel to advise DVA on litigation (*Legal Service Expenditure – DVA website*).

(b) Senator Lambie asked DVA through Senate Estimates as to how much DVA spent on in house lawyers' i.e. seconded partner or lawyer from private law firms. The answer was a staggering $300,000.00 in the last 2 years alone. This cost is for a private lawyer to literally sit in DVA's National Office in Canberra to help THEM essentially make decisions or get legal advice on proposed decisions.

(c) There is the increase in legal costs paid by DVA from $4.5 million spent on private law firms as identified in the *Military Review of Military Compensation Arrangements in 2009* for external lawyers to go to the AAT on their behalf. That figure is now $9.429m in 2013/14 compared to $9.01m in 2013/13. *(Legal Services Expenditure, DVA Website)*

(d) There does not appear to be any attempt by DVA to limit the use of private lawyers acting on their behalf. In any event DVA do not use the equivalent of the ESO – Advocate i.e. Level 4 Tip trained but ELS level advocates. In other cases they have the benefit of a former VRB member and barrister who works 'in house 'for DVA as their 'advocate' in many VEA cases that I have acted on behalf of Veterans' under the VEA.

7. The DVA – Legal Aid Relationship

(a) The single appeal pathway to the VRB brings with it the (implied) right to Legal Aid for Veterans with Overseas service i.e. deployments to Iraq and Afghanistan; irrespective of a means test and based on the merit of the case. For the majority of Veterans injured during their normal service i.e. non overseas service, they are highly unlikely to be eligible for legal Aid under the respective State or Territory Legal Aid means test as the means test is stringent.

(b) Access to Legal Aid is not an inherent right for veterans even with Operational service. This is evident when NSW legal Aid decided in December 2014 and in response to cut to Legal Aid funding by the Commonwealth Attorney General to NOT fund Veterans even with operational service.

(c) After being notified of this substantial policy change by NSW Legal Aid on the 19th of December 2014 and bringing it to the attention of and enlisting the assistance from ESO's by reminding DVA of how they spruik the VRB system as providing "beneficial support" to Veterans with operational service i.e. access to Legal Aid, the NSW Legal Aid Commission reinstated Aid.

(d) DVA cannot control or determine access to Legal Aid as it is the States and Territories who disburse Legal Aid after the Commonwealth Attorney General make a grant. This relationship is made abundantly clear by DVA to "compensation lawyers" when we have previously highlighted how hard it is to run cases on the current grant of Legal Aid that, "it's not within our (DVA's) control" as it is the State Government who determines the amount of the grant.

(e) The right for Veteran's with operational service and having gone through the proposed single appeal path i.e. the VRB and expect access to Legal Aid is not enshrined. Clearly this is not a hypothetical question given what has happened in the recent past.

(f) DVA cannot rely on the "good will" of State or Territory Legal Aid Commissions to fund Veterans, especially when they are subjected to the Commonwealth Attorney General reducing their annual grants. Who will miss out; Veterans or say those applying for Legal Aid for committing violent crimes and needing access to lawyers as their liberty are at stake.

8. Veterans' Access to Justice and the "Level Playing Field"

(a) The single appeal pathway will invariably mean less Veterans being able to be legally represented through the AAT process. The AAT website shows the number of Veterans who run a case through the AAT unrepresented. This reality and scenario has probably been borne out of going to the VRB and, after being unsuccessful want to go on to the AAT. They approach lawyers who inform them that they are ineligible for legal aid as it is a peace time injury, do not have the right to have their legal costs paid, or reimbursed for medical evidence, witness fees or to get barristers who can do it on a contingency basis.

(b) This scenario is real as a large number of Veterans in this situation come to me and ask for advice about appealing to the AAT following a VRB appeal. I ask, "Did your advocate tell you that by going to the VRB you can NOT get your legal costs paid even though I think your case has merit and should be appealed?" – The answer for most cases is, "NO, I had no idea".

(c) Do the ESO's advocates know of or appreciate this consequence? Largely from my anecdotal discussions with the Veterans or informally through Information sessions I have with ESO advocates and pension's officers, the answer is, "No" they don't. Even asking advocates about what advice they give and do they spell out the consequences of the advice i.e. opting for the VRB appeal path means no right to legal cot s if they proceed further to the AAT is often met with the response that they were unaware of the consequences of the advice.

(d) I know of cases where advocates appear at the AAT and go up against DVA's private law firm, who in turn engage their barrister. In one decision earlier this year, a level 4 advocate acted for Veterans in a 2 day AAT hearing. This involved examining, cross examining, re-examining witnesses i.e. the doctors and the Veteran, dealing with complex SoP's, factual and medical arguments and making submissions. Plus the advocate is not in the office assisting other Veterans for at least 2 days plus at least an additional day for preparation. When do advocates get trained in the small detail of running an AAT Applications?

(e) DVA fund the ESO's and provide advocate training through BEST grants and TIP training so they need to ensure are they preparing advocates for this level of representation when they themselves brief private law firms to appear who in turn engage barristers.

9. Veterans, ESO's & Compensation Lawyers –The Myths and Reality

(a) The response by the Minister to the Schedule 2 amendment going to an Inquiry was to essentially attack the lawyers who assist Veterans and ESO's through the legal process.

(b) A response by Mr Keith Hinkler, MP to a constituent drew support on this premise from a local Veteran who says:

> *"The current review processes are not only confusing for veterans, but younger veterans often find themselves falling into the trap of a 'No Win-No Fee' predator."*

(c) Firstly, for firms and individual lawyers like myself who have devoted a substantial or in my case, my whole working life to assist Veterans, often at no cost or at substantial reduced rates it is done so to assist Veterans first. Remuneration comes with the outcome. The reality is that 'compensation lawyers' do get paid, but in most instances the majority if not all of the money comes from DVA and only after a decision is overturned or set aside.

(d) This so called 'predatory practice' i.e. having professional representation through a civilian legal process at no cost and subject to a positive outcome, is unique given there is no other professional organisations who would entertain the notion of acting on a contingency basis. For example, it is like going to your accountant and asking them to do a tax return and will only get paid unless they get you get a refund.

(e) The evolution of contingency fees in so far as my practice has evolved, and in general with other Plaintiff law firms that I know and have been involved with, has empowered Veterans and their families to access justice as they would not be able to afford the hourly rate or what the court scale allows for if they were to be charged 'up front; or progressively". Plus barristers can also appear not only in the AAT but the Federal court and High court – again on a contingency basis which means that DVA and not the Veteran pays subject to a successful outcome.

(f) Additionally by Veterans' accessing justice through legal representation, it allows lawyers to examine how the law applies to a Veteran's factual and medical circumstances. In many instances the benefit of AAT decisions, Federal court and High court appeals are the precedents that expand the entitlement for Veterans i.e. the case of *Fellows* who established the right to 2 separate lump sums for two separate knee injuries or *Robson*; two separate lump sums for two separate psychiatric conditions – one from peace keeping in Rwanda and the other from multiple fractures following a parachute accident.

(g) The precedents would not be possible if cases did not proceed on a "no win – no fee" basis. Again by winning it means that DVA pay the court costs and the barristers' fees – not the Veterans.

(h) DVA know how to subtract and deny entitlements – as compensation lawyers we know how to enhance and add to entitlements. No tricks, no predatory practices; just using the beneficial nature of the legislation, getting the right evidence and legal argument together to achieve the best outcome deserving of a Veteran.

(i) Acting for Veterans is more than getting 'lump sums' for "predatory" lawyers. For example, the right to rehabilitation program to include tertiary education, to challenge DVA "deeming' a Veteran capable of earning and having their benefits cut off. Or for a spouse, who more times than not, is the wife or partner of a Veteran to be recognised as an attendant career so they are entitled to more than the Centrelink rate of pay to nurse their injured Veteran.

(j) A substantial number of cases involve the challenge of a decision by DVA denying liability for claims that are rejected or fighting DVA to not 'apportion' non accepted conditions for injuries and the effects. A small decision but if left unchallenged has the potential for huge reductions in entitlements.

10. More than "Compensation"

(a) The so called 'Compensation lawyers' do more than just appeal DVA decisions but contribute through exposing the failures of the system and not just reviewing a wrong decisions. Things like, the lack of transitional management, poor or defective administration claims caused by DVA are made public.

(b) There is additional advice and assistance provided with respect to collateral benefits that may not always be identified by advocates advising on Veterans' appeal rights and representation to the VRB. Things like the right to retrospective MSBS and DFRDB Comsuper pensions, civil claims for negligence and so forth. After talking to a Veteran about their problems, lawyers can uncover and do a lot more.

(c) This Committee has experienced "compensation lawyers" in the Veterans' jurisdiction appearing before the Senate and other Government reviews through submissions about rights, entitlements and issues facing Veterans. It is a real and a 'no cost' demonstrated commitment that lawyers take on when looking after Veterans. It is likely to be lost or substantially weekend if the amendment proceeds and Veterans' will no longer be able to attend lawyers given they will not be able to pay the real costs i.e. legal costs, barristers fees, disbursements and medical reports that DVA would otherwise be liable for if the application results in a positive outcome.

(d) The proposed single pathway appeal will reduce the involvement for lawyers to advocate on issues that they deal with and see emerging through appeals to the AAT as quite simply there will be fewer appeals.

(e) As it is no one pays for the preparation time and to be out of the office (at our own expense to appear before committees who may sit interstate) and to make submissions. I have been an "advocate" on important issues for longer than some ESO's on issues facing Veterans.

11. Veterans & Legal Representation – No more and No less Than DVA

(a) DVA have staff and unlimited resources to fund in house lawyers from private law firms who are essentially doing their job at the tax payers' expense. If the system is so straight forward under the single appeal path, the likelihood is that advocates will not be able to appear before the AAT nor will Veterans be able to afford lawyers. The issue is why then do DVA need private lawyers working in house and externally to represent them yet expect Veterans to rely on ESO advocates to appear before the AAT.

(b) The Committee need to keep in mind that under the current appeal path, DVA only pays the Veterans' lawyer IF the decision is set aside and the Veteran gets a more favourable outcome i.e. DVA got it wrong.

(c) The proposed amendment will deny Veterans what DVA has – access to legal assistance from specialist lawyers who appear in the AAT on their behalf.

(d) Ironically, the amendments will mean that DVA staff i.e. Commonwealth public servants appealing to the AAT will have this right to legal representation and the costs paid for (subject to a successful outcome) when Veterans will not. This is an inequitable situation and one that should not be allowed to quietly happen by enacting the Schedule 2 amendment.

Greg Isolani
KCI LAWYERS
15th September 2015

Veterans' Review Board
National Registry

2nd Floor, Tower B, Centennial Plaza, 280 Elizabeth Street, Surry Hills, NSW 2010 · GPO Box 1631, Sydney NSW 2001
Phone (02) 9211 3090 · Fax (02) 9211 3074

Name
Organisation
Address
Suburb State Pcode

Dear Mr/Ms Name

Veterans' Review Board Liaison meeting – trial of Aternative Dispute Resolution

As you are aware, the Board's trial of ADR in NSW and the ACT for all matters lodged on or after 1 January 2015 has now been running for over six months. Currently, over 309 applications been progressed to various events in the trial. Of those applications 189 (or 61.6%) have progressed to finalisation without the need for a hearing in under 48 days. It is important to note that more 124 (or 65.6%) of finalised applications have been concluded at the outreach phase of the ADR model, without the need to progress to conferencing.

I would like to extend an invitation to you to attend a Liaison Meeting regarding the trial of ADR. The meeting will provide you with an opportunity to provide feedback regarding the trial and discuss issues with your peers who have also been participating in the trial.

It would be appreciated if there are any items you wish to raise or add to the agenda, if you could provide them in advance to Ms Kim Carter at kim.carter@vrb.gov.au.

When: Thursday, 24 September 2015 at 11.30am

Where: Veterans' Review Board
2nd floor, 280 Elizabeth Street
Surry Hills NSW 2010

Yours sincerely,

Doug Humphreys
Principal Member

Please RSVP by 21 September 2015

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PRACTICING ESO ADVOCATES MEETING - NSW VRB REGISTRY

LEGACY HOUSE 47 YORK STREET SYDNEY - 20 AUGUST 2015 - 1.00 PM

CHAIR: Tony Latimore - Veterans Advocacy Service Legal Aid

NOTES: Peter Ellis – IVES

PRESENT: (12)

Garry Luscombe & Will Slater – VCSNB

Ken Wunsch – Dee Why RSL

Cathy Every & Louise Povolny - Sydney Legacy

David Murray & James Dallas - Defence Care (State RSL NSW Branch)

Melanie Lloyd – VVPPA (residing FNQ)

Tony Latimore – VAS Sydney Legal Aid

Sheldon Maher OAM – V V FNC (Lismore)

Peter Ellis & Jolanda Fensom – IVES (Illawarra)

Meeting was held to discuss difficulties experienced with the current 'Alternate Dispute Resolution TRIAL conducted in NSW & ACT.

An agenda was circulated prior to the meeting vide email.

OPENING

Meeting was informed that notes would be taken but the name of speaker or ESO would not be recorded against the notes which are not in minute format.

Chair reminded the meeting that comments should be about the institution and not directed against any individual aligned with the Veterans Review Board.

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The meeting was made up of the major players providing ESO advocacy at the NSW VRB Registry.

The meeting quickly agreed that there was no dispute with the legislation that provides the frame work for 'Alternate Dispute Resolution'. However there were serious concerns about the content and implementation of the Policy and Guidelines document being used for the 12 months trial.

In no particular order the following comments were fielded:

- The time frame between the three ADR steps is unrealistic and high case load ESO advocates cannot achieve them and still provide a quality service.
- With the short time frames between ADR steps remote and rural veterans are left with giving telephone instructions to advocates whereas face to face interviews with the S137 report can realise better case presentation or soliciting better evidence, particularly in assessment matters where GARP and MIA's need to be highly scrutinised.
- Phone instructions are prone to error particularly where hearing difficulties are very common amongst the veteran community.
- Time frames make it difficult to obtain written material from veterans, particularly if it is a written consent to withdraw part or all of review issues.
- Advocates are enticed by VRB members to submit an oral withdrawal of matters on behalf of client. This is sheer folly considering clients renege quiet often.
- An advocate has to read the folio at least three times as well as obtain instructions three times, as well as convey to client the results at each of the three steps. This is wasting time particularly when on the first read of the folio it can become very apparent that the clients oral evidence before a full hearing is the only way to obtain fair resolution after hearing primary evidence.
- Preparing 'issues' 'facts / contentions' and finally a typed submission also takes up valuable advocate's time particularly where the matter will rise or fall on client's oral evidence.

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- The process of the three ADR steps is a carbon copy of the AAT process. This process is used by solicitor offices with regime systems in place. The ESO advocate is not equipped with these resources.
- The ESO advocate will have a far greater personal case load than any major solicitor office dealing with veteran's law.
- There was concern that the Registry was using the ADR process so as to force ESO advocates to provide comprehensive legal submissions prior to any full panel hearing.
- As of this date 20 August the trial has been in vogue for 8 months. Those present at the meeting could relate only a few instances whereby they had matters resolved at any of the three ADR steps.
- Criticism was aired as to the NSW Registry not involving the practicing advocates in the development of the ADR policy and guidelines. It was felt that the content does not take into consideration that the office procedures of the ESO advocacy offices would have to evolve and make change so that a smooth transition could give a trial its best chance without major disruption.
- The meeting was informed that some (2) advocates felt they were being bullied by the ADR representative when giving hardship circumstances relating to a veterans ability to provide evidence within the time frames.
- It was felt by some advocates that at the present time the Registry was rushing files through the ADR so as to suit the TRIAL statistics and not giving the clients issues their best chance
- It was remarked upon in regard of pushing for high output trial statistics. **"YOU CANT MEASURE HOW GOOD DECISIONS ARE, YOU CAN ONLY MEASURE HOW QUICK DECISIONS ARE"**
- The implementation of the ADR trial without ESO advocates participating in the drafting of the 'Policy and Guidelines' caught the ESO Advocacy offices very unprepared to cope with the 'high phone traffic' between the Registry, Advocate & Client. Plotting the client's progress through the ADR requires a SYSTEM of checks and balances to be developed in the office. Carrying out tasks required between the steps also added extra duties that were not planned or rostered for.

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- It was UNFAIR for the Registry to have its systems in place and expect the ESO Advocacy offices to play catch up during the trial. We have still not caught up.
- It is UNFAIR that the ADR trial Policy & Guidelines are only being assessed by NSW & ACT. There are flaws in the document and the other states MUST be included in any appraisal.
- ESO Advocacy offices operate differently but achieve the same outcome. The ADR Policy and Guidelines in its trial format is highly disruptive in the delivery of service.
- Only including the N15/ & A15/ reviews in the trial is wrong. The extra work required for the ADR trial has caused less work to be done on N14 & A14/ reviews. Pushing 2015 reviews ahead of 2014 & 2013 reviews is unfair for the latter clients. It will result in less COR's being submitted and cause less hearings for panel members to preside over.
- The legislation states that the Minister can make an 'instrument' in respect of the ADR process. The Policy and Guidelines In its present format is flawed. It will be difficult to amend 'Instruments' so the Policy and Guidelines should be thoroughly tested at this stage with stakeholders input.
- Whilst the Practicing ESO Advocate would have the experience to manage a file through the ADR process, the rank and file local advocate would not necessarily have the skills as this was NOT a topic in TIP training. A client can be disadvantage because of this.
- The AAT template of ADR will not work at the VRB Registry level without major adjustment. The ESO Practicing Advocate whilst a jack of all trades with appeal work does not have the time to mandatorily put EVERY case through ADR. The advocates does not have the office does not have the time to mandatorily put EVERY case through ADR. The advocates does not have the office clerk, or available temps to call in when leave is taken. They also have high caseloads and it is most difficult to Instruct another advocate on many ADR cases.
- **The ADR hearing dates are set far 'too short of notice of hearing'. Backlogs in the Registry not meeting the 'time frame' suddenly become panic stations for the VRB staff who are under pressure from seniors to fix dates with no tolerance to pleadings by advocates.**

WORKSHOP

- **The main issues are the format of the Policy and Guidelines documents.**

RESOLVED

- **That Principal Member only be invited to attend our next meeting to hear our concerns.**

    - **Next meeting 15 October 2015 – location TBA**

Peter Ellis

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Keith Pitt MP

Federal Member for Hinkler

Response to Constituent:

Thank you for your correspondence relating to appeal pathways for Department of Veterans' Affairs (DVA) clients who are covered under the Military Rehabilitation and

Compensation Act 2004(MRCA).

In the 2015-16 Budget the Government announced it would deliver the long-overdue Single Appeal Pathway under the MRCA. This arrangement stemmed from

Recommendations 17.1 and 17.2 of the Review of Military Compensation Arrangements which was conducted under the previous Labor Government and completed in 2011.

The Single Appeal Pathway replaces the current dual appeal pathway with a simpler, fairer and less complex appeal process using the veteran-preferred Veterans' Review

Board (VRB) model. This model is identical to that under the Veterans' Entitlements Act 1986 (VEA) and its adoption has been endorsed unanimously by the veteran and ex-service community.

The VRB is an independent panel that can hear appeals from DVA clients in a non-adversarial setting. DVA is not represented at VRB proceedings and clients are able to seek free representation from a veterans' advocate rather than paying for their own personal legal representation.

By ensuring that all MRCA clients are able to access the VRB, veterans and their families will be able to have their matter dealt with in a faster, simpler and less costly

process. The reforms will bring the MRCA appeals process into line with the appeals process that already exists for clients who are covered by the VEA. Importantly, should an individual disagree with a decision of the VRB, they still have the right to progress the matter to the Administrative Appeals Tribunal.

There has been misinformed commentary that the Bill removes the right of internal appeal from veterans. Under the MRCA section 347 enables the Military Rehabilitation and Compensation Commission (MRCC), on its own initiative, to reconsider an original decision made by it. There are no time or reason restrictions on the provision. The Bill retains section 347 completely unaltered. It is section 347 that will enable the Commission to undertake an internal review.

It is the Department's intention, consistent with the discretionary nature of the provision, to conduct an internal review of the primary decision whenever a VRB application is received and before the VRB actions the application to it. This will mirror the operation of section 31 of the VEA, This is in fulfilment of the accepted MRCA Review recommendation 17.2. The MRCC and the Government agreed to the internal review process being a first step in the process of review of a primary decision.

The proposed changes have the enthusiastic and unanimous support of the veteran community and ex-service organisations who, have long advocated for MRCA appeals to follow the model set by the VEA.

It is regrettable that the Australian Labor Party has decided to play politics with the appeal process involving veterans. It is even more disappointing that they have decided to back lawyers over veterans and tried to oppose a measure that they supported when last in government. Their decision to bow to the demands of Labor lawyers is reprehensible given Labor supported the measures in the House of Representatives in August, only to reverse their position at the 11th hour before debate occurred in the Senate in September.

During the House of Representatives debate on the Veterans' Affairs Legislation (2015 Budget Measures) Bill 2015, three Labor speakers spoke in favour of the Bill, saying:

Labor will support this Bill because it does represent a modest improvement to entitlements of, and services to, veterans. (Shadow Minister for Veterans' Affairs, David Feeney, 20 August 2015, House of Representatives) Schedule 2 of the Bill will streamline the appeals process into a single pathway for reconsideration or review of an original determination under chapter 8 of the Military Rehabilitation and Compensation Act. This amendment has the support of ex-service organisations and I commend the government for putting it in. (Former Labor Minister for Veterans' Affairs, Warren Snowdon MP, 20 August 2015, House of Representatives)

Schedule 2 of the Bill concerns itself with the appeals process available for reviews of 'original determinations'. The current review arrangements create two separate pathways. As [a local veteran] says:

The current review processes are not only confusing for veterans, but younger veterans often find themselves falling into the trap of a 'No Win-No Fee' predator.

The changes to be made to the review process under this bill will streamline the process into a single pathway, and that is a good thing. This part of the amendment has the full support of the ex-service organisations. (Shadow Parliamentary Secretary to the Shadow Attorney-General, Graham Perrett MP, 20 August 2015, House of Representatives)

And the day before the Bill was debated in the Senate, Labor's spokesman on veterans' affairs continued to offer Labor's support for the proposed Single Appeal Pathway:

"It makes sense to have a single appeal pathway via the Veterans Review Board" (Shadow Minister for Veterans' Affairs David Feeney, 6 September 2015, News Corp article)

These changes give our veterans and ex-service people three appeal options rather than the irrevocable choice between just two of them. The lawyers complaining about these changes are more concerned with their own fees and charges than about fair and just appeal arrangements for veterans appealing decisions of the MRCC.

The Coalition Government is united with the ex-service community in unanimously supporting the Single Appeal Pathway. We remain committed to ensuring that the reforms the ex-service community has long advocated for are implemented in full.
The Abbott Government is committed to recognising the unique nature of military service.

We are proud of our record of delivering for veterans and their families.

Yours sincerely,

Keith Pitt MP

Federal Member for Hinkler