

The Senate

Finance and Public Administration
References Committee

Administrative review of veteran
and military compensation and
income support

December 2003

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TERMS OF REFERENCE

On 19 June 2003, the following matter was referred to the Finance and Public Administration References Committee for inquiry and report.

The options and preferences for a revised system of administrative review within the area of veteran and military compensation and income support, including:

- (a) an examination and assessment of the causes for such extensive demand for administrative review of decisions on compensation claims in the veterans and military compensation jurisdictions;
- (b) an assessment of the operation of the current dual model of internal review, Veterans' Review Board/Administrative Appeal Tribunal, its advantage, costs and disadvantages;
- (c) an assessment of the appropriate model for a system of administrative review within a new, single compensation scheme for the Australian Defence Forces and veterans of the future, including compensation claim preparation, evidentiary requirements, facilitation of information provision and the onus of proof;
- (d) identification of policy and legislative change required to amend the system at lowest cost and maximum effectiveness; and
- (e) an assessment of the adequacy of non-means tested legal aid for veterans, the appropriateness of the current merits and its administration, and options for more effective assistance to veteran and ex-service claimants by ex-service organisations and the legal industry

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Executive Summary

The purpose of this report is to assess the current review structure and process for veteran and military compensation cases, and analyse a range of options for streamlining the review hierarchy and improving the review system's administration.

History and structure of the veterans' review system

Chapters 2 to 4 summarise the history and structure of the veterans' appeal system and overview a succession of reports on the appeal system by both the Auditor-General and the Administrative Review Council (ARC) over the past 20 years. Chapter 2 provides a brief history of the repatriation review system and a summary of repatriation principles that have received broad political and community support since the end of the First World War.

Chapter 3 explains the current dual system of merits review in the veteran and military compensation areas under both the *Veterans' Entitlement Act 1986* (VEA) and the Military Compensation and Rehabilitation Scheme (MCRS) against a backdrop of fundamental change to Australia's system of administrative and judicial review in the early to mid 1970s, and to veterans' entitlements law. Chapter 3 also provides a brief overview of the review system that is being considered under the proposed new Military Rehabilitation and Compensation Scheme.

An exposure draft of the Military Rehabilitation and Compensation Bill 2003 (MRCB) was released by the Minister for Veterans' Affairs, the Hon Danna Vale, on 27 June 2003. Chapter 8 of the bill, entitled 'Reconsideration and review of determinations', deals specifically with the review process in the area of veteran and military compensation. Significantly, the core structures and procedures of appeal which currently operate under the VEA and the MCRS—the dual model of internal and external review involving the Veterans' Review Board (VRB) and the Administrative Appeals Tribunal (AAT)—will remain the same under the proposed new scheme.

The Committee notes that in the future, with one common Act applying to all types of service, the institutional framework for external review will remain tied to the previous dual eligibility model based on two very different Acts. This will effectively mean vastly different processes for ADF personnel, dependent only on their type of service—including consideration of appeals in two separate Divisions of the AAT. The Committee has difficulty accepting DVA's reasons for replicating the current system given its inherent problems.

As discussed in chapter 4, since the mid 1980s there have been no less than six reviews of aspects of the veterans' appeals system by both the Auditor-General and the ARC. These various reviews identified a number of structural and administrative problems and made recommendations for change. However, they were carried out in the shadow of a complex review structure that remained unchanged since recommendations of the Toose report were implemented in 1979. Except for a far-

reaching government proposal in the late 1990s to overhaul the Commonwealth's merits review tribunals by introducing a new Administrative Review Tribunal (ART), the structure of the veterans' review system has not been challenged.

The Committee finds that noticeable improvements to the appeals process by DVA have in recent years led to efficiencies in the administration of the primary and internal review stages. Yet it believes that administrative problems caused by the structure of the veterans' review process, some of which were first identified in the mid-1980s and subsequently examined by the ARC in its landmark *Better Decisions* report, have not been satisfactorily addressed either by government or by key stakeholders. This report essentially attempts to address these outstanding issues.

The Committee finds that there is a remarkable consistency in the problems with the veterans' review process that have been identified by key stakeholders over the past 20 years, yet working through these problems and finding practical solutions has proven difficult. Moreover, reform of the veterans' review process has been overshadowed in recent years by a government priority to reform the broader system of veterans' entitlements and introduce a new military compensation scheme. The Committee believes this priority has meant that a major concern with the system—that the review process has become unnecessarily complex—remains unresolved.

Weaknesses of the veterans' review system

The overview in chapters 1 to 4 provides the necessary backdrop to the report's three core chapters. Their purpose is to critically evaluate the current veterans' review system, assess a range of options for structural and administrative reform, and address practical and political considerations that need to be taken into account in order to foster a culture of reform in this complex jurisdiction.

The Committee has identified at least five related structural and administrative challenges surrounding the veterans' review system:

- The high level of demand for review of primary claims;
- Delays in settling appeals caused by the withholding of important information from decision-makers at the primary and first tier (VRB) stages of the review process;
- A culture of appeal where the VRB is seen as a stepping stone to a higher (and quasi-judicial) level of review where legal aid is available;
- The high overturn rate caused in most cases by new medical evidence being made available at the AAT stage of the review process; and
- The poor knowledge and skills base of ex-service organisations (ESOs), and the risk to the review system associated with a declining pool of ESO advocates.

The Committee examined the relationship between the review structure and these administrative weaknesses, especially the extent to which the three-tier hierarchy is a factor contributing to the high level of demand for review.

An analysis of figures provided by DVA on the review of decisions made under the VEA and the *Safety, Rehabilitation and Compensation Act 1988* (SRCA), respectively, leads the Committee to two conclusions. First, with regard to appeals under the VEA, an overwhelming number of claims are settled prior to the AAT hearings—approximately only 1 in 30 claims proceed through the review hierarchy from primary level to the AAT. The culture of appeal, to the extent that it is a problem, has not translated into an excessive number of cases proceeding from internal review through to the AAT.

However, while it appears that most cases are settled at either internal review or the VRB, the Committee is of the view that still too many cases proceed to the most expensive review tier. This reinforces the Committee's view that additional efforts should be made to further reduce the number of appeals reaching both the VRB and the AAT.

Second, an unacceptably high number of cases under review are varied or overturned at the VRB and AAT stages of review. A relatively small number of cases—approximately 25 per cent—appealed at the VRB progress to a full AAT hearing. The remaining 75 per cent of cases are either withdrawn or conceded by the Repatriation Commission. The main factor contributing to both the high overturn rate at the VRB and the high number of cases withdrawn prior to an AAT hearing is the production of new medical evidence.

The Committee fully endorses the principle of early and quick resolution of appeal cases, preferably at the internal review stage. The Committee accepts that improvements have been made in this area, but believes that further reforms should be considered.

The Committee finds that the figures provided by DVA on the rate of appeals under the VEA and the MCRS, at face value do not support a strong connection between the review structure and a willingness for claimants to exercise their right of appeal. However, the overturn rate indicates that the level of appeal could be reduced further.

The Committee finds that factors other than the review hierarchy contribute both to the high number of appeals of primary decisions and to the high overturn rate at the VRB and AAT stages of review. Two critical factors are the ability of claimants to introduce new evidence at any stage of the review process and to withhold important information until their case is reviewed by the AAT.

The Military Compensation and Rehabilitation Scheme

The most telling criticisms of the review process are reserved for the Military Compensation and Rehabilitation Scheme. Apart from a number of ambiguities and inconsistencies surrounding the interpretation and application of complex legislation, the Committee received evidence from ex-service organisations and legal representatives about a reported practice of DVA using private law firms to assist it with the reconsideration process. The Committee is concerned that delegates are not only incorporating legal advice into their own independent written judgment but are using that advice for the purpose of the entire reconsideration. While the Committee is unable to determine to its satisfaction the extent to which whole reconsiderations are

being referred to lawyers for advice, it believes the issue needs to be reviewed by DVA and remedial measures implemented should they be required.

The Committee finds that Australian Defence Force (ADF) personnel are at a distinct disadvantage under the current system because a large number of claimants do not have the money to pay for legal representation at the primary and reconsideration levels of MCRS decision-making and, even if they did, there is currently no entitlement for legal costs to be reimbursed if they successfully overturn a decision following internal review.

The Committee also received evidence which was highly critical of the different avenues of appeal under the current review system. Leading stakeholders indicated their support for a streamlined and single review process for all ADF and ex-ADF personnel regardless of whether their service is warlike, non-warlike and peacetime only.

This level of support for an alternative single review path suggests to the Committee that the claim by both DVA and the Department of Defence that there is a broad consensus about the review model proposed in the draft MCRB, should be treated with caution. In light of this, the Committee is concerned that in its current form the draft MCRB adds yet another layer of complexity to the mix of law covering the review of veteran and military compensation. Moreover, the problems and discrepancies that have been identified with the structure and operation of the existing review system will in all likelihood be carried over to the new military compensation scheme, unless changes are made to the draft bill.

The Committee finds that the review model included in the draft MCRB does not adequately address a range of structural and administrative weaknesses with the existing review system that are identified by a number of leading ESOs and legal practitioners who have an intimate working knowledge of the system's operation and administration—for example, delays in settling appeals caused by the withholding of evidence from primary decision makers, variations in the quality of representation by ESO advocates, the poor quality of claims in a complex jurisdiction, and the number of appeal and review avenues.

Ex-service organisations

Ex-service organisations (ESOs) have played a crucial role in the veterans' review process over a number of years by helping veterans prepare their compensation and appeals claims and by representing them, where necessary, before the VRB and AAT. The Training and Information Program (TIP) and Building Excellence in Support and Training (BEST) program, in particular, have provided much needed financial assistance to ESO representatives. However, the Committee believes that ESOs are struggling with the complexities of the VEA and MCRS appeals system, and remain under-resourced. The resources that are made available to ESOs are stretched to the point where they are finding it difficult to cope with the heavy demands made by the system. This means that veterans who appeal primary decisions do not always receive an adequate level of support.

Additional problems with the BEST program identified by a number of ESOs are that funding is dispersed too widely among many small groups, and the current annual funding arrangement makes it difficult for ESOs to recruit, train and retain sufficient number of skilled advocates.

The Committee finds that the BEST and TIP programs have been very valuable. However, should there be no additional funding for these programs, the Committee believes that changes should be made to the existing funding arrangement to enable ESOs to improve the effectiveness of the services they provide to the veteran community.

Structural reform

An issue at the heart of this inquiry is identifying what structural reforms, if any, are needed to help reduce the demand for review of primary decisions and facilitate the early settlement of appeals. A number of proposals for structural reform were canvassed during the inquiry. The Committee examined three options:

- Streamline the current review process by removing one external review tier, such as the VRB. This would result in a two tier system consisting of internal review followed by external review by the AAT;
- Streamline the current review process by merging the VRB/AAT tiers into one external review body. This structure would provide a modified two stage process adopting procedures that are currently in use by the VRB and AAT; and
- Introduce a legislative limitation on the circumstances in which review by the AAT may be sought, focusing on matters involving issues of general principle and cases involving ‘manifest errors’.

The Committee finds that removing the VRB tier altogether or collapsing the VRB and AAT tiers into one streamlined process would be premature at this point in time because these options do not have the political support of ESOs. It follows that the VRB should be retained as the first tier of external review, with the AAT continuing as the final body of merits review available to veterans or widows.

The Committee supports a cautious and incremental approach to reform if this avoids the need to pursue more difficult systemic reform. It believes that every opportunity should be provided to test the effectiveness of administrative reform before heading down the path of far-reaching structural reform.

The Committee believes that it is not appropriate to support a proposal, first articulated under different circumstances by the ARC nearly a decade ago, to introduce a legislative limitation on the circumstances in which second tier review may be sought. However, the Committee believes that such a proposal should be kept under review.

Administrative reform

A second category of reform proposals examined during the inquiry, while not addressing systemic reform, focus instead on administrative reform within the existing review hierarchy. Two categories of administrative reform were analysed:

- Introduce a range of incentives to encourage the production of all relevant evidence at the earliest possible stage of the review process—for example, introduce legal assistance at lower levels of the review hierarchy and provide retrospective payment of benefits to the date when relevant information was obtained; and
- Improve the internal operation of the VRB by introducing some of the practices and procedures of the AAT—for example, mandatory conciliation and conference registrars.

The Committee recognises the ex-service community’s resistance to legal assistance being introduced at the VRB, and finds that the current arrangements for legal aid should remain in place. However, the Committee would like to see the issue of legal aid in the veterans’ jurisdiction kept under review. It believes that non adversarial models of legal representation in the VRB may be worth considering in the future.

The Committee finds that disbursements for medical evidence at the VRB stage are inadequate. However, in the event that the level of disbursements is increased, the Committee believes they should not be repeated at higher review levels. The Committee believes that reimbursements earlier in the review process should encourage provision of better evidence, and that the non availability of disbursements at the AAT would be a sound complementary initiative (except perhaps for a modest level of reimbursement in the event a decision is overturned).

The Committee finds that every attempt must be made to settle cases earlier in the review process, particularly at the VRB, using conciliation and mediation processes similar to those used at the AAT. The Committee believes that the current practice of conference registrars in the AAT in ensuring quality assurance is working well. The dramatic cost differential between the VRB and the AAT indicates that the use of such processes at the VRB, together with an expansion of the current role of VRB Registrars, should be cost neutral to government.

Practical and political consideration

The main conclusion that the Committee draws from its assessment of reform options is that radical proposals to restructure the veterans’ review process do not have the support of the veterans’ community and, for this reason, should not be pursued in the short to medium term. A number of options canvassed during the inquiry, such as abolishing the VRB and merging VRB and AAT appeal processes, were strongly criticised by the main ESOs.

The Committee appreciates that this cultural barrier to reform within the veterans’ community is a product of a number of factors—the complexity of this particular jurisdiction, the number of players involved in the review process, the interests at stake, and the history of reform. These political and practical difficulties in achieving structural reform suggest that certain preconditions for reform must not go unnoticed in future. In particular, change will most likely emerge only after long periods of consultation in which mutual understanding and trust is forged between the major stakeholders.

The Committee concludes on a positive note by observing that ESOs are serious about reducing the culture of appeal and hence the need for veterans to exercise their appeal rights—‘getting it right the first time’ was a motto expressed on numerous occasions during the inquiry. The Committee notes that ESOs prefer to work towards this goal from within the existing review hierarchy by focusing on improvements to the system’s administration and practical incentives for the early settlement of claims.

The Committee considers that reforms aimed at bringing about cultural change in this jurisdiction should harness the support among ESOs for administrative reforms and measures that promote early settlement of claims. The Committee believes that progress on these fronts will improve the likelihood of not only reducing any culture of appeal but also the wider prospects for creating a culture of reform among the key stakeholders in the system.

The Committee finds that a total restructure of the review process at this stage is not possible because it does not have the political support of ESOs at this time. The Committee, however, believes that structural reform is essential to overcome weaknesses that have been identified in this report, and that reform can best be achieved incrementally with the support of all leading stakeholders.

The Committee believes that there are worthy reforms which could be initiated to give effect to the strong criticisms of the review process that have been raised within the veteran’s jurisdiction over many years. Moreover, the Committee would like to see priority given to incentives to assist with the early provision of information and hence the earliest possible settlement of appeal cases. The Committee would also like to see an increased use of VRB Registrars to ensure that applications are not deficient with regard to all necessary supporting material, including medical evidence.

For all of the reasons considered in this report, the Committee finds that the best way to approach reform of the veterans’ review system is to support incremental reforms rather than impose a major reform agenda onto a system that, in the Committee’s view, performs effectively. Specifically, the Committee would like to see a modified review process trialled in one State over a two year period to test the effectiveness of a number of modest changes to the VRB stage of the review process.

Findings and Recommendations

Findings

Chapter 4

- The Committee finds that noticeable improvements to the appeals process by DVA have in recent years led to efficiencies in the administration of the primary and internal review stages. Yet it believes that administrative problems caused by the structure of the veterans' review process, some of which were first identified in the mid-1980s and subsequently examined by the ARC in its landmark *Better Decisions* report, have not been satisfactorily addressed either by government or by key stakeholders.
- The Committee finds that there is a remarkable consistency in the problems with the veterans' review process that have been identified by key stakeholders over the past 20 years, yet working through these problems and finding practical solutions has proven difficult. Moreover, reform of the veterans' review process has been overshadowed in recent years by a government priority to reform the broader system of veterans' entitlements and introduce a new military compensation scheme. The Committee believes this priority has meant that a major concern with the system—that the review process has become unnecessarily complex—remains unresolved.

Chapter 5

- The Committee fully endorses the principle of early and quick resolution of appeal cases, preferably at the internal review stage. The Committee accepts that improvements have been made in this area, but believes that further reforms should be considered.
- The Committee finds that the figures provided by DVA on the rate of appeals under the VEA and the MCRS, at face value do not support a strong connection between the review structure and a willingness for claimants to exercise their right of appeal. However, the overturn rate indicates that the level of appeal could be reduced further.
- The Committee finds that factors other than the review hierarchy contribute both to the high number of appeals of primary decisions and to the high overturn rate at the VRB and AAT stages of review. Two critical factors are the ability of claimants to introduce new evidence at any stage of the review process and to withhold important information until their case is reviewed by the AAT.
- The Committee finds that ADF personnel are at a distinct disadvantage under the current system because a large number of claimants do not have the money to pay for legal representation at the primary and reconsideration levels of MCRS

decision-making and, even if they did, there is currently no entitlement for legal costs to be reimbursed if they successfully overturn a decision following internal review.

- The Committee finds that the review model included in the draft MCRB does not adequately address a range of structural and administrative weaknesses with the existing review system that are identified by a number of leading ESOs and legal practitioners who have an intimate working knowledge of the system's operation and administration—for example, delays in settling appeals caused by the withholding of evidence from primary decision makers, variations in the quality of representation by ESO advocates, the poor quality of claims in a complex jurisdiction, and the number of appeal and review avenues.
- The Committee finds that the BEST and TIP programs have been very valuable. However, should there be no additional funding for these programs, the Committee believes that changes should be made to the existing funding arrangement to enable ESOs to improve the effectiveness of the services they provide to the veteran community.

Chapter 6

- The Committee finds that removing the VRB tier altogether or collapsing the VRB and AAT tiers into one streamlined process would be premature at this point in time because these options do not have the political support of ESOs. It follows that the VRB should be retained as the first tier of external review, with the AAT continuing as the final body of merits review available to veterans or widows.
- The Committee supports a cautious and incremental approach to reform if this avoids the need to pursue more difficult systemic reform. It believes that every opportunity should be provided to test the effectiveness of administrative reform before heading down the path of far-reaching structural reform.
- The Committee believes that it is not appropriate to support a proposal, first articulated under different circumstances by the ARC nearly a decade ago, to introduce a legislative limitation on the circumstances in which second-tier review may be sought. However, the Committee believes that such a proposal should be kept under review.
- The Committee recognises the ex-service community's resistance to legal assistance being introduced at the VRB, and finds that the current arrangements for legal aid should remain in place. However, the Committee would like to see the issue of legal aid in the veterans' jurisdiction kept under review. It believes that non adversarial models of legal representation in the VRB may be worth considering in the future.
- The Committee finds that disbursements for medical evidence at the VRB stage are inadequate. However, in the event that the level of disbursements is increased, the Committee believes they should not be repeated at higher review levels. The Committee believes that reimbursements earlier in the review process

should encourage provision of better evidence, and that the non availability of disbursements at the AAT would be a sound complementary initiative (except perhaps for a modest level of reimbursement in the event a decision is overturned).

- The Committee finds that every attempt must be made to settle cases earlier in the review process, particularly at the VRB, using conciliation and mediation processes similar to those used at the AAT. The Committee believes that the current practice of conference registrars in the AAT in ensuring quality assurance is working well. The dramatic cost differential between the VRB and the AAT indicates that the use of such processes at the VRB, together with an expansion of the current role of VRB Registrars, should be cost neutral to government.

Chapter 7

- The Committee finds that a total restructure of the review process at this stage is not possible because it does not have the political support of ESOs at this time. The Committee, however, believes that structural reform is essential to overcome weaknesses that have been identified in this report, and that reform can best be achieved incrementally with the support of all leading stakeholders.
- The Committee believes that there are worthy reforms which could be initiated to give effect to the strong criticisms of the review process that have been raised within the veteran's jurisdiction over many years. Moreover, the Committee would like to see priority given to incentives to assist with the early provision of information and hence the earliest possible settlement of appeal cases. The Committee would also like to see an increased use of VRB Registrars to ensure that applications are not deficient with regard to all necessary supporting material, including medical evidence.
- For all of the reasons considered in this report, the Committee finds that the best way to approach reform of the veterans' review system is to support incremental reforms rather than impose a major reform agenda onto a system that, in the Committee's view, performs effectively. Specifically, the Committee would like to see a modified review process trialled in one State over a two-year period to test the effectiveness of a number of modest changes to the VRB stage of the review process.

Recommendations

Recommendation 1

The Committee recommends that the ANAO conduct an audit of the reported practice of the Military Compensation and Rehabilitation Scheme using private law firms for the purpose of the entire reconsideration of the original decision. It also recommends that DVA, in consultation with the ANAO, establish guidelines for private law firms in providing advice to ensure that the authority of delegated decision-makers is not being bypassed. (Para 5.54)

Recommendation 2

The Committee recommends that the future administrative review process under the new Military Rehabilitation and Compensation Scheme (MRCS) should be the same for all ADF and ex-ADF personnel. All appeals to the Administrative Appeals Tribunal should be heard by one Division which might be titled the ‘Military’ Division. This new process does not apply to the existing review process under the MCRS. (Para 5.68)

Recommendation 3

The Committee recommends that in order for ex-service organizations (ESOs) to provide an adequate and sustainable advocacy service, funding arrangements for the TIP and BEST programs should be reviewed in order to improve the effectiveness of the programs. Funding for the programs should be on at least a bi-annual basis to enable ESOs to make better use of their available financial resources. (Para 5.94)

Recommendation 4

The Committee recommends that a two-year trial be initiated in one State with the agreement of the veterans’ organisations in that State for a variation to the existing review process. That new process should include:

- the introduction into the VRB of pre-hearing mediation and conciliation processes as currently employed in the AAT including the presence of the claimant, the advocate and the DVA;**
- an increased use of VRB Registrars to ensure that applications are not deficient with regard to all necessary supporting material, including medical evidence;**

- **enhancement of medical disbursements prior to the VRB. The disbursements are to be equivalent in value to those currently available at the AAT, but once they are taken they are not to be made available a second time should there be a further appeal to the AAT; and**
- **the same legal aid provisions that exist under the current review model. (Para 7.34)**

The Committee also recommends that DVA undertake a review of the trial at the conclusion of the two-year period. The review should assess the outcomes of the trial against a set of performance indicators to determine whether there is scope either to extend the trial period or introduce the revised VRB process in other States and on a permanent basis. The review and any decision to introduce a revised process should proceed in consultation with all major stakeholders. (Para 7.35)

List of Abbreviations

| | |
|------|---|
| AAT | Administrative Appeals Tribunal |
| ADF | Australian Defence Force |
| ALRC | Australian Law Reform Commission |
| ANAO | Australian National Audit Office |
| ARC | Administrative Review Council |
| ART | Administrative Review Tribunal |
| BEST | Building Excellence in Support and Training Program |
| CCPS | Compensation Claims Processing System |
| DVA | Department of Veterans' Affairs |
| ESO | Ex-service Organisation |
| MCRS | Military Compensation and Rehabilitation Scheme |
| MRCB | Military Rehabilitation and Compensation Bill |
| MRCC | Military Rehabilitation and Compensation Commission |
| MRCS | Military Rehabilitation and Compensation Scheme |
| RMA | Repatriation Medical Authority |
| RRT | Repatriation Review Tribunal |
| SMRC | Specialist Medical Review Board |

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|------|---|
| SoPs | Statements of Principle |
| SRCA | <i>Safety, Rehabilitation and Compensation Act 1988</i> |
| TIP | Training and Information Program |
| VEA | <i>Veterans' Entitlement Act 1986</i> |
| VRB | Veterans' Review Board |

Chapter 1

Introduction

Background

1.1 The impetus for this inquiry is the Government's proposed new Military Rehabilitation and Compensation Scheme (MRCS), which is designed to provide a single scheme of rehabilitation, compensation and other entitlements for members of the Australian Defence Force (ADF). For the first time, the scheme will apply to all forms of military service—warlike, non-warlike, and peacetime. All eligible members who suffer an injury or illness when on service *after* the new scheme takes effect will be covered by one piece of legislation.

1.2 An exposure draft of the Military Rehabilitation and Compensation Bill 2003 (MRCB) was released on 27 June 2003, together with a complete 'narrative guide'. The Government has indicated that the bill will be introduced into the Parliament late in 2003. In releasing the exposure draft, the Minister for Veterans' Affairs, the Hon Danna Vale, stated: 'The release of this draft marks a watershed for the entire Defence portfolio. It signals the biggest change in military compensation legislation since the introduction of the Veterans' Entitlement Act nearly two decades ago, and the creation of the Military Compensation and Rehabilitation Service in 1994'.¹

1.3 Chapter 8 of the bill, entitled 'Reconsideration and review of determinations', deals specifically with the review process in the area of veteran and military compensation. According to DVA, appeal arrangements have been the subject of extensive discussions between it and the veteran community within a working party established by DVA under the authority of the minister to consider approaches the government might take on a new military compensation scheme.² On the surface the proposed review system sets out a 'revised' process for internal and external merits review for veterans and ADF personnel.

1.4 The core structure and procedures of appeal which currently operate under both the *Veterans' Entitlements Act 1986* (VEA) and the Military Compensation and Rehabilitation Scheme (MCRS)—notably the dual model of internal and external review involving the Veterans' Review Board (VRB) and the Administrative Appeals Tribunal (AAT)—remain the same under the proposed new scheme.³

1 The Hon Danna Vale, Release of the exposure draft of the Military Rehabilitation and Compensation Bill, Parliament House, 27 June 2003, Speech

2 Dr Johnston, DVA, *Committee Hansard*, 26 September 2003, p.1

3 The Proposed New Military Rehabilitation and Compensation Scheme, Narrative Guide, Chapter 8 'Reconsideration and review of determinations'

1.5 The exposure draft states clearly that the Act will be *prospective* in operation and apply only to service rendered on or after the commencement date. The VEA and the MCRS operating in tandem will continue to apply to all injuries incurred during service before the commencement date. It does not replace the VEA or MCRS or change any other entitlements. This means that some people will be eligible for compensation and administrative review under different schemes governed by several pieces of legislation.⁴

1.6 The purpose of this report is to assess the current review structure and process for veteran and military compensation cases, and analyse a range of options for streamlining the review hierarchy and improving the review system's administration.

Reference to the Committee and conduct of inquiry

1.7 On 19 June 2003, the Senate referred the following matter to the Finance and Public Administration References Committee for inquiry and report: *The options and preferences for a revised system of administrative review within the area of veteran and military compensation and income support.*

1.8 In considering these terms of reference, the Senate specifically asked the Committee to examine and report on the following issues:

- a) an examination and assessment of the causes for such extensive demand for administrative review of decisions on compensation claims in the veterans and military compensation jurisdictions;
- b) an assessment of the operation of the current dual model of internal review, Veterans' Review Board/Administrative Appeal Tribunal, its advantage, costs and disadvantages;
- c) an assessment of the appropriate model for a system of administrative review within a new, single compensation scheme for the Australian Defence Forces and veterans of the future, including compensation claim preparation, evidentiary requirements, facilitation of information provision and the onus of proof;
- d) identification of policy and legislative change required to amend the system at lowest cost and maximum effectiveness; and
- e) an assessment of the adequacy of non-means tested legal aid for veterans, the appropriateness of the current merits and its administration, and options for more effective assistance to veteran

4 DVA, Submission No. 10, p.14. The department notes that the existing VEA and MCRS review structures will continue to service appeals by those already eligible under those schemes for perhaps another fifty to sixty years.

and ex-service claimants by ex-service organisations and the legal industry.

1.9 The Committee advertised the inquiry in the *Australian* on 2 July 2003 and on its internet homepage at <http://www.fpa.aph.sen.gov.au>. It called for written submissions to be lodged with the Committee by 15 August 2003. The Committee also wrote to relevant Commonwealth departments and agencies, ex-service organisations and legal firms drawing their attention to the inquiry and inviting submissions.

1.10 The Committee received 14 submissions. A list of submissions is contained in Appendix 1. All submissions were made public documents and can be accessed on the Committee's web page.⁵

1.11 After consideration of the submissions, the Committee held public hearings in Sydney and Canberra on 25 and 26 September 2003, respectively. Details of the hearings and the witnesses who appeared at them are contained in Appendix 2. The *Hansard* transcript of evidence taken at the hearings is also available on the Committee's homepage.

1.12 During the course of the inquiry some Commonwealth departments and agencies and other witnesses appearing before the Committee provided answers to questions taken on notice at hearings, as well as further information.

Acknowledgments

1.13 The Committee wishes to express its appreciation to everyone who contributed to the inquiry by making submissions and appearing before the Committee at the public hearings.

5 http://www.aph.gov.au/Senate/committee/fapa_ctte/vetsreview/index.htm

Chapter 2

Brief history of the repatriation review system

The repatriation system

2.1 Any consideration of the current system of administrative review in the area of veteran and military compensation must take into account the long history of Australia's repatriation system, and the complex mix of legislation that provides repatriation and compensation benefits to veterans and to ADF personnel.

2.2 Of particular note are the core philosophical and ethical considerations underpinning the system as a whole that have received broad political and community support since the end of the First World War. These core considerations, or repatriation principles, were first formulated and expressed by Justice Toose in his comprehensive review of the repatriation system in the mid 1970s.¹

2.3 The principles express, on behalf of the nation, indebtedness to those who have given service to it in time of war 'thereby endangering their lives and health and probably suffering economic loss'. Consequently, the nation has a duty to ensure that those who have served the nation 'are properly cared for to the extent that they should never have to beg or rely on charity'. The principles also place on governments an obligation to provide suitable rehabilitation and compensation for those who have served in the armed forces and their dependents who have suffered some disability. Compensation and other benefits are viewed as a matter 'of right' and not as welfare, and where doubt exists the matter should be 'resolved in favor of those claiming to be entitled'.²

2.4 The list of principles formulated by Toose has since been endorsed (with some minor revision or elaboration) in reports by Professor Peter Baume AO (1994)³ and The Hon John Clarke QC (2003).⁴ The Baume report endorsed the principles described by Toose as reflecting accurately the broad principles behind the repatriation system. However, it went further in noting that one of the important principles not expressly mentioned but implied by Justice Toose '...is that the Commonwealth has a responsibility to provide compensation and care to veterans and their dependents for incapacity or death related to service'.⁵

1 *Independent Enquiry into the Repatriation System*, AGPS, Canberra, 1975, pp.40–41

2 *Independent Enquiry into the Repatriation System*, AGPS, Canberra, 1975, p.41

3 *A Fair Go: Report on Compensation for Veterans and War Widows*, 1994

4 *Report of the Review of Veterans' Entitlements*, January 2003

5 *A Fair Go: Report on Compensation for Veterans and War Widows*, March 1994, p.9

2.5 The Clarke review argued that the principles espoused by Toose and endorsed by Baume were, in essence, subsidiary ones deriving from a higher-level core principle. It expressed this core principle in the following terms:

The Government, in expression of the nation's debt of gratitude, shall provide a beneficial level of compensation and support to veterans and their dependants for incapacity and death resulting from service in the armed forces during times of war or of conflict or in warlike and non-warlike operations.⁶

The review system to 1979

2.6 The history of the repatriation review system dates back to the *War Pensions Act 1914*, which provided pensions for war-caused death or incapacity. The Act was administered by a three person Pension Board which included a medical practitioner.⁷ From 1915 the Act included the right of appeal on entitlement and assessment matters to the Commissioner of Pensions from an initial determination by Deputy Commissioners in each State. The *Australian Soldiers' Repatriation Act 1920* provided a right of appeal to the Repatriation Commission, which was an incorporated body of three persons. A Medical Advisory Committee composed of eminent medical experts could consider a case involving complex medical questions.⁸

2.7 Subsequent legislative change saw the first external appeal tribunals established in 1929 under the *Australian Soldiers' Repatriation Act 1920*: the War Pensions Entitlement Appeal Tribunals and the War Pensions Assessment Appeal Tribunals. These tribunals were established following complaints from ex-service organisations about the absence of an independent right of appeal.⁹ The main function of the tribunals, as their name suggests, was to review determinations of eligibility for war pensions and assessment of the level or amount of pension to which a veteran was entitled.¹⁰

6 *Report of the Review of Veterans' Entitlements*, January 2003, p.101

7 Robin Creyke and Peter Sutherland (with Paul Ridge), *Veterans' Entitlements Law*, The Federation Press and Softlaw Community Projects, 2000, p.443

8 Robin Creyke and Peter Sutherland (with Paul Ridge), *Veterans' Entitlements Law*, The Federation Press and Softlaw Community Projects, 2000, p.443

9 Robyn Creyke, 'Interpreting Veterans' Legislation: Lore or Law?' in John McMillan (ed.), *Administrative Law: Does the Public Benefit?*, Australian Institute of Administrative Law Inc, Canberra 1992, pp.323–24

10 The distinction between claims assessment and claims for entitlement is an important one. Entitlement relates to determining whether a veterans' disability is war-caused and fulfils the criteria of the relevant Statement of Principle (SoP). Assessment cases are those in which a veteran who already receives a disability pension may submit a further claim for assessment with a view to receiving a higher rate of pension. Australian National Audit Office, *Review of Veterans' Appeals Against Disability Compensation Entitlement Decisions*, Audit Report No. 29 2000–01, p.30

2.8 By the mid-1930s a three-tiered decision-making structure had been put into place, comprising Repatriation Boards, the Repatriation Commission, and the two Appeal Tribunals. Appeals from Repatriation Boards could be made either to the Commissions in the first instance and then to the Appeal Tribunals, or directly to the Tribunals. Significantly, under this emerging review system there was no general right of appeal to a court from decisions on repatriation matters.¹¹

Changes recommended by the Toose Report

2.9 The repatriation review system remained largely unchanged until Justice Toose handed down a comprehensive review of all aspects of the repatriation system in 1975.¹² In his report, Toose enumerated principles which were to govern the method of determining claims and appeals. These principles are important because they are central to the administration of the current review system. The report states that in determining appeals, a Board, the Commission and Appeal Tribunals should:

- Act according to substantial justice and the merits of the case;
- Not be bound by technicalities or the rules of evidence;
- Give the claimant the benefit of the doubt;
- Draw from all the circumstances and the evidence and medical opinions all reasonable inferences in favour of the claimant;
- Regard the onus of proof as being on the person or authority who contends the claim should not be granted or allowed to the full extent claimed;
- Give reasons for decisions; and
- In the event of disagreement give a majority decision.¹³

2.10 Three key recommendations made by Toose were largely implemented in 1979. The report recommended that Repatriation Boards be replaced by delegates of the Commission; a single tribunal (preferably a division of the proposed Administrative Appeals Tribunal (AAT)) replace the two Appeal Tribunals; and an appeal on a question of law be made available to the proposed new Federal Court.

2.11 In practice, the two Appeal Tribunals were replaced by a first-tier external review body, the Repatriation Review Tribunal (RRT), instead of a division of the AAT. There was also a second level of external review (on merits grounds) available

11 Between 1914 and 1980 only five repatriation cases were heard by Australian courts. Significantly, between 1980 and 1992, after the opening up of the system to external review, the number of cases heard by the courts rose to 169 (3 by the High Court, and 44 by the Full Court of the Federal Court), Robyn Creyke, 'Interpreting Veterans' Legislation: Lore or Law?' in John McMillan (ed.), *Administrative Law: Does the Public Benefit?*, Australian Institute of Administrative Law Inc, Canberra 1992, pp.321–52

12 *Independent Enquiry into the Repatriation System*, AGPS, Canberra, 1975

13 *Independent Enquiry into the Repatriation System*, AGPS, Canberra, 1975, p.231

to the AAT from the President of the RRT. And for the first time, a right of judicial review by the Federal Court and appeal from the AAT on a question of law was permitted by the legislation.

2.12 According to the Administrative Review Tribunal (ART), a two-tier structure of external review was necessary to deal with the rising number of appeals and their level of complexity: ‘Repatriation, a high-volume jurisdiction, required a first-tier tribunal to decide matters speedily, informally, and quickly, and a second-tier tribunal to give more detailed attention to difficult issues of fact and law’.¹⁴

Refinement of the review system

2.13 The system was further refined following reviews of the repatriation system in 1983 by the ART,¹⁵ and by an independent advisory committee appointed by the Minister for Veterans’ Affairs.¹⁶ Amongst other things, these reviews resulted in the RRT being replaced by the Veterans’ Review Board (VRB), which commenced operation in January 1985. The VRB, together with the other tiers of review, continued to operate with the introduction of the Veterans’ Entitlement Act in 1986. According to Creyke and Sutherland, the VRB was established ‘...for this high volume jurisdiction to provide a review body which was relatively cheap, accessible, expeditious and informal. The intention also was that it would assist primary decision-makers by developing consistent principles and providing interpretation of the legislation...’.¹⁷

2.14 Additional structures were added to the system with the establishment in 1994 of the Repatriation Medical Authority (RMA), which is an independent statutory authority responsible to the Minister for Veterans’ Affairs, and the Specialist Medical Review Council (SMRC). They were established to determine the circumstances in which death, injury or disease can be attributed to military service. The role of the Authority is to formulate Statements of Principle (SoPs),¹⁸ and that of the Council is to hear appeals from decisions of the RMA.

14 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No. 39, 1995, p.195 (hereafter referred to as *Better Decisions*)

15 Administrative Review Council, *Review of Pension Decisions under Repatriation Legislation*, Report No. 20, 1983

16 *Report of the Advisory Committee on Repatriation Legislation Review*, 1983

17 Robin Creyke and Peter Sutherland (with Paul Ridge), *Veterans’ Entitlements Law*, The Federation Press and Softlaw Community Projects, 2000, p.445

18 Medical Statement of Principles set out the relevant sound medical-scientific evidence which is required to support claims for any particular disease, disability, injury or death that could be related to military service.

2.15 Both bodies are constituted by specialist medical practitioners.¹⁹ Significantly, the SoPs prepared and published by the Authority are disallowable instruments that are tabled in both Houses of the Australian Parliament. They are binding on the Repatriation Commission, the VRB and the AAT.

Conclusion

2.16 This chapter has provided a brief history of the repatriation review system against a background of core principles underpinning Australia's repatriation system, first espoused by Toose in 1975. These principles have been endorsed by subsequent reviews of the repatriation system and by successive governments to maintain and expand the provision of benefits to Australia's ex-service community. These principles acknowledge that repatriation is fundamentally a benevolent concept, and that the nation is especially indebted to those who have voluntarily given service to it in time of war, thereby endangering their lives and health.

2.17 It has also highlighted that notwithstanding the repatriation system's long history, key structures of the system's current review process (ie. the VRB and RMA) were put in place relatively recently, between 1979 and 1994. While the Clarke review notes that the *repatriation* system has evolved considerably over the past eight decades, the *review* system remained relatively static for much of this period, at least until the recommendations of the Toose report were implemented in the late 1970s. However, it is fair to say that some of the institutional practices and norms underpinning and guiding the contemporary appeals process—notably the principle of external and independent merits review—have their genesis in the earliest repatriation legislation, notably the *Australian Soldiers' Repatriation Act 1920*.

2.18 Chapter 3 explains the current dual system of merits review in the veteran and military compensation areas, against a backdrop of fundamental change both to Australia's system of administrative and judicial review in the early to mid 1970s, and to veterans' entitlements law. It also provides a brief overview of the review system being considered under the proposed new Military Rehabilitation and Compensation Scheme.

19 Both bodies operate under the *Veterans' Affairs (1994–95 Budget Measures) Legislation Amendment Act 1994*. The aim of the legislation was to create a more equitable and consistent system of dealing with claims for disability pensions received from Australian veterans and their dependants.

Chapter 3

The dual system of review in the veteran and military compensation areas

The merits review system

3.1 The process of merits review in the veterans' area can only be properly understood as forming part of an integrated and coherent merits review system that was put in place in the mid 1970's following publication of two influential reports by Kerr in 1971 and Bland in 1973.¹ The reports recommended, amongst other things, that there be established a general administrative review tribunal to review certain government decisions on their merits. The Commonwealth Government legislated to give effect to those recommendations. Enactment of the *Administrative Appeals Tribunal Act 1975* saw the creation of the Administrative Appeals Tribunal (AAT) with jurisdiction to review Commonwealth administrative decisions on their merits. It was designed to centralise the review functions of a large number of existing disparate tribunals which dealt only with segments of Commonwealth decision-making.²

Principles of merits review

3.2 Across these varied jurisdictions the same core principles underpin the review hierarchy. First, a fundamental distinction needs to be drawn between merits and judicial review. When courts exercise judicial review, for example, they are strictly limited to deciding whether a decision complies with the principles of law. They cannot rule on whether a decision is wrong on the facts or the merits of the decision.³ In contrast, tribunals exercising merits review are designed to review all aspects of a decision, including findings relating to the facts, law and policy. The standard against which the facts, law and policy is judged is referred to as the 'correct or preferable' standard.

3.3 A second principle follows from the first: all tribunals exercise *de novo* merits review, which means that a review body will 'stand in the shoes' of the primary decision maker and make a fresh decision affirming, varying or setting aside the

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- 1 The Kerr Committee report, Parliamentary Paper No 144 of 1971 and the Bland Committee report, Parliamentary Paper No 316 of 1973
 - 2 Senate Legal and Constitutional Legislation Committee, *Inquiry into the Provisions of the Administrative Review Tribunal Bill 2000 and the Provisions of the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000*, February 2001, p.2
 - 3 Robin Creyke, *The Administrative Appeals Tribunal—What's Happening?*, Current Issues Brief No. 8 1999–2000, Department of the Parliamentary Library, Parliament House, Canberra, October 1999, p.5

original decision based on all the information available to it.⁴ Thus according to the ARC, merits review is characterized by ‘...the capacity for substitution of the decision of the reviewing person or body for that of the original decision maker’.⁵

3.4 During the course of its comprehensive review of Commonwealth merits review tribunals, the ARC provided a list of objectives of the system, of which the first two are widely seen as being the most important. The objectives listed were:

- To achieve correct and preferable decisions;
- To be accessible and responsive;
- To promote better quality decision making by agencies;
- To allow improvements to policy and legislation;
- To be coherent; and
- To make efficient use of resources.⁶

Internal and external review

3.5 In high volume jurisdictions such as social security and veterans’ appeals, it has been widely recognised over the past two decades that a review system with complementary tiers is the best way to fulfill these objectives. The tiers usually consist of a progression from internal review to one or two tiers of external review.⁷ Internal review, as the name suggests, is review undertaken by a person or body within the government agency that made the original decision.

3.6 In contrast, external merits review refers to review that is undertaken by a body external to the agency that made the original decision. The main objective of these external bodies is to ensure, to the greatest possible extent, that their decisions are made, and are seen to be made, independently from the government agencies whose decisions are under review. In this context, first tier external review is meant to operate as a filter, shielding the second tier from a large number of cases ‘which often involve the same basic issue requiring only the application of settled law to individual fact’.⁸ The second tier of external review, however, is designed to act as an

4 Administrative Review Council, *The Scope of Judicial Review: Discussion Paper*, 2003, pp.27–28

5 *Better Decisions* p.9

6 *Better Decisions*, p.10

7 Stephen Skehill, ‘The Hidden Dimension of Administrative Law: Internal and First Tier Review—1’, *Canberra Bulletin of Public Administration*, No. 58, 1989, pp.137–40; Tom Brennan, ‘The Hidden Dimension of Administrative Law: First Tier and Internal Review—II’, *Canberra Bulletin of Public Administration*, No. 58, 1989, pp.141–45

8 The Hon Justice Deidre O’Connor, ‘Effective Administrative Review: An Analysis of Two-tier Review’, *Australian Journal of Administrative Law*, Vol. 1, No. 1, 1993, p.4

authoritative guide ‘formulating and developing principles to guide primary decision-makers and first-tier tribunals’.⁹

3.7 According to the then President of the AAT, Justice Deirdre O’Connor:

The twin objectives of a system of external review of administrative decisions are an adequate standard of justice in all cases and efficiency at the lowest possible cost to the community in terms of time, money and personal convenience.¹⁰

3.8 The key point to observe is that external tiers of review are meant to exist in a complementary relationship which is considered essential to the effective functioning of the system of review. The ARC is of the view that if there is no discernible distinction between the nature of the review available at the first and second tiers, ‘then it may well be that the process is inefficient and expensive’.¹¹

Dual system of review in the veteran and military compensation areas

3.9 The Tanzer Review identified five different arrangements under which the current Military Compensation Scheme (MCS) provides benefits:

- *Safety Rehabilitation and Compensation Act 1988 (SRCA)*;
- *Military Compensation Act 1994 (MCA)* Specific enhancements for the ADF only were made by this Act;
- *Veterans’ Entitlement Act 1986 (VEA)*;
- Dual eligibility under both the SRCA and the VEA (see below); and
- Additional benefits under the Defence Act 1903 (Defence determination 1988/3).¹²

3.10 One element of the compensation scheme that is often a source of confusion is the interface between the VEA and the SRCA, or what is referred to as ‘dual eligibility’. The concept of dual eligibility was first introduced in December 1972 when peacetime coverage under the *Repatriation Act 1920* was extended to serving military personnel. Individuals already covered by the Commonwealth employees’ compensation legislation thus had dual entitlement. According to the Clarke review, the situation was intended to be ‘a short-term bridging measure pending the implementation of a new, separate military compensation scheme’.¹³ That did not

9 The Hon Justice Deirdre O’Connor, ‘Effective Administrative Review: An Analysis of Two-tier Review’, *Australian Journal of Administrative Law*, Vol. 1, No. 1, 1993, p.4

10 The Hon Justice Deirdre O’Connor, ‘Effective Administrative Review: An Analysis of Two-tier Review’, *Australian Journal of Administrative Law*, Vol. 1, No. 1, 1993, p.4

11 ARC, Submission no. 11, p.14

12 Department of Defence, *The Review of the Military Compensation Scheme*, March 1999, p.9

13 *Report of the Review of Veterans’ Entitlements*, January 1993, p.86

eventuate for a further 22 years until the introduction of the *Military Compensation Act 1994* which ended peacetime coverage under the VEA.¹⁴ Thus the ARC's description of the two schemes—VEA and MCRS—as '...complex, involving a range of entitlements, differing review hierarchies, and in the case of the MCS...different legislative regimes'.¹⁵

3.11 Internal and external merits review has long been a feature of the veterans' jurisdiction. The Repatriation Commission, through the Department of Veterans Affairs (DVA), is responsible for dispensing various entitlements under the VEA. Since December 1999, when the MCRS was transferred from Defence to DVA under a service agreement between the two departments, claims for compensation under the SRCA have been administered within DVA.

3.12 There are currently two clear pathways of merits review, depending on the nature of the entitlement being sought. The dual pathways and their key features will now be considered in some detail.

Review of compensation decisions under the *Veteran's Entitlement Act 1986* (VEA)

3.13 The Repatriation Commission is responsible to the Minister for Veterans' Affairs for the general administration of the VEA. It administers claims and pensions and its officers (who are sourced from DVA and who act as delegates to the Commission) determine compensation claims.¹⁶ Under the disability compensation sub-program, eligible persons receive entitlements that fall under several categories, for example compensation by way of a disability pension (VEA Parts II and IV), income support benefits by way of service pension (VEA Parts IIIs and IIIA), health care benefits (VEA Part V), and other allowances and benefits (VEA Parts VI, VII and VIIIA).

3.14 The framework of administrative review of primary decisions by officers of the Repatriation Commission (for disability pensions only) comprises a three-tier system.¹⁷

14 The complex interrelationship between the different types of service and the cover provided by either the SRCA or the VEA is discussed in the Tanzer review of the military compensation scheme at p.10 and pp.20–23.

15 ARC, Submission no. 10, p.9

16 Australian National Audit Office, *Review of Veterans' Appeals Against Disability Compensation Entitlement*, Audit Report No.29 2000–2001, p.26

17 Review of compensation decisions by the AAT may also be appealed to the Federal Court and to the High Court on points of law rather than merit. The Commonwealth and Defence Force Ombudsman may also investigate claims of maladministration (see *Ombudsman Act 1976*). The issue of appeals to the Federal Court does not fall within the terms of this inquiry.

Internal review (VEA s31)

3.15 The Repatriation Commission has the power to review its own decision. A veteran may also request that DVA conduct an internal review under s31. Veterans may appeal to the VRB (see below) without requesting an internal review; however it is DVA policy to screen all appeals to the VRB for possible internal review under s31. DVA is required under s137 to prepare a summary of the evidence considered in making the primary decision (known as a ‘s137 report’). This report is provided to the applicant (within 42 days) and to the VRB for the purposes of preparing and hearing the veterans’ appeal.¹⁸

External review by the Veterans’ Review Board (VEA s135)

3.16 The VRB is an independent statutory body under the VEA, and a Commonwealth tribunal. It commenced operation on 1 January 1985. The VRB deals with a range of claims from war widows’/widowers’/orphans pensions to assessment of the rate of pension paid for incapacity from war/defence caused injury or disease. The VRB is comprised of three types of members: senior members (experienced lawyers who preside at hearings), service members (selected from persons nominated to the Minister by national ex-service organisations), and members (drawn from a wide cross section of the community).

3.17 The VRB holds *de novo* hearings to decide every case (usually a panel of three). Applicants *cannot* be represented by a legal practitioner; however the vast majority of applicants are represented by ex-service and related organisations. The VRB relies on the material contained in the documents provided under s137 of the VEA supplemented by material provided by the applicant in writing prior to the hearing, or orally, or in writing at the hearing.¹⁹

External review by the Administrative Appeals Tribunal (VEA s175)

3.18 The AAT is the final body of merits review available to veterans or widows. The AAT has a number of Divisions in which reviews are conducted. The Veterans’ Appeal Division is dedicated to applications made for review of decisions under the VEA. An applicant to the AAT can appear in person or be represented by another person who can be legally qualified. Significantly, non-means tested legal aid *is* available at the AAT stage of the appeals process and, like VRB hearings, the AAT conducts its reviews *de novo*. New information can be introduced to determine the correct and preferable decision on the evidence before it.²⁰

18 DVA, Submission no. 10, p.1

19 DVA, Submission no. 10, p.3

20 DVA, Submission no. 10, p.4

3.19 The review hierarchy for service pensions and income support supplements does not involve the VRB: external review of decisions by the Commission in these areas is by the AAT only.

Summary of VEA review system

3.20 There are a number of features of the review process under the VEA, some of which will be considered in more detail in chapters 5 and 6:

- VRB and AAT reviews are conducted *de novo*. New evidence can be presented which was not available to the primary decision maker;
- Applicants can be represented before the VRB but *not* by a legal practitioner. However, lawyers can help applicants prepare their cases;²¹
- The absence of any onus on applicants to provide information to support their claims (see onus of proof provisions of VEA, s120);
- The ‘reasonable hypothesis’ standard applies (once a reasonable hypothesis is raised from the evidence linking a disability or death to service, the claim must be accepted unless the decision-maker is satisfied beyond reasonable doubt that there is insufficient ground for accepting the claim);²²
- Non-means tested legal aid is available for review of decisions by the AAT (subject to a merits test). See Legal Aid Guidelines—Guideline 5: ‘War Veterans’ matters’. No costs are awarded in the Veterans’ Division; and
- Expenses for obtaining medical evidence are recoverable: up to \$467 for each condition claimed at the VRB stage, and up to a total of \$2,500 at the AAT stage.

Review of compensation decisions under the *Safety, Rehabilitation and Compensation Act 1988* (SRCA)

3.21 The Military Compensation and Rehabilitation Scheme (MCRS) offers current and former members of the ADF compensation and rehabilitation for injury or disability caused by military service. Since December 1999, DVA has administered the MCRS on behalf of the Department of Defence. Under the legislation administered by the MCRS—the SRCA and the *Military Compensation Act 1994*—there is provision for internal and external review. However, unlike the three-tier review process for appeals under the VEA, the administrative review of decisions under the MCRS comprises a two-tier process only: internal review under s62 of the SRCA, followed by merits review by the AAT. This is carried out by the Compensation Division and not the Veterans’ Division, which is the case under the VEA.

21 VRB, Submission no. 7, p.11

22 ARC, Submission no. 11, p.5

Internal review (SRCA s62)

3.22 The MCRS may initiate a review of its own decision or a person dissatisfied with a decision may request that it be reconsidered. The later situation requires a claimant to request a review within 30 days of receiving the decision, and that the request includes a statement of reasons. This process differs from the review under the VEA because the applicant has the right to request an internal review whereas there is no such statutory right under s31 of the VEA.²³

External review

3.23 An applicant dissatisfied with the internal review process can apply to the AAT for a review of the decision. According to DVA, applications for review by the AAT must be submitted within 60 days of the decision being received by the applicant.

Summary of MCRS review system

3.24 Key features of the review process under the MCRS include:

- The SRCA (s62) provides a statutory right to internal review (unlike the VEA);
- There is only one level of external merits review (AAT);
- Mandatory conciliation is conducted prior to hearings by the AAT;
- The civil standard of proof applies (the decision-maker decides the claim to their reasonable satisfaction);
- Legal aid is available at the AAT stage of the process, however both merits and means tests apply; and
- Applicants may recover costs reasonably incurred in pursuing their application if they are successful or partially successful.

Volume of claims and cost of review

3.25 As mentioned at the beginning of this chapter, the veterans' reviews process is a high volume jurisdiction comprising a large number of primary claims for compensation. For example, the number of primary claims finalised in 2001–02 was 53,441, a 3 per cent decrease on the previous year. During this period, there were 15,966 review activities processed, including s31 reviews, reports prepared by the VRB and AAT decisions disposed of.²⁴

3.26 During 2001–02, DVA provided \$2.5 billion in disability compensation to 318,850 veterans, veterans' dependents, war widowers and children of incapacitated

23 DVA, Submission no. 10, p.5

24 DVA, *Annual report 2001–02*, pp.146–48

veterans. Parliament appropriated \$2.6 billion for this purpose in 2002–02, and \$2.8 billion in 2003–04.²⁵

3.27 The Australian National Audit office (ANAO) has noted that the total cost of administering disability compensation decisions is significant. For example, figures quoted for 1999–2000 reveal a total cost of \$61.6 million consisting of primary decisions \$29 million; internal review \$14.7 million; external review (VRB) \$7.5 million and AAT \$10.4 million.²⁶

3.28 It is important to note that the average cost to DVA per pension claim has fallen by a significant amount over the past decade, from \$868 in 1991–92 to \$541 in 1995–96. The amount stood at \$529 in mid-2002. Over the same period, the average time taken to process a claim has fallen from 157 days in 1991–92 to 102 days in 1995–96 and averaged 62 days in 1991–92. Acceptance rates for compensation claims at the primary level also rose by approximately 10 per cent.²⁷

The review process under the proposed Military Rehabilitation and Compensation Bill 2003

3.29 In March 1999, Mr Noel Tanzer submitted his report on the Review of Military Compensation.²⁸ The report set out three options for a single, self-contained military compensation scheme to replace existing MCRS and VEA entitlements—a SRCA derivative model, a VEA derivative model, and a new integrated military-specific scheme. After canvassing the advantages and disadvantages of each scheme, the report recommended the adoption of the third option. Interestingly, the report did not address the appeals process under the proposed MCRS.

3.30 Recommendations contained in the Tanzer report form the basis of the Military Rehabilitation and Compensation Bill 2003 (MRCB). An exposure draft of the bill was released by the Minister for Veterans' Affairs, the Hon Danna Vale, on 27 June 2003. It provides for a self-contained safety, compensation and rehabilitation scheme for the ADF, covering all future service short of declared war involving generalised mobilisation.

3.31 Chapter 8 of the bill, entitled 'Reconsideration and review of determinations', contains the proposed provisions in regard to the reconsideration and review of primary decisions by delegates of the Military Rehabilitation and Compensation Commission (MRCC) and delegates of the Service Chiefs. Under the proposed bill, dissatisfied claimants may apply to have the original decision reconsidered internally

25 Australian National Audit Office, *Veterans' Appeals Against Disability Compensation Decisions: Follow-up Audit*, Audit Report No.58 2002–2003, p.23

26 Australian National Audit Office, *Review of Veterans' Appeals Against Disability Compensation Entitlement*, Audit Report No.29 2000–2001, p.13

27 ARC, Submission no. 11, p.12

28 *The Review of the Military Compensation Scheme*, Department of Defence, March 1999

(within 30 days of receiving the reviewable decision). However, according to DVA, if the member or former member's claim is the result of warlike or non-warlike service, an application may be made to the VRB for review (see below), but if this avenue of appeal is taken an applicant may not also ask for an internal reconsideration.²⁹

3.32 On this final point, the Committee is concerned at what would seem to be an unnecessary restriction, creating more perceived anomalies. Internal review is a fundamental part of quality assurance within the determining system. It is also fundamental to the need to correct decisions as early as possible in the review process.

3.33 The bill provides for two separate avenues of reconsideration and review following a primary decision; however an applicant can choose only *one* avenue of review which is binding from the time an application or request for review is made:

- **VRB pathway modelled on the VEA:** If an applicant has warlike or non warlike service, he/she may appeal for review to the VRB. The application must be lodged within 12 months after notice of the determination is given to the applicant. The person then has three months to appeal to the Veterans' Division of the AAT. This option is available to all persons whose claim relates to warlike or non-warlike service. It is proposed that legal aid will continue to be available for those who choose this route.
- **MRCC pathway modelled on the SRCA:** If an applicant has only peacetime service, he/she has 30 days to request internal reconsideration by a delegate of the MRCC not involved in the original decision, followed by a request for external review by the Compensation Division of the AAT. This is modelled on the current process which operates under the SRCA. Applications arising from peacetime service *do not* have access to the VRB. This review option applies to all claims relating to peacetime service or where the person is eligible to seek review by the VRB but chooses to seek reconsideration by a MRCC delegate.

3.34 Applications made to the AAT are only for the review of reviewable determinations. A reviewable determination is:

- A reconsideration decision under s299 revoking, confirming or varying a delegated determination;
- A reconsideration decision of a warlike or non-warlike service delegated determination that has been made by the MRCC; and
- A decision of the VRB concerning a review of a warlike or non-warlike service delegated decision.³⁰

3.35 Under the proposal, legal aid will be available at the AAT stage under the same conditions that apply to claimants under the VEA and the SRCA. According to DVA:

29 DVA, Submission no. 10, p.6

30 DVA, Submission no. 10, p.7

Where warlike or non-warlike service is involved and the applicant is appealing a VRB decisions then only a merit test will apply and there is no cost recovery. Where a person with warlike or non-warlike service has chosen internal reconsideration and by-passed the VRB, or the claim is based on peacetime service, both a merit and means test will apply and costs can be awarded against the Commonwealth or the applicant. In short, costs are not recoverable where the reviewable determination at the AAT is a decision of the VRB.³¹

3.36 DVA explained to the Committee why, after an extensive process of consultation with ex-service organisations, the review model chosen for the new compensation scheme mirrors the current review system:

We advised the government...that the best option was to continue with two parallel tracks in a sense traveling more closely together now and providing more obvious points of comparison. We expect that over a period of some years now that there will be a better opportunity to compare the two and if possible meld them or learn from each other.³²

3.37 The Committee also heard from DVA that three factors were paramount in the final decision to more or less retain the existing review structure in the new military compensation scheme. First, the department maintained that during the course of working party discussions, ex-service organisation (ESO) representatives had conveyed that the only acceptable way to proceed at this point in time was to adopt essentially the existing review entitlements and structures. The departmental Secretary, Dr Johnston, told the Committee that in his opinion ESOs are not opposed to reform. Rather ‘...in light of the discussions in the [ESO] working party...there was no consensus on a single preferred mode’. DVA had been unable ‘...to put forward a rationale or an analysis that [was] persuasive to the veteran community on a preferred melding of the two [review pathways]’.³³

3.38 Second, the continued use of existing structures will, it is claimed, avoid the complications of additional review mechanisms within the ADF and veteran jurisdictions. And third, DVA argued that the existing structures are well established and have proven cost effective in handling claims that fall within broadly identical jurisdictions. Accordingly, the Commonwealth will be able to capitalise on its investment in existing review structures and ensure their continued viability.³⁴

3.39 The Committee finds it interesting that, apart from DVA, only a few of the key stakeholders offered constructive comments on, or criticisms of, the process of review considered in the draft MCRB. As a consequence, and because the review

31 DVA, Submission no. 10, p.7

32 Dr Johnston, DVA, *Committee Hansard*, 26 September 2003, p.18

33 Dr Johnston, DVA, *Committee Hansard*, 26 September 2003, p.18

34 DVA, Submission no. 10, pp.10–11

structure proposed for the draft bill is more or less identical to the current review structure, the Committee assumes that criticisms of the current system apply equally to the proposed review process. The Committee examines these criticisms in Chapter 5.

3.40 The Committee notes that in the future, with one common Act applying to all types of service, the institutional framework for external review will remain tied to the previous dual eligibility model based on two very different Acts. This will effectively mean vastly different processes for ADF personnel, dependent only on their type of service—including consideration of appeals in two separate Divisions of the AAT. The Committee has difficulty accepting DVA's reasons for replicating the current system given its inherent problems.

Chapter 4

Past reviews of the veterans' appeal system: 1983–2003

4.1 A number of structural and administrative problems with the veterans' system have been identified over the past twenty years by a succession of reports by the ARC, the Auditor-General and a report commissioned by the Minister for Veterans' Affairs in 1993. Several common themes that emerged from earlier reports are relevant to the issues examined in this and the following chapter.

4.2 This chapter provides a brief overview of some key findings and recommendations contained in previous reports on the veterans' review system. These recommendations have resulted in significant improvements to the administration of the review system. This is followed by a brief overview of the government's now defunct proposal for an Administrative Review Tribunal (ART), focusing on the debate whether second tier review should be 'as of right' or 'by leave' only (ie. where the range of cases that may be reviewed by the AAT is limited). The point of the discussion is to draw out some of the implications of the ART proposal for future reform of the veterans' review system.

Early reports in the area of veterans' review

4.3 For a number of years, the ARC expressed concern with what it believed was a culture of appeal in the veterans' area. This, it argued, created lengthy delays in finalising appeal cases, resulting in a review system that was more inefficient and costly than it should have been. The ARC, in its 1983 review of pension decisions under repatriation legislation, identified at least four deficiencies with the review system:

- Primary decisions are often made on the basis of incomplete evidence;
- Claimants are frequently not given adequate explanations of the reasons for decisions;
- Claimants are often inadequately represented; and
- There are a large number of appeal and review avenues.¹

4.4 The consequences of these deficiencies were not surprising: amongst other things, too many claims for entitlements were rejected at the primary level and subject to appeal, and an excessive number of appeals were proceeding to first tier external review causing a heavy workload for the then RRT and considerable delays with the final settlement of cases.

1 Administrative Review Council, *Review of Pension Decisions Under Repatriation Legislation*, Report No. 20, 1983, p.23

4.5 These (and other) concerns were discussed at some length by the ARC resulting in recommendations for substantial reform, primarily to the system's structure. The most important recommendation was for a Veterans' Appeals Board (VAB) to be established as an intermediate review body to offer an 'expeditious, economical and informal level of review', with the AAT being the final review tribunal in the repatriation system. It was envisaged that apart from the AAT's role in determining individual cases, it would also 'develop and enunciate general principles for the guidance of primary decision makers and the VAB'.

4.6 The first part of this recommendation was adopted with the creation of the Veteran's Review Board in 1985. In justifying a two-tiered review system to hear appeals on the merits, the Council stated:

...the existing structure of multiple tiers of primary and review decision making procedures [has caused] substantial delays, and is both unnecessary and wasteful of resources. Decisions are not always adequately considered at either the primary or review stages of decision making. It is the Council's view that the deficiencies of the existing system prevent it from best serving the interests of veterans and their families.²

4.7 More than a decade later, the ARC revisited this line of criticism in a far reaching report on the Commonwealth merits review system.³ It drew attention to a number of problem areas in the veterans' jurisdiction in the context of a broader discussion on wholesale reform of the system of merits review. For example, in a chapter relating to tribunal review processes, the ARC noted that some applicants for veteran's entitlements:

- withhold or fail to obtain relevant information until the original decision is under review by the AAT; and
- do not always raise with the VRB all the issues involved in the original decision, which means the VRB is effectively by-passed in relation to the consideration of some issues of review.⁴

4.8 While the ARC concluded that consideration of the solution to this problem was outside the report's terms of reference, it noted in passing that a partial solution 'appears to lie in appropriate incentives to encourage the production of all available evidence at the earliest possible time'.⁵ However, the report did not give consideration to the kinds of incentives that would lead to this preferred outcome.

2 Administrative Review Council, *Review of Pension Decisions Under Repatriation Legislation*, Report No. 20, 1983, p.30

3 *Better Decisions*

4 *Better Decisions*, pp.39–40

5 *Better Decisions*, p.40

Improvements to the veterans' review system

4.9 Since the mid-1990s, and following on from the ARC report, improvements have been made to the administration of the review system, mostly in line with a series of recommendations by the Auditor-General. Most importantly, ANAO Report No. 8 of 1992–93, which made over fifty recommendations, resulted in the Minister for Veterans' Affairs appointing a three member Veterans' Compensation Committee, headed by Professor Peter Baume, to address issues identified by ANAO.

4.10 The Committee's report, known as 'the Baume Report',⁶ made a series of important recommendations which subsequently led to a number of government initiatives that were announced in the 1994–95 Budget. These initiatives included, amongst other things, the introduction of Statements of Principle (SoPs) to guide decision-making in compensation cases, the subsequent establishment of the Repatriation Medical Authority (RMA), and the development of an automated decision support tool called the Compensation Claims Processing System (CCPS).

4.11 More recently, the ANAO completed two detailed performance audits on the appeals system for veterans' entitlements.⁷ While the ANAO's terms of reference were limited to examining the efficiency of the *current* internal review and first tier external review process (thus excluding consideration of wider systemic reform), it made several important findings and recommendations designed to make the review process more cost-effective and administratively efficient. The recommendations contained in Report No. 29 of 2000–2001, which focus on DVA's and the VRB's management of veterans' appeals against disability compensation entitlement decisions, aim to:

- Minimise the level of appeal by improving the quality of investigation and reasons for decisions at the primary level;
- Encourage settlement of appeals at the earliest possible stage;
- Improve DVA's preparation of s137 reports on the evidence;
- Better manage the risks to the timeliness and quality of reviews which arise from a diminishing pool of volunteer ESO representatives; and
- Establish a common method of counting appeal cases and decisions for both DVA and VRB.

6 Veterans' Compensation Review Committee, *A Fair Go: Report on Compensation for Veterans and War Widows*, AGPS, Canberra, 1994

7 Australian National Audit Office, *Review of Veterans' Appeals Against Disability Compensation Entitlement*, Audit Report No. 29 2000–2001, and *Veterans' Appeals Against Disability Compensation Decisions: Follow-up Audit*, Audit Report No. 58 2002–2003

4.12 The ANAO concluded that from 1996–97, DVA has improved the efficiency of the administration of the compensation scheme ‘...by finalising almost 40 per cent more primary claims and conducting significantly more internal reviews’.⁸

4.13 In a follow-up audit, the ANAO reported progress against the implementation of recommendations from its 2001 audit. The ANAO noted that DVA had implemented one recommendation and partially implemented three, leading it to conclude that DVA’s progress in implementing the recommendations ‘had contributed to substantial reductions in the time necessary to resolve appeals against disability pension decisions’.⁹ It recommended that DVA and VRB encourage all veterans and their dependents to seek ex-service organisation advocacy support.

4.14 Not surprisingly, DVA agreed with ANAO’s assessment in arguing that there has been a qualitative improvement in the decision-making framework of the veterans’ jurisdiction over the past decade. According to departmental Secretary, Dr Johnston:

The acceptance rate in the department at the primary level has gone up by about 10 per cent over the last 10 years and the appeal rate has correspondingly declined to the VRB, and declined even further to the AAT, and the acceptance rates at both of those levels have declined as well.¹⁰

The Administrative Review Tribunal (ART) proposal

Background

4.15 In June 2000 two bills were introduced in the Parliament to establish an Administrative Review Tribunal (ART). The main purpose of the bills was to incorporate the five specialist review tribunals—Administrative Appeals Tribunal (AAT), the Social Security Appeals Tribunal (SSAT), Migration Review Tribunal (MRT), Veterans’ Review Board (VRB), and Immigration Review Tribunal (IRT)—within a single tribunal structure. The amalgamation was designed to reduce the number of applications for administrative review, provide a streamlined and less costly system of review, and maintain flexible and less legalistic review procedures.¹¹

8 Australian National Audit Office, *Review of Veterans’ Appeals Against Disability Compensation Entitlement*, Audit Report No. 29 2000–2001, p.16

9 Australian National Audit Office, *Veterans’ Appeals Against Disability Compensation Decisions: Follow-up Audit*, Audit Report No. 58 2002–2003, p.18

10 Dr Johnston, DVA, *Committee Hansard*, 26 September 2003, p.22

11 Robin Creyke, ‘Whither the Review System?’, in R. Creyke and M. Sassella (eds), *Targeting Accountability and Review: Current Issues in Income Support Law*, CIPL, Canberra, 1998, p.128

Issues relevant to veterans' review

4.16 The impetus for reform came from recommendations contained in the ARC report, *Better Decisions* (1995), which were accepted, in principle, by the government in March 1997.¹² Two issues which, in part, underpinned the ARC's recommendation for a new appeals tribunal assist with understanding both the complexities of the review process in the area of veteran and military compensation and the political issues associated with far-reaching proposals for reform.

4.17 First, when the ART legislation was introduced in the Parliament, the VRB was not included within the ART framework. Unlike the other various specialist tribunals which were to be united into a new, single tribunal, the VRB was to continue as the only separate high volume first tier review body.¹³ According to Professor Creyke, this apparently was a political decision, thinly veiled as 'the special needs of veterans'.¹⁴ Intense lobbying against the proposal to merge the VRB with other specialist review tribunals under a new review structure paid political dividends for the veterans' community.

4.18 Notwithstanding this political concession, the veterans' community opposed the government's final ART proposal. Amongst other things, the community opposed attempts to either dilute or remove automatic second tier review rights. While the VRB was excluded from the ART's first tier divisions, on the surface permission was given for second tier review 'as of right' for veterans' appeals from the Board. However, as Professor Creyke points out, veteran's appeals were to be conducted by the ART's first—not second—review tier.

4.19 In practice, this would represent a significant downgrading of veterans' appeal rights because 'The ART's first tier division is, at most, the equivalent of review by the VRB itself'.¹⁵ The veterans' community was concerned that the quality of review in the proposed Veterans' Appeals Divisions of the ART would be well below that offered by the VRB, in effect denying them second tier merits review.

4.20 Second, much concern was conveyed to the Senate Legal and Constitutional Committee's 2001 inquiry into the proposed ART bills regarding the impact of the government's proposed legislation on the overall quality of administrative review.

12 The Hon Daryl Williams, Commonwealth Attorney General and Minister for Justice, News Release, *Reform of Merits Tribunal*, 20 March 1997

13 Robin Creyke, 'Tribunal reform: A Commentary', in Susan Kneebone (ed.), *Administrative Law and the Rule of Law: Still Part of the Same Package?*, AIAL, Canberra, 1999, p.362

14 Robin Creyke, 'Whither the Review System?', in R. Creyke and M. Sassella (eds), *Targeting Accountability and Review: Current Issues in Income Support Law*, CIPL, Canberra, 1998, p.129

15 Robin Creyke, 'Tribunal reform: A Commentary', in Susan Kneebone (ed.), *Administrative Law and the Rule of Law: Still Part of the Same Package?*, AIAL, Canberra, 1999, p.362

There was particular concern over the proposal to replace second tier review ‘as of right’ with second tier review ‘by leave’ only.

4.21 The proposed legislation provided two grounds upon which an application for second tier review could be made:

- The first tier review was made by a single member panel of the ART; and the executive member or President is satisfied that the application raises a principle or issue of general significance; and
- The applicant for the first tier review and the original decision maker agree in writing that the decision involved a manifest error of law or fact that materially affects the first tier review decision, and the President or executive member is satisfied that the first tier review decision involved such an error that there has been no appeal to the Federal Court on a question of law from the first tier review decision.¹⁶

4.22 The government’s ‘by leave’ provisions were a major issue of controversy because they were considered by many to be too stringent, unworkable in practice and conceptually unclear.¹⁷ A useful summary of the case against the government’s proposal is provided in the Law Council of Australia’s submission to the Legal and Constitutional Legislation Committee inquiry into the ART bills:

The proposal that second-tier review is only available in the case of manifest error of law or fact...if both parties agree, is unrealistic and unworkable. In effect it gives an agency a veto over review of decisions involving errors of law or fact, thereby sanctioning illegal practices or incorrect or not preferable decision-making. The Law Council believes this restriction breaches the principle of legality and is contrary to fundamental rule of law principles. Understandably it was not included in the grounds for second tier review recommended in the *Better Decisions* report.¹⁸

4.23 The important point here is that the government’s ‘by leave’ provisions were a significant departure from those advanced by the ARC in *Better Decisions*. The ARC advanced a strong case for limiting access to second tier review:

...the Council considers that if persons affected by administrative decisions have ‘as-of-right’ access to merits review by a review tribunal that is fair, credible and accessible [such as the VRB], then there is no justification for

16 Senate Legal and Constitutional Legislation Committee, *Inquiry into the Provisions of the Administrative Review Tribunal Bill 2000 and the Provisions of the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000*, February 2001, p.12

17 Senate Legal and Constitutional Legislation Committee, *Inquiry into the Provisions of the Administrative Review Tribunal Bill 2000 and the Provisions of the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000*, February 2001, pp.46–49

18 Law Council of Australia, Submission no. 40, attachment A, p.17

those persons to have an *unqualified* right to additional levels of external merits review [such as the AAT].¹⁹

4.24 The ARC provides clear grounds for granting permission for further review. Recommendation 97 states that the grounds for granting permission for review by a Review Panel should be:

- that, in the opinion of the ART President, the case raises a principle or issue of general significance;
- that, in the opinion of the ART President, the decision of the ART division involved a manifest error of fact or error of law that is likely to have materially affected the decision; or
- that new information is brought to the attention of the ART President which, in the President's opinion, could not reasonably have been discovered prior to the finalisation of the case before the ART division, and which would have materially affected the decision.²⁰

4.25 The Council concluded that while access to external review is crucial, guaranteed access to two levels of external review is not: 'Indeed, if the purpose of guaranteed further review is to seek a different "preferable" decision, the question may well be asked why there should not be three or any number of further levels of review'.²¹

4.26 The *Better Decisions* report and subsequent ART proposal brought to the surface a complex debate about, amongst other things, the merits of automatic access to second tier review that had largely been the preserve of the legal community. The proposals resulted in efforts to sift through and categorise arguments, identify the strengths and weaknesses of proposals to restrict access to second tier review, and tease out the implications of specific reform proposals for the wider merits review system.²² To this extent, the ARC and government proposals have served a useful purpose.

19 *Better Decisions*, p.152, emphasis added.

20 *Better Decisions*, Recommendation no. 97, p.156. The arguments used by the ARC to limit access to second tier review were broadly supported by a review of the social security review and appeals system commissioned by the government in December 1996. The report, published in August 1997, recommended that: 'The access by right to a second tier tribunal of external review should be removed; if the administrative arrangements for the proposed ART provide for a "second tier" review panel, access to this review panel should be by leave of the ART presiding member'. *Review of the Social Security and Appeals System*, A Report to the Minister for Social Security, 1997, p.23

21 *Better Decisions*, p.163

22 In addition to published works referred to in footnotes 13 and 14, see also Professor Creyke's analysis in 'Tribunals: Divergence and Loss', *Federal Law Review*, vol. 29, no. 3, 2001, pp.403-27.

Summary

4.27 It is clear from *Better Decisions* that the ARC developed a proposal to remove guaranteed access to two tiers of merits review specifically to overcome a long-standing concern with the review process in the veterans' jurisdiction. The Council argued that 'as-of-right' access from the VRB to further review by the AAT 'contributed to a culture where some applicants approach the VRB with an expectation of eventually proceeding to the AAT, and they do not always present the VRB with all relevant information, or raise all relevant issues'. Removing automatic access to an avenue of further review would '...introduce a strong incentive for applicants to present their best information and case at the earliest stage of the review process'.²³

4.28 While only marginally concerned with the veterans' jurisdiction, the Committee considers that the *Better Decisions* report presents a compelling argument for reforming and improving the veterans' review system by providing a strong incentive for applicants to present their best information at the earliest stage of the review process—in this instance by placing a restriction on access to second tier review. The argument is that the incentive would result in most appeal cases being finalised within a single level of merits review. However, as debate surrounding the original ART proposal demonstrates, reform proposals that threaten the integrity of the VRB as well as long standing appeal rights are likely to be strongly resisted by the veterans' community.

4.29 The issue raised by *Better Decisions* that is most relevant to this inquiry is whether the key objective identified by the Council as early as 1983—finalising cases at the earliest stage of the veterans' review process—is best achieved by systemic reform (for example, by limiting access to second tier review) or additional improvements to the review system's overall administration, or perhaps a combination of systemic and administrative reform. The Committee considers these questions in Chapters 6 and 7.

Conclusion

4.30 The Committee notes that over the past twenty years a series of recurring themes have emerged from different inquiries into the system of veterans review by the ARC and the Auditor-General. These inquiries point to administrative deficiencies with the review system which, as it turns out, have not been easily remedied. Reports by the ARC in 1983 and 1995 recommended far-reaching systemic reform of the broader system of merits review, including the appeals process for veterans.

4.31 The Committee acknowledges that systemic change to the veterans' review system has been more difficult to achieve than reform of specific areas of the system's administration. The provision of generous benefits under the repatriation system

coupled with a tradition of veterans exercising their right of appeal represent formidable obstacles to any well-meaning proposals for structural reform. As Secretary of DVA, Dr Johnston conveyed to the Committee: ‘The access to appeal is a fundamental right in administrative law and it is as strongly held by the veteran community as any other sector of the community’.²⁴

4.32 Apart from the creation of the VRB in 1985 and the Repatriation Medical Authority and Specialist Medical Review Council in 1994, structural reform of the veteran’s review system has not been easy to achieve and in recent years has not received the attention it deserves.

4.33 The government’s attempt to introduce an overarching review tribunal in the late 1990s is a case in point. The proposal’s stringent ‘by leave’ provisions were widely criticised by, amongst others, the veteran community which contributed to the ART’s subsequent demise in the Senate. The Committee concludes that the demise of the government’s reform agenda in 2001 will make it difficult to recover the conceptual groundwork provided by the *Better Decisions* report, especially on the subject of limiting access to second tier review in order to encourage the earliest possible settlement of appeal cases.

4.34 In this regard, the Committee takes note of various reviews of the veterans’ appeals system by the Auditor-General that focus on specific administrative anomalies within the existing review framework—especially at the primary and internal review stages. However, it is noteworthy that these reviews only occasionally refer to the wider structural issues and principles that underpin the Commonwealth merits review system. The Committee also notes the importance of preventing new anomalies from appearing in the review system as a result of administrative or legislative change.

4.34 The consistency of these anomalies serves as a reminder of the constraints that face current reform proposals. The next chapter looks at another set of issues that impinge on such proposals—namely, administrative weaknesses in the current system and how these are interlinked with the system’s hierarchy of internal and two-tier external review.

Findings

- The Committee finds that noticeable improvements to the appeals process by DVA have in recent years led to efficiencies in the administration of the primary and internal review stages. Yet it believes that administrative problems caused by the structure of the veterans’ review process, some of which were first identified in the mid-1980s and subsequently examined by the ARC in its landmark *Better Decisions* report, have not been satisfactorily addressed either by government or by key stakeholders. This report essentially attempts to address these outstanding issues.

24 Dr Johnston, DVA, *Committee Hansard*, 26 September 2003, p.21

- The Committee finds that there is a remarkable consistency in the problems with the veterans' review process that have been identified by key stakeholders over the past 20 years, yet working through these problems and finding practical solutions has proven difficult. Moreover, reform of the veterans' review process has been overshadowed in recent years by a government priority to reform the broader system of veterans' entitlements and introduce a new military compensation scheme. The Committee believes this priority has meant that a major concern with the system—that the review process has become unnecessarily complex—remains unresolved.

Chapter 5

Evaluating the system of review in the veteran and military compensation jurisdictions

5.1 This chapter addresses two related themes. First, it identifies and evaluates the current administrative weaknesses surrounding the veterans' review process that have come to light during the course of this inquiry. Second, it touches briefly on the causal link between these key weaknesses and the system's hierarchy of internal and two-tier external review.

5.2 The main purpose of the chapter is to examine those factors contributing to a high level of demand for review of decisions on compensation claims in the veterans' and military compensation jurisdictions. Finding practical and politically viable alternatives to limit the demand for review of primary decisions is the subject of the final two chapters.

Weaknesses of the review system—overview

5.3 The structure of the repatriation review system has had unexpected consequences for the way the system has developed over the past two decades, especially for how financial and human resources are allocated during the review process. The key problem is not so much with the principles underpinning the system of administrative review established in the mid-1970s, but with the structures created for the review and administration of veteran entitlement decisions that form part of the larger system of Commonwealth merits review.

5.4 At least five related structural and administrative challenges were raised during the course of this inquiry. For convenience, they can be summarised as follows:

- The high level of demand for review of primary claims;
- Delays in settling appeals caused by the withholding of important information from decision-makers at the primary and first tier (VRB) stages of the review process;
- A culture of appeal where the VRB is seen as a stepping stone to a higher (and quasi-judicial) level of review where legal aid is available;
- The high overturn rate caused in most cases by new medical evidence being made available at the AAT stage of the review process; and
- The poor knowledge and skills base of ESOs, and the risk to the review system associated with a declining pool of ESO advocates.

Demand for administrative review

5.5 A number of factors have contributed to what is often referred to as a culture of appeal in the veterans' jurisdiction:

- Principles of generosity underlying the veterans' and military compensation scheme (summarised in chapter 2);
- There is no onus on applicants to provide information to support their claims and little incentive to have claims properly prepared, creating unique difficulties for the primary decision maker—for example, limited access to all the relevant evidence, not being aware of issues underlying an applicant's claim, and so on. Legislation effectively places the onus of proof on DVA;
- Difficulties experienced by voluntary welfare officers keeping abreast of changes to case-law and legislative developments in a very complex area, especially when advising veterans on claims, statements and questionnaires;
- Review levels are generally likely to be quite high where complex scientific and medical evidence is a factor in the decision making process;¹
- There is a lack of quality medical evidence and restrictions to qualified legal representation prior to external merits review by the VRB and AAT. This means that advocates are restricted by the claimant's financial situation;²
- New evidence may be introduced at any time during the process;
- No fees are applied, no cost penalties exist for failure to succeed, and no limits are placed on the number of times a veteran can seek a review or an appeal. Veterans, therefore, consider that they have a good prospect of achieving financial gain at no cost to themselves.
- The attraction of compensation as a source of retirement income; and
- An attitude that compensation is a right, that all things being equal no one should be precluded, and that persistence pays.

5.6 Of particular concern is how the current review process, and some of its underlying principles, provide a direct incentive for veterans and war widows to exercise their right to access an established process of merits review. In other words, there are few incentives to have claims properly prepared in the first instance, and for all supporting evidence to be provided. Likewise, the system provides few, if any, disincentives (ie. cost penalties) for appeals that fail and for unmeritorious or speculative claims. As already noted, these problems are well documented by the ARC in its *Better Decisions* report and by the Auditor-General.

5.7 These factors appear to have resulted in a high level of demand for review of primary decisions, with many applicants viewing the VRB as a stepping stone to the final resolution of their case by the AAT, where legal aid funding is available.

1 ARC, Submission no. 11, p.7

2 Slater & Gordon, Submission no. 2, p.2

According to Mr Greg Isolani (Legal Adviser, AFFA): ‘Some practitioners who specialise in VEA type claims at the AAT encourage veterans to use the VRB merely as a stepping stone to get to the AAT, apply for legal aid and then get stuck into the merits of the case’.³ Legal firm Sparke Helmore was emphatic on this issue: ‘In almost every case where a veterans’ claim is rejected under the DVA system the claim is subject to further review’.⁴

5.8 The chapter now turns specifically to the relationship between the review structure and some of the administrative problems that have been identified. It will assess the extent to which the review hierarchy is a factor contributing to the high level of demand for review.

Assessing the review structure

The review hierarchy I: ‘getting it right the first time’

5.9 It is widely considered that internal review represents an important means of reducing the level of applications for external review. Prior to the mid-1990s, it was uncommon for the Repatriation Commission to reconsider a decision that was adverse to an applicant. However, following recommendations of the Baume report,⁵ the Repatriation Commission began introducing policies to make greater use of s31 reviews.

5.10 A theme repeated in submissions and at public hearings was the need to settle as many cases as possible at the primary and internal stages of review. Settling cases without the need for external review has the advantage of resolving cases in the shortest possible time frame and in a cost effective manner. All stakeholders from DVA, ESOs and the legal profession agree that an expeditious claims and appeals process—‘getting it right the first time’—should be a priority of the review system. This is summed up neatly by Mr McCombe, President of VVFA:

Our principle is that we try to get the claims settled and determined at the earliest possible stage and we encourage the veterans to get as much medical or factual supporting evidence to us so that we can get a good decision for them at a delegate level.⁶

I think you will find that all the major ex-service organisations have the same principle as us on this. There is no benefit at all in not giving up all the evidence. There is just none at all.⁷

3 Mr Greg Isolani, Legal Adviser, AFFA, *Committee Hansard*, 25 September 2003, p.3

4 Sparke Helmore, Submission no. 9, p.5

5 Veterans’ Compensation Review Committee, *A Fair Go: Report on Compensation for Veterans and War Widows*, AGPS, Canberra, 1994

6 Mr McCombe, VVFA, *Committee Hansard*, 25 September 2003, p.36

7 Mr McCombe, VVFA, *Committee Hansard*, 25 September 2003, p.43

5.11 Very little information is available on the savings generated by a higher rate of appeals being settled at the earlier stages of review. The ANAO has previously found that while the total cost of the review process under the VEA has increased by more than 10 per cent in real terms since 1991–92, DVA has managed to reduce the total cost of primary decision-making by more than 25 per cent.⁸ DVA told the Committee there has not been any cost-benefit analysis of shifting more resources to the earlier stages of the review process. Obstacles to such an analysis include the different way the two schemes—VEA and MCRS—treat claims and counterclaims, and the different onus of proof requirements under the two schemes.⁹

5.12 The importance of internal review is reinforced by the ARC in its 2000 report on the internal review of agency decision making.¹⁰ The report states two clear advantages of internal review: it provides a quick and easily accessible form of review for clients who choose not to exercise their right to external review, and it is a useful quality control mechanism that can feed back into and influence primary decision making.¹¹

5.13 The ARC accepts that there are disadvantages and risks associated with the internal review process.¹² However, it concludes that internal review overwhelmingly plays an important role in contributing to the objectives of the broader merits review system, ‘...provided it is relatively timely, free, undertaken by sufficiently independent review officers, and involves an appropriate level of contact between internal review officers and applicants’.¹³

5.14 While noting the benefits of internal review to the applicant if the agency’s decision is quickly set aside or varied in his or her favour, the ARC argues that the most significant contribution to the merits review system is made by external merits review tribunals.¹⁴

5.15 The next section considers the external review process in the veterans’ area and the relationship between first and second tier review.

8 Australian National Audit Office, *Review of Veterans’ Appeals Against Disability Compensation Entitlement*, Audit Report No. 29 2000–2001, p.17

9 Mr Maxwell, DVA, *Committee Hansard*, 26 September 2003, p.18

10 *Internal Review of Agency Decision Making*, Report No. 44, November 2000

11 *Internal Review of Agency Decision Making*, Report No. 44, November 2000, p.2

12 Three specific problem areas are identified: it can act as a barrier (causing delays), result in capture by the agency culture (with few variations of original decisions), and lead to inconsistent treatment of clients in different geographic areas.

13 *Internal Review of Agency Decision Making*, Report No. 44, November 2000, p.2

14 *Better Decisions*, p.126

The review hierarchy II: is it driving the demand for review?

5.16 Whether there should be one or two external tiers of merits review in the veterans' jurisdiction is a vexed question which goes to the heart of the broader Commonwealth merits review system established a little over 25 years ago. The Committee notes that a range of views on the adequacy of the existing review hierarchy surfaced during this inquiry and will be examined critically in chapter 6.

5.17 The ARC made a strong case for retention of two external review tiers, the VRB and AAT. The existence of two distinct tribunals with different operating procedures allows the more senior tribunal to focus on normative and systemic objectives while retaining its function of ensuring that correct or preferable decisions are made.

5.18 A key question is whether the current review hierarchy is delivering the best outcomes for veterans and for taxpayers, and whether there are practical alternative models for a streamlined and simplified review system. As already noted, it was drawn to the Committee's attention that a factor contributing to the culture of appeal in the veterans' jurisdiction is the number of avenues of appeal which, it is alleged, encourage applicants to exercise their appeal rights. This charge can be tested by a brief analysis of figures provided by DVA.

5.19 The figures in Table 1 relate to the review of decisions made under the VEA. It lists the acceptance rates at the primary, VRB and AAT determining levels for the years 1994–95 to 2001–02. The figures in Table 2 relate to the review of decisions under the SRCA. It lists the number of decisions varied on appeal by the claimant for the years 2000–01 to 2002–03.¹⁵

5.20 Table 1 show that in the 2001–02 financial year, 37,020 claims were completed at primary level with an acceptance rate of 61 per cent (14,438 claims were rejected). Of the claims rejected 6,837 (47 per cent) were finalised at the VRB and 1,057 cases proceeded to the AAT. The set aside/varied rate at the VRB is 30 per cent. The equivalent set aside/varied rate at the AAT is 58 per cent.¹⁶

5.21 Two conclusions can be drawn from these figures. First, with regard to appeals under the VEA, an overwhelming number of claims are settled prior to the AAT hearings—approximately only 1 in 30 claims proceed through the review hierarchy from primary level to the AAT. The culture of appeal, to the extent that it is a problem, has not translated into an excessive number of cases proceeding from

15 DVA, Submission no. 10, pp.12–13

16 Although these are official DVA figures, they should be treated with a degree of caution, as the Secretary of DVA, Dr Johnston, explained. He told the Committee that even his own figures 'are quite misleading' to the extent they assume there is concurrence between the cases completed each year, '...whereas in fact cases take some time to go through each of their processes, so you are not comparing the same claim in each of the columns', *Committee Hansard*, 26 September 2003, p.16

internal review through to the AAT. It appears that most cases are settled at either internal review or the VRB.

5.22 The Committee, however, appreciates the view held by some legal practitioners that even this small number of cases reaching the AAT represents an ongoing weakness with the review system.¹⁷ There are still too many cases proceeding to the most expensive review tier. This reinforces the Committee's view that additional efforts should be made to further reduce the number of appeals reaching both the VRB and the AAT.

5.23 Second, an unacceptably high number of cases under review are varied or overturned at the VRB and AAT stages of review. Professor Creyke, one of Australia's leading experts in veterans' entitlement and administrative law, advised the Committee that only a small number of cases—approximately 25 per cent—appealed at the VRB progress to a full AAT hearing.¹⁸ The remaining 75 percent of cases are either withdrawn or conceded by the Repatriation Commission. According to Professor Creyke, the main factor contributing to both the high overturn rate at the VRB and the high number of cases withdrawn prior to an AAT hearing is the production of new evidence.¹⁹

Table 1: Acceptance rates at the primary, VRB and AAT determining levels under the *Veteran's Entitlement Act 1986*²⁰

| Year | Primary claims completed | Total accepted % | VRB finalised | VRB Set aside/varied rate % | AAT Primary intake | AAT Set aside/varied rate % |
|---------|--------------------------|------------------|---------------|-----------------------------|--------------------|-----------------------------|
| 1994/95 | 34,952 | 56 | 5,882 | 38 | 1,690 | 78 |
| 1995/96 | 44,302 | 59 | 5,060 | 31 | 1,538 | 65 |
| 1996/97 | 41,780 | 59 | 5,784 | 27 | 1,684 | 61 |
| 1997/98 | 44,691 | 56 | 5,535 | 27 | 1,456 | 63 |
| 1998/99 | 42,055 | 59 | 6,553 | 30 | 1,936 | 57 |
| 1999/00 | 38,902 | 61 | 8,769 | 31 | 1,608 | 59 |
| 2000/01 | 38,210 | 61 | 7,925 | 31 | 1,497 | 59 |
| 2001/02 | 37,020 | 61 | 6,837 | 30 | 1,057 | 58 |

17 Mr Snell, Sparke Helmore, *Committee Hansard*, 26 September 2003, p.31

18 Professor Creyke, ARC, *Committee Hansard*, 26 September 2003, p.57

19 Professor Creyke, ARC, *Committee Hansard*, 26 September 2003, p.57

20 DVA, Submission no. 10, p.12

Table 2: Decisions varied on appeal by the claimant under the *Safety Rehabilitation and Compensation Act 1986*²¹

| Year | Reconsiderations finalised | Percentage of decisions varied | AAT intake | AAT Percentage of decisions varied. |
|---------|----------------------------|--------------------------------|------------|-------------------------------------|
| 2000/01 | 1496 | 23 | 311 | 21 |
| 2001/02 | 1537 | 27 | 323 | 43 |
| 2002/03 | 1615 | 22 | 323 | 31 |

5.24 This candid assessment is supported by the VRB which states in its 2001–02 Annual report: ‘Anecdotal material strongly indicates that concessions [by the Repatriation Commission] are made on the basis of new material presented’.²² Of applications finalised by the Veterans’ Division of the AAT during 2002:

- 30 per cent were withdrawn by the applicants; and
- 46 per cent were conceded by the Repatriation Commission.

5.25 The Committee has not been able to pursue the factors driving the high concession rate. The extent to which it is the result of new evidence or resource pressure on advocates within DVA remains unclear.

5.26 More telling is the breakdown of figures for the remaining 24 per cent of applications that were finalised by decisions formally published with reasons:

- 39.3 per cent involved an affirmation of the decision under review; and
- 60.7 per cent led to a decision under review being varied or set aside.²³

5.27 The Committee believes that both sets of figures raise important questions: why are claimants not presenting evidence important to their case at the primary or internal review levels, especially when a number of ESOs told the Committee that they adhere strongly to the motto—‘getting it right the first time’? And, would the rate of settlement at the primary and internal stages of review rise appreciably with the provision of evidence earlier in the review process?

5.28 A few preliminary observations are pertinent to this analysis. The Committee is aware that many claims have been made about the culture of appeals. One claim repeated in the evidence is that a culture has developed whereby veterans deliberately exploit the review hierarchy by withholding important information from the primary decision maker, and use the VRB as a stepping stone to the AAT in order to access

21 DVA, Submission no. 10, p.13

22 Veterans’ Review Board, *Annual report 2001–02*, p.2

23 Veterans’ Review Board, *Annual report 2001–02*, p.57

legal aid.²⁴ However, the Committee did not seek evidence to support this particular claim.

5.29 A strong message was conveyed to the Committee by representatives of the RSL, the RDFWA and Legacy regarding this culture of appeal. Mr Wills, Legacy, summarised a widely held sentiment when he told the Committee that ‘getting it right the first time [ie. primary decisions] is absolutely fundamental to the way we operate. It is not in dispute anywhere among our advocates...’.²⁵ Mr McKenzie, RSL, told the Committee that many years ago ‘there were some individuals and organisations who were playing dead at the Veterans’ Review Board so they could go to the AAT and get legal aid’. However, he assured the Committee that ‘by and large the system has got rid of those things’.²⁶

5.30 More plausible explanations for the non-provision of important information at the early review stages were provided by Professor Creyke. To begin with, a characteristic of a jurisdiction which involves mostly older veterans is that people will often acquire new conditions during a review process that can often take more than two years to complete.²⁷ It is simply not possible to identify ‘...at the beginning of the review process the sorts of conditions a person will suffer by the end of the process’.²⁸

5.31 In addition, veterans are not skilled in putting forward claims on their own behalf and are not experts in either epidemiological issues or in diagnosing medical conditions. On the whole:

Although the obligation is...placed on the department [DVA] under its legislation to investigate...unless it is given any clues about possible conditions that an applicant is suffering, it may not necessarily undertake a very full analysis to determine whether there are conditions they could have explored...some of this comes out along the way. Those are practical issues that I think the nature of the [veterans’] population and the nature of the medical conditions create.²⁹

5.32 The ARC in its submission referred to another factor that was first identified in its *Better Decisions* report. It argued that some applicants fail to obtain relevant information (often expert medical evidence) until the original decision is under review by the AAT ‘...because of a perception that the AAT is more likely to look on it more

24 Mr Snell, Sparke Helmore, *Committee Hansard*, 26 September 2003, p.3

25 Mr Wills, Legacy, *Committee Hansard*, 26 September 2003, p.79

26 Mr McKenzie, RSL, *Committee Hansard*, 26 September 2003, p.79

27 According to figures provided by the Legal Aid Commission of NSW, 66.7 per cent of outstanding applications before the VRB were less than one year old, 26.4 per cent were 1 to 2 years old and 5.4 per cent of applications were more than 2 years old. Answer to Question on Notice, 14 October 2003

28 Professor Creyke, ARC, *Committee Hansard*, 26 September 2003, p.58

29 Professor Creyke, ARC, *Committee Hansard*, 26 September 2003, p.58

favourably or that DVA is more likely to make a concession at the AAT because of the cost of contesting the claim'.³⁰

5.33 These circumstances, which are unique to the veterans' jurisdiction, explain why the veterans' community strongly supports the principle of *de novo* review, and hence retention of the fundamental distinction, discussed in chapter 3, between merits and judicial review. Not only does *de novo* review have the advantage of enabling the AAT to consider evidence that has come to light subsequent to the decision of the primary decision-maker. It also avoids wastage of time, resources and money arising from a situation where an individual is forced to have to make more than one application for review. This would come about if the AAT was only entitled to review the original decision and the individual's circumstances changed significantly by the time the matter appeared before the AAT.³¹

Conclusion

5.34 A core issue before the Committee is whether there is sufficient evidence linking a three-tier review hierarchy with deficiencies in the review process to warrant recommending major structural reform. The Committee finds that the figures provided by DVA on the rate of appeals under the VEA and the MCRS, at face value do not support a strong connection between the review structure and a willingness for claimants to exercise their right of appeal. The overturn rate, however, indicates that the level of appeal could be reduced further.³²

5.35 The Committee notes the assessment provided by the ARC that the relatively large number of claims that proceed to the VRB, the smaller number that progress to the AAT and the high overturn rates at both levels are features that apply in any administrative system throughout the world. Internationally, the overturn rate apparently is approximately one third to one quarter of all primary decisions. According to Professor Creyke, 'Any system is going to have errors and those errors need to be dealt with in a robust system'.³³ The Committee, while reassured by this assessment, does not accept it as a reason for not pressing for further improvement.

30 ARC, Submission no. 11, p.15

31 The Hon Justice Deidre O'Connor, 'Effective Administrative Review: An Analysis of Two-tier Review', *Australian Journal of Administrative Law*, Vol. 1, No. 1, 1993, p.11. Interestingly, before May 1981, if further evidence was produced at the AAT which had not been available to the Repatriation Commission or Repatriation Board which made the primary decision, the AAT was obliged under the *Repatriation Act 1920* to adjourn the hearing and request the Commission to reconsider the decision in the light of that further evidence. According to O'Connor, 'This provision caused considerable delays and an ever-increasing backlog of applications'. Professor Creyke also criticised the suggestion of remitting new evidence to the department for reconsideration because of the 'gruelling task' faced by veterans' who proceed from internal review to the VRB and AAT: 'To send them back to start the process again...seems to be counterproductive', *Committee Hansard*, 26 September 2003, p.56

32 DVA, Submission no. 10, Attachment A, p.12

33 Professor Creyke, ARC, *Committee Hansard*, 26 September 2003, p.55

5.36 The Committee finds that factors other than the review hierarchy contribute both to the high number of appeals of primary decisions and to the high overturn rate at the VRB and AAT stages of review. Two critical factors are the ability of claimants to introduce new evidence at any stage of the review process and to withhold important information until their case is reviewed by the AAT.

5.37 At the very least, the Committee appreciates that any systemic reform in the veterans' review jurisdiction would seriously challenge core principles underpinning the merits review system, including benefits flowing from the existence of two distinctive and complementary review tiers. For this reason, the Committee considers that any reform proposals must be examined with great caution. The Committee is keen to examine whether reforms to alleviate various weaknesses with the review process can be achieved *within* the existing review hierarchy, thus avoiding the need for large scale reform.

5.38 The Committee notes, however, that MCRS processes are dictated by Comcare from whom the delegation is made under the SRCA. As a derivative of this public service compensation scheme, there is a large difference between the administration of the MCRS and the VEA with respect to values, standards and processes. This difference will remain while the VEA and MCRS operate in tandem. The improvement in client service offered by DVA cannot ameliorate that difference.

Criticisms of the Military Compensation and Rehabilitation Scheme (MCRS)

5.39 The most telling criticisms of the review process are reserved for the Military Compensation and Rehabilitation Scheme (MCRS). Mr Greg Isolani (Legal Adviser, AFFA), in his submission and at a public hearing, highlighted ambiguities with the review process that in his view 'go against the grain of beneficial and remedial legislation to assist veterans or current ADF members to receive their compensation benefits'.³⁴

5.40 These ambiguities relate mostly to the interpretation and application of complex legislation. Mr Isolani, for example, identified a number of problems with the lodgment of claims: doctors exploit the ambiguity of language to reject claims; there is no provision of standard medical questions to assist veterans; veterans receive opinions in areas for which Occupational Physicians have no particular expertise; and delegates can reject claims by relying on only one medico-legal opinion.³⁵

5.41 Moreover, there is a major discrepancy between the time when veterans decide to lodge a claim (because medical conditions often do not manifest for many years) and a requirement under legislation for an application for compensation to be

34 Mr Greg Isolani, Legal Adviser, AFFA, *Committee Hansard*, 25 September 2003, p.3

35 KCI Lawyers, Submission no. 13

lodged within six months from the date of injury. The MCRS has a tendency to reject applications on these grounds.³⁶

5.42 These wide-ranging criticisms account for a number of negative comments directed at the MCRS by ESO representatives, especially as they relate to the period when the scheme was managed by the Department of Defence. The RSL, for example, felt that during this period the MCRS review process ‘...was characterized by a degree of harshness in the attitude of those who administered the scheme. The beneficial features associated with the management of veterans review appeared to be missing and a more confrontational atmosphere was present’.³⁷

5.43 The Committee notes that ‘doctor shopping’ may be endemic to compensation schemes, and clearly with MCRS the practice is also used to reject claims. The Committee also notes that this was one of the prime reasons for the adoption of the Repatriation Medical Authority and the employment of statements of principles in the VEA. Further, the introduction of this system into the new military compensation scheme may ameliorate some of this unfortunate conflict.

The reconsideration and review process

5.44 A key area of concern with MCRS relates to the use by DVA of private law firms from the Attorney-General’s panel of approved solicitors to assist with the reconsideration process, as was previously the case when the Defence Department administered the scheme. Officers from DVA explained that the practice of claims officers at the reconsideration stage seeking external legal advice had been in place since the mid-1990s when the MCRS was administered by the Defence Department. It appears that the practice was continued by DVA when the scheme was transferred to DVA in 1999 as a practical measure to deal with a backlog of claims.³⁸

5.45 The problem, however, appears to be that delegates not only incorporate legal advice into their own independent written judgment but use that advice for the purpose of the entire reconsideration. Mr Brown (ISPA) was of the view that whole case files were being given to specific law firms who would then either affirm or overturn the original decision, in effect taking responsibility for decision-making away from the delegate and placing it with the law firm.³⁹

5.46 In his submission, Mr Isolani described the use of private law firms by MCRS as ‘an unlawful delegation of MCRS’ powers’ giving MCRS ‘an advantage whereby they are able to spend Commonwealth funds to engage private law firms to assist them with their internal reviews and to maintain their technical legal defences to reject

36 KCI Lawyers, Submission no. 13, p.4

37 RSL, Submission no. 1, p.3

38 Mr Ontong, DVA, *Committee Hansard*, 26 September 2003, p.12

39 Mr Brown, ISPA, *Committee Hansard*, 25 September 2003, p.27

claims'.⁴⁰ In subsequent written evidence presented to the Committee, he qualified the term 'unlawful' by describing the delegation as being 'not consistent' with s62 of the SRCA.⁴¹

5.47 ISPA likewise expressed the same level of concern, describing the use of legal firms for reconsideration as 'totally unfair' and 'biased', suggesting that there was a gross imbalance in the review system under the MCRS in favour of the Commonwealth.⁴²

5.48 While the Committee is of the view that all stages of the review process must be in strict accordance with the law, the main issue under consideration is one of equity and fairness for those seeking just compensation. The Committee finds that ADF personnel are at a distinct disadvantage under the current system because a large number of claimants do not have the money to pay for legal representation at the primary and reconsideration levels of MCRS decision-making and, even if they did, there is currently no entitlement for legal costs to be reimbursed if they successfully overturn a decision following internal review.

5.49 The issue is put succinctly by Mr Ray Brown: 'Whilst the Commonwealth can employ legal firms without regard to costs to defend its case, in some cases using barristers, claimants are restricted to the level of legal expertise and have no access to legal aid'.⁴³

5.50 Officers from DVA, when questioned about the practice of the reconsideration process being delegated to legal firms, confirmed that legal advice was sought for approximately 30 to 40 per cent of all reconsiderations finalised in 2002–03.⁴⁴ However, DVA challenged the accuracy of the criticisms leveled by ESO and legal representatives. In the first instance, Mr Johnson, Branch Head, Disability Compensation, stated:

...our reconsideration officers are the delegates and they are the ones who make the decisions. They can seek additional medical or legal information on the matter that they are reconsidering, but our people—not the lawyers or the legal companies—are the delegates.⁴⁵

5.51 The Secretary of DVA, Dr Johnston, amplified these remarks by making an important distinction between whether the whole reconsideration is referred to a lawyer for advice on what the decision should be, 'which arguably would go beyond

40 KCI Lawyers, Submission no. 13, p.9

41 KCI Lawyers, Answer to Question on Notice, 15 October 2003, p.2

42 Mr Brown, ISPA, *Committee Hansard*, 26 September 2003, p.26

43 ISPA, Submission no 3, p.2

44 Mr Johnson, DVA, *Committee Hansard*, 26 September 2003, p. 15

45 Mr Johnson, DVA, *Committee Hansard*, 26 September 2003, p.11

what is envisaged by a delegation', or whether only matters of law are referred to a lawyer, 'which is quite proper in any review process'.⁴⁶

5.52 Further clarification was provided by Dr Johnson when he provided the Committee with some relevant additional information. He was at pains to contrast the VEA system—a rules based system covered by one Act and with an expert computer system (CCPS) to guide the decision maker through the process—with MCRS, which operates under three Acts with complex transitional arrangements. According to Mr Johnson, it is the level of complexity which often requires the assistance of outside legal firms. In addition, MCRS is not unique in its use of a legal panel for reconsiderations. Apparently the same process is followed by Comacre, Australia Post, Telstra and other agencies that have a license from Comcare to administer the SRCA.⁴⁷

5.53 However, the Committee is unable to determine to its satisfaction the extent to which whole reconsiderations are being referred to lawyers for advice. Notwithstanding DVA's clarification, the Committee believes the issue needs to be reviewed and that remedial measures should be implemented if required.

Recommendation 1

5.54 The Committee recommends that the ANAO conduct an audit of the reported practice of the Military Compensation and Rehabilitation Scheme using private law firms for the purpose of the entire reconsideration of the original decision. It also recommends that DVA, in consultation with the ANAO, establish guidelines for private law firms in providing advice to ensure that the authority of delegated decision-makers is not being bypassed.

The same review path for VEA and MCRS claimants?

5.55 As indicated in chapter 3, a feature of the current review system is the different avenues of appeal for veterans under the VEA and for compensation cases administered by DVA under the SRCA. It appears that historically the main policy reason for two different review paths is a long standing distinction between warlike and non-warlike service and peacetime service.⁴⁸ This was confirmed by both ISPA and DVA.

5.56 However, the RSL, which supports the distinction between warlike and non-warlike service, is highly critical of the Defence Department for using that broader

46 Mr Johnston, DVA, *Committee Hansard*, 26 September 2003, p.13

47 Mr Johnson, DVA, *Committee Hansard*, 26 September 2003, p.44

48 According to DVA, warlike and non-warlike service (referred to as operational service by Defence and DVA) involves a government initiated operation or a deployment which consists of at least three elements: a mission, rules of engagement and for warlike service the question of whether casualties are expected. Mr Pearce, Defence Department, *Committee Hansard*, 26 September 2003, p. 38

distinction as an excuse for continuing with two different review paths under the proposed new military compensation scheme (ie. not providing the scheme with an appeal mechanism to the VRB).⁴⁹

5.57 In fact, the RSL, Slater & Gordon, ISPA, Legal Aid Commission of NSW, and Sparke Helmore solicitors are all highly critical of the different avenues of appeal on the grounds that it is no longer appropriate to have two review models under the proposed new military compensation scheme. They each support a streamlined and single review process for all ADF and ex-ADF personnel regardless of whether their service is warlike, non-warlike and peacetime only. Ideally, a single review process would be modelled on the current VEA model which includes the VRB as the first external review tier.⁵⁰

5.58 Sparke Helmore offers additional criticisms of the proposed review model to bolster its support for a 'single system of review applicable to all persons regardless of the nature of their defence force service'.⁵¹ It points out, for example, that the model does not include any measures, legislative or otherwise, which would facilitate early and effective dispute resolution. In fact, it states that by retaining the VRB route modeled on the VEA, the model encourages review at higher and more costly levels, which is widely considered one of the main shortcomings of the current system. The submission also claims that people who elect the MRCC/AAT route face restrictive legal aid provisions compared with those who choose to follow the VRB route.

5.59 The Committee believes that this level of support for an alternative single review path suggests that the claim by both DVA and the Defence Department that the review model proposed in the draft MCRB '...was the one that had the broadest consensus'⁵² following consultations with ESOs on the new military compensation scheme, needs to be viewed with some caution.

5.60 Moreover, the problems and discrepancies that have been identified with the structure and operation of the existing review system will in all likelihood be carried over to the new military compensation scheme, unless changes are made to the draft MRCB.

5.61 Some ESOs expressed the view that following review by the VRB, the Veterans' Division of the AAT would be the best avenue for all applicants. The RSL is concerned that the Compensation Division of the AAT hears appeals under the MCRS because 'this Division inevitably has a culture of dealing with "workers' compensation" and, perhaps, lacks an understanding of the special nature of military service'.⁵³

49 Mr McKenzie, RSL, *Committee Hansard*, 26 September 2003, p.75

50 Mr Brown, ISPA, *Committee Hansard*, 25 September 2003, pp.29–30;

51 Sparke Helmore, Submission no. 9, p.15

52 Mr Pearce, Department of Defence, *Committee Hansard*, 26 September 2003, p.43

53 RSL, Submission no. 1, p.3

5.62 ISPA also argued that it would be more efficient for one Division of ATT to hear all appeals. A single compensation scheme should ‘reduce anomalies, confusion and...make the process of claiming compensation and rehabilitation easier and more user-friendly. This includes reviews and appeals’.⁵⁴

5.63 The ARC in its submission makes the observation that the current VEA and military compensation schemes ‘...are complex involving a range of entitlements, differing review hierarchies, and in the case of the MCS, depending on the nature of the service giving rise to the claim, different legislative regimes’.⁵⁵

5.64 In light of this observation, the Committee is concerned that in its current form, chapter 8 of the draft MRCB adds yet another layer of complexity to the mix of law covering the area of administrative review of veteran and military compensation.

5.65 At the very least, the Committee believes that data collected under the VEA and the SRCA is indicative of information that should be collected under the new Military Rehabilitation and Compensation Scheme to better inform subsequent consideration of the review process and structure. It would be appropriate for the relevant agency and key stakeholders involved in the new scheme to disclose data for each stage of the review process—for example, on the number of applications and appeals, the rate of appeals withdrawn and overturned and the number of appeals that succeed.

5.66 More importantly, the Committee finds that the review model included in the draft bill fails to address a range of structural and administrative weaknesses with the existing review system that are identified by a number of leading ESOs and legal practitioners who have an intimate working knowledge of the system’s operation and administration.

5.67 Some of these weaknesses—notably delays in settling appeals caused by the withholding of evidence from primary decision makers, inadequate representation by ESO advocates, the poor quality of claims in a complex jurisdiction, and the number of appeal and review avenues—have been a feature of the system for at least twenty years, and identified as core problem areas by a succession of reports by the Auditor-General and the ARC.⁵⁶

54 ISPA, Submission no.3, p.2

55 ARC, Submission no. 11, p.9

56 Administrative Review Council, *Review of Pension Decisions under Repatriation Legislation*, Report No. 20, 1983 and *Better Decisions*. Australian National Audit Office, *Compensation pensions to veterans and war widows*, Audit report No. 8 1992–93; *Follow-up of an Efficiency Audit on Compensational Pensions to veterans and War Widows*, Audit Report No. 15 1994–95; *Compensation Pensions to Veterans and War Widows*, Audit Report No. 3, 1996–97; *Review of Veterans’ Appeals Against Disability Compensation Entitlement Decisions*, Audit Report No. 29 2000–01; *Veterans’ Appeals Against Disability Compensation Decisions: Follow-up Audit*, Audit Report No. 58 2002–03

Recommendation 2

5.68 The Committee recommends that the future administrative review process under the new Military Rehabilitation and Compensation Scheme (MCRS) should be the same for all ADF and ex-ADF personnel. All appeals to the Administrative Appeals Tribunal should be heard by one Division which might be titled the ‘Military’ Division. This new process does not apply to the existing review process under the MCRS.

Other criticisms of MCRS

5.69 The Committee’s attention was drawn to three additional related concerns with the administration of the MCRS. First, DVA pointed out that a detailed statement of reasons is provided to the claimant which incorporates advice on legal issues, medical evidence and any other matters that are part of the initial determination and reconsideration.⁵⁷ However, DVA also confirmed that in the statement of reasons provided to a claimant, legal advice is not attributed to an external legal firm.⁵⁸

5.70 Second, where legal advice is obtained by MCRS at the reconsideration stage and an application is made to the AAT regarding the reconsideration, there is no requirement for a copy of that legal advice to be provided to the veteran. This was confirmed by DVA.⁵⁹ This appears to be inconsistent with s59 (1) of the SRCA that allows a veteran to receive documents held by the Commonwealth in respect of their claim.⁶⁰

5.71 Third, the level of funds allocated to law firms by DVA at the internal review stage is significant and has been increasing over time, especially for Barristers, Senior Counsel and Queen’s Counsel. In all likelihood this represents a sizeable shift in the allocation of resources from internal review officers operating under the MCRS to external legal firms.

5.72 According to figures provided by DVA, the MCRS employs five law firm for advice in the area of the review of decisions—Australian Government Solicitor (AGS), Phillips Fox Lawyers, Blake Dawson Waldron, Dibbs Barker Gosling and Sparke Helmore Solicitors. The total amount paid to the five firms for the 2002–03 financial year (as at 30 June 2003) was \$5,188,561.⁶¹

57 Mr Johnson, DVA, *Committee Hansard*, 26 September 2003, p.15

58 Mr Ontong, DVA, *Committee Hansard*, 26 September 2003, p.16

59 Mr Ontong, DVA, *Committee Hansard*, 26 September 2003, p.15

60 KCI Lawyers, Answer to Question on Notice, 15 October 2003, p.2

61 DVA, Answers to Question on Notice No 1593, 27 June 2003

Ex-service organisations

5.73 Ex-service organisations (ESOs) have played a crucial role in the veterans' review process over a number of years by helping veterans prepare their compensation and appeals claims and by representing them, where necessary, before the VRB and AAT. Over the past decade, programs initiated by DVA have strengthened ESO representation in the claims and appeals process. Since 1994–95, DVA has been funding the Training and Information (TIP) program, from 1996–99 the Claims Assistance Grants Scheme (CAGS) and from 1999 the Building Excellence in Support and Training (BEST) program.⁶²

TIP and BEST programs

5.74 The TIP program, administered jointly by DVA and ESOs, is designed to train and resource ESO pension officers, welfare officers and advocates so that they can provide the best possible advice to veterans seeking assistance under the VEA. Three courses are covered by the program—pension officer, welfare officer and advocate courses—together with refresher courses to update experienced practitioners on developments in legislation, policy and procedures relevant to claims and appeals.⁶³

5.75 According to DVA, the TIP program also runs advanced advocacy courses to assist practitioners in preparing cases for review before the VRB and AAT, and courses for a number of supplementary skills such as networking and relationships and the use of electronic tools made available to practitioners by the Department.⁶⁴ During 2001–02, TIP funding amounted to \$650,000 which supported 231 training courses nationally involving approximately 3200 participants.

5.76 Linked closely with TIP is the BEST program, a government initiative announced in the 1999–2000 Budget with funding of \$5.6 million over four years. The program essentially provides monetary support and IT equipment to ESO practitioners. Under the program, funding assistance provides for salary costs for full or part time ESO practitioners and administrative support staff, computer equipment to assist ESO practitioners, and consumables, running costs and other general costs relating to the lodgment of claims and appeals.⁶⁵

5.77 The Committee notes that DVA completed in October 2002 an independent evaluation of BEST by consultants Better Enterprise. The evaluation recognised the important role played by experienced and trained representatives in raising the standard of compensation appeal applications. Apparently, it recommended that the program should continue with an increased level of funding.⁶⁶

62 DVA, Submission no. 10

63 DVA, Submission no. 10, p.8

64 DVA, Submission no. 10, p.8

65 DVA, Submission no. 10, p.9

66 Legacy, Submission No. 4a, p.2

5.78 Continued support for BEST and TIP programs within DVA was confirmed at the Committee's public hearings. Mr Maxwell, Division Head, Compensation and Support, indicated support for a progressive nation-wide expansion of the way these programs have operated in regional Victoria in recent years. He spoke highly of the way ESO resources have been pooled under one management stream '...whereby they roster their services and can plug any shortcomings that individual associations may have in their ranks...'.⁶⁷

5.79 In line with ANAO recommendations, DVA has also commenced development of a strategic paper that will address future arrangements to support the ongoing advocacy role provided by the ESO community.⁶⁸

5.80 The ANAO also points out that DVA has made efforts to achieve consistency of policy and procedure in the advocacy system through forums with ESOs such as the joint DVA/ESO Operation Working Party and the National and State Compensation Claims Workshops. DVA is also currently developing the Veteran Practitioner Activity Database (VPAD) to assist ESO practitioners store and manage claimant details and key details of their casework.

The future role of ESO representatives

5.81 The Committee recognises that the TIP and BEST programs have provided much needed financial assistance to ESO representatives. However, it believes that ESOs nonetheless continue to struggle with the complexities of the VEA and MCRS appeals system, and remain under-resourced. Moreover, resources that are made available to ESOs are stretched to the point where they are struggling to cope with the heavy demands made by the system. This means that veterans who appeal primary decisions do not always receive an adequate level of support.

5.82 There is also a high turnover rate amongst ESOs. Despite good intentions, some ESO representatives who receive training do not manage enough cases to improve their skills. Their collective work, however, is extraordinarily valuable and ESO's understandably are proud and defensive of their efforts in helping their former comrades in arms.

5.83 Mr Snell, a representative from Sparke Helmore solicitors who works mainly under the MCRS, stated categorically that ESOs are struggling because they are poorly resourced:

They [ESOs] are well meaning but possibly not of the requisite quality of training and experience to be advocating the interests of the applicants whom they represent in some cases. Often misunderstandings or misapprehensions about either the statements of principle or the way in

67 Mr Maxwell, DVA, *Committee Hansard*, 26 September 2003, p.20

68 Australian National Audit Office, *Veterans' Appeals Against Disability Compensation Decisions: Follow-up Audit*, Audit Report No. 58 2002–2003, p.36

which the law should be interpreted lead to the prolongation of matters and difficulties in settling matters...⁶⁹

5.84 The Committee notes that some of the problems relating to ESOs have been identified previously by the Auditor-General. In fact, the role of ESOs in the review system received little public scrutiny until the Auditor-General highlighted in 2001 the risks to the timeliness and quality of the review process which arise from the variable quality of services provided by a diminishing pool of volunteer representatives.⁷⁰

5.85 During the course of the 2001 audit, a number of ESOs advised the ANAO that the issue will become more acute in future years due to two factors:

- The ageing of experienced representatives makes it unlikely they will be able to provide the same level of service to veterans; and
- ESOs are likely to experience difficulty in attracting, developing and retaining younger representatives of sufficient quality because most of them are volunteers and, as mentioned previously, funding under the BEST program is limited.

5.86 The Auditor-General recommended that DVA, in partnership with ESOs, 'develop a formal strategic plan for providing advocacy support to veterans over the medium to long term'.⁷¹ DVA agreed with the qualification that it would require the agreement of ESOs 'which may be concerned about a perceived challenge to their independent structures and volunteer networks'. Overall, the response concluded on a positive note: 'DVA will continue to work with the ESOs to deal in a structured way with the issues raised by the ANAO report'.⁷²

5.87 Significantly, the sole recommendation in the Auditor-General's follow-up Audit of 2003, which received support from both DVA and the VRB, focused on the role of ESOs:

The ANAO recommends that DVA and VRB, in order to facilitate veterans' compensation appeals, and in the context of their strategic planning in this area, encourage all veterans and their dependants to seek Ex-Service Organisation advocacy support.⁷³

5.88 In reaching its conclusions, the Auditor-General made an additional observation relating to ESO participation in the review system. It noted that between

69 Mr Snell, Sparke Helmore, *Committee Hansard*, 26 September 2003, p. 32

70 Australian National Audit Office, *Review of Veterans' Appeals Against Disability Compensation Entitlement*, Audit Report No. 29 2000–2001

71 Australian National Audit Office, *Review of Veterans' Appeals Against Disability Compensation Entitlement*, Audit Report No. 29 2000–2001, p.63

72 Australian National Audit Office, *Review of Veterans' Appeals Against Disability Compensation Entitlement*, Audit Report No. 29 2000–2001, p.63

73 Australian National Audit Office, *Veterans' Appeals Against Disability Compensation Decisions: Follow-up Audit*, Audit Report No. 58 2002–2003, p.19

1995 and 2000 the time taken to finalise cases at the VRB increased by 60 per cent to an average of approximately 12 months. The main cause of this increase is the length of time required by veterans and/or representatives to prepare their cases. According to the Auditor-General, the delays are caused, in part, by factors within a representative's control, 'including the demands of high caseloads on the relatively small number of representatives who have been trained to the level at which they can assist with appeals'.⁷⁴

5.89 The Committee is concerned with an additional problem that relates to the quality and consistency of advocacy services provided by ESOs. The Vietnam Veterans' Federation of Australia (VVFA) argues that the BEST program does not provide a sufficient level of funds to enable ESOs to properly prepare cases under review. According to VVFA President, Mr McCombe, the problem is twofold. Funding for BEST is too widely dispersed among too many small groups, and the current annual funding for the program makes it difficult for ESOs to recruit and retain sufficient numbers of skilled advocates:

One of the things about the [BEST] grant is that it goes from one year to the next and you have to apply every 12 months. We just cannot guarantee our advocates continuing employment...When we are training up a person, we would like to say, 'We'd like to keep you for three to four years.' Under this system, we do not know what we are going to get from year to year...⁷⁵

5.90 Legacy also supports the provision of additional funds for the BEST program and is critical of the current annual funding arrangement. In its response to the independent evaluation of BEST conducted for DVA by Better Enterprises in 2002, Legacy's BEST representatives stated:

The limited funding [for BEST] is...exacerbated by it being on an annual basis rather than a rolling program. This creates difficulties in retaining staff and keeping liquidity at the end of the funding period. There are simply not enough funds available for the program to achieve its full potential.⁷⁶

5.91 However, the Committee received some conflicting evidence on funding arrangements for BEST, and the difficulty ESOs have in recruiting and retaining voluntary advocates. The RSL, for example, expressed a high level of satisfaction with both the TIP and BEST programs and observed that it had not experienced difficulties recruiting voluntary advocates.⁷⁷ The VVFA offered a different perspective when it told the Committee that it had experienced a high volunteer

74 Australian National Audit Office, *Review of Veterans' Appeals Against Disability Compensation Entitlement*, Audit Report No. 29 2000–2001, p.59

75 Mr McCombe, VVFA, *Committee Hansard*, 25 September 2003, p.38

76 Legacy, Submission no. 4a, p.2

77 Mr McKenzie, RSL, *Committee Hansard*, 26 September 2003, p.71

turnover rate which meant that volunteers were constantly being replaced and retrained.⁷⁸

5.92 The ARC identified other shortcomings with the level of skill and training provided for lay advocates. It argued that rationalisations are needed within ESOs to assist with the development of a professional cadre of advocates who can perform their advocacy function consistently on a national basis:

That would prevent a situation, which currently applies, where more than 80 per cent of advocates often only deal with one or two hearings a year...It would, I think, be preferable if you had core groups who moved from one region to another or whose members moved from one region to another, as hearings were required, who received the upgraded and improved training that would be available to improve the quality of the advocacy at this level.⁷⁹

5.93 The Committee finds that the BEST and TIP programs have been very valuable. However, should there be no additional funding for these programs, the Committee believes that changes should be made to the existing funding arrangement to enable ESOs to improve the effectiveness of the services they provide to the veteran community.

Recommendation 3

5.94 The Committee recommends that in order for ex-service organisations (ESOs) to provide an adequate and sustainable advocacy service, funding arrangements for the TIP and BEST programs should be reviewed in order to improve the effectiveness of the programs. Funding for the programs should be on at least a bi-annual basis to enable ESOs to make better use of their available financial resources.

Legal aid

5.95 Legal Aid Commissions are independent statutory agencies established under state and territory legislation. As independent statutory bodies, the Commissions determine whether to grant legal aid in individual cases. However, they are required by their respective funding agreements with the Commonwealth to apply the Commonwealth Guidelines to any application for legal assistance for any Commonwealth matter, including legal assistance to veterans.⁸⁰

5.96 The relevant guidelines for veterans are found in Guideline 5: War Veterans' matters. The Guidelines, which were implemented in July 2000, were developed as a result of a national evaluation of the administration of the War Veterans' Legal Aid Scheme. The evaluation involved the Attorney-General's Department in consultation

78 Mr McCombe, VVFA, Committee Hansard, 25 September 2003, p.44

79 Professor Creyke, ARC, *Committee Hansard*, 26 September 2003, p.55

80 Attorney-General's Department, Submission no. 14, p.2

with Legal Aid Commissions, DVA, the AAT, ESOs and the Law Council of Australia.⁸¹

5.97 Guideline 5 states that assistance to war veterans is *not* means tested and funding is available for complex and non-complex matters.⁸² This is considered to be consistent with the generous disposition towards veterans with operational service.⁸³ Non-complex funding up to \$2,500 is provided in two stages. Stage 1 allows a maximum of 10 hours for work up to and including the second preliminary conference. Stage 2 allows a maximum of 12 hours work for the hearing.⁸⁴ However, funding at each stage is subject to merits assessment and compliance with the Commonwealth's Checklist for Administration of War Veterans' Matters and the AAT's General Practice Direction.⁸⁵

5.98 The Commission may determine at any time that a matter is complex, and may have regard to three issues:

- Whether several conditions are being claimed, and reports are required from 3 or more areas of medical expertise;
- Whether there is a complex link between the Statement of Principle and the condition claimed; and
- Whether unresolved issues of law are involved.⁸⁶

5.99 However, a merits test does apply to veterans which consists of three elements:

- A test of the legal and factual merits (reasonable prospect of success);
- The prudent litigant self funding test; and
- The appropriateness of spending limited public funds.⁸⁷

5.100 A number of issues relating to legal aid for veterans were brought to the Committee's attention. First, National Legal Aid (NLA) advised the Committee that it had recommended various changes to the Guidelines, which are currently under review by the government, and made a number of representations to the

81 Attorney-General's Department, Submission no. 14, p.1

82 National Legal Aid, Submission no. 6, p.2

83 ARC, Submission no. 11, p.21

84 Attorney-General's Department, Submission no. 14, Attachment C, p.8

85 National Legal Aid, Submission no. 6, p.6

86 National Legal Aid, Submission no. 6, p.6

87 National Legal Aid, Submission no. 6, p.2

Commonwealth about the need to increase resources to Commissions to enable them to increase the hourly rate payable for legal aid work.⁸⁸

5.101 Second, the Legal Aid Commission of NSW argued that more resources are required for it to address access and equity issues to service target groups living in regional and remote areas, Aboriginal and women clients and clients from culturally and linguistically diverse backgrounds. During 2002–02, the Commission conducted 25 regional advice clinics across NSW, targeting Aboriginal veterans and ex-service women that have been under-represented in Veterans' Advocacy Service statistics.⁸⁹ The Commission argued that it would like the opportunity to expand the provision of services in rural areas.

5.102 NLA also claimed that there was a limited number of qualified legal practitioners prepared to do legal aid work for veterans. Factors include the generally low fees payable, the fact that work for veterans' matters is highly specialised, and a general trend of static or decreasing applications across the country.⁹⁰ Apart from the issue of legal fees being too low, NLA argued that 'the fact that work for veterans' matters is highly specialised, and what appears to be a general trend of static or decreasing applications across the country', may also be contributing to the small number of practitioners prepared to do legal aid work.⁹¹ The RSL believes there are sufficient solicitors who are prepared to take on cases, 'but only just'.⁹²

5.103 Some ESOs, such as the RSL, believe that less experienced ADF members are at the 'mercy of lawyers' who offer their service on a 'no win no fee basis'. It argues that non-means tested legal aid should be available to all members and ex-members of the ADF who appeal to the AAT.⁹³ This, however, would require overturning the long standing policy that non-means tested legal aid should be available only to those with warlike service.

5.104 The Committee is of the view that the most contentious issue surrounding legal aid in the veteran's jurisdiction appears to be at what point in the review process it should first become available. There is no doubt that the availability of legal aid makes an enormous difference to veterans, but who should receive it and at what stage in the process are moot points. The issue of legal aid for veterans needs to be considered in the wider context of budgetary costs and government policy on legal aid, particularly the needs of other jurisdictions which compete for funding from

88 Legal aid commissions set the fees which are payable to private legal practitioners who undertake legal aid work, For complex matters, some commissions pay an hourly rate to reflect the level of work required, while others negotiate a lump sum payment to cover the work. Attorney-General's Department, Submission no. 14, Attachment C, p.8

89 Legal Aid Commission of NSW, Submission no. 8

90 National Legal Aid, Submission no. 6, p.2

91 National Legal Aid, Submission no. 6, p.2

92 RSL, Submission no. 1, p.3

93 RSL, Submission no. 1, p.4

within the same budgetary allocation—for example, family law, immigration and criminal law where access to legal aid is more difficult.

5.105 While there is support for legal aid to be made available at the earliest point of the veterans' review process, some stakeholders maintain that introducing legal representation at the VRB would reduce that body's capacity to filter cases and produce speedy and low cost decisions. This contentious issue will be examined in more detail in the next chapter.

Findings

- The Committee fully endorses the principle of early and quick resolution of appeal cases, preferably at the internal review stage. The Committee accepts that improvements have been made in this area, but believes that further reforms should be considered.
- The Committee finds that the figures provided by DVA on the rate of appeals under the VEA and the MCRS, at face value do not support a strong connection between the review structure and a willingness for claimants to exercise their right of appeal. However, the overturn rate indicates that the level of appeal could be reduced further.
- The Committee finds that factors other than the review hierarchy contribute both to the high number of appeals of primary decisions and to the high overturn rate at the VRB and AAT stages of review. Two critical factors are the ability of claimants to introduce new evidence at any stage of the review process and to withhold important information until their case is reviewed by the AAT.
- The Committee finds that ADF personnel are at a distinct disadvantage under the current system because a large number of claimants do not have the money to pay for legal representation at the primary and reconsideration levels of MCRS decision-making and, even if they did, there is currently no entitlement for legal costs to be reimbursed if they successfully overturn a decision following internal review.
- The Committee finds that the review model included in the draft MCRB does not adequately address a range of structural and administrative weaknesses with the existing review system that are identified by a number of leading ESOs and legal practitioners who have an intimate working knowledge of the system's operation and administration—for example, delays in settling appeals caused by the withholding of evidence from primary decision makers, variations in the quality of representation by ESO advocates, the poor quality of claims in a complex jurisdiction, and the number of appeal and review avenues.
- The Committee finds that the BEST and TIP programs have been very valuable. However, should there be no additional funding for these programs, the Committee believes that changes should be made to the existing funding arrangement to enable ESOs to improve the effectiveness of the services they provide to the veteran community.

Chapter 6

Reforming the system of review: Fostering structural and administrative change

Background

6.1 Support amongst ESOs for retaining a framework of internal and external review and preserving the distinctive administrative qualities of the VRB and AAT is a strong theme in evidence presented to the Committee. In particular, the veterans' community considers the inquisitorial rather than adversarial nature of VRB hearings and the quasi-judicial character of AAT hearings as fundamental to the effective administration of the merits review system.

6.2 ESOs also strongly support the principle of *de novo* hearings, the current reverse onus of proof arrangements where DVA is required by legislation to investigate claims, and the right to access legal aid at the AAT. At the same time, ESOs endorse recent initiatives undertaken by DVA and the VRB to improve the administration of decision-making at primary and first tier external review levels, as recommended by the Auditor-General.

6.3 In light of the assessment of the current review system undertaken in the previous chapter, the Committee believes a consensus is emerging as to what should be the system's most important outcome. Specifically, the majority of stakeholders argue that a review system should be tailored to maximise early settlement of as many cases as possible, preferably at the primary and internal review stages.

6.4 Achieving this objective would bring a number of advantages for all parties involved in the review process. It would avoid delays that veterans sometimes experience in bringing their appeal cases to a satisfactory resolution, and it would minimise the level of stress that veterans experience, especially those with psychological conditions. It would also result in considerable cost savings for the Commonwealth by avoiding the need for veterans to exercise their right of appeal to the highest and most expensive review tier—the AAT.

6.5 This chapter considers whether there is a need to go beyond an emphasis on improving the review system's administration by DVA and the VRB, as illustrated by a succession of ANAO reports on the subject. Specifically, the Committee considers what, if any, structural reforms would help reduce the demand for review of primary decisions and facilitate the early settlement of appeals. Chapter 7 addresses practical and political considerations that confront agendas to reform the veterans' review system, and considers what is at stake in fostering a culture of reform in this complex jurisdiction.

Support for reform: Introduction

6.6 The Committee appreciates that while major stakeholders support reform of the review system, a wide range of proposals are recommended in the written submissions. Some of these proposals are incompatible and might inadvertently cause administrative inefficiencies within the review process. Others lack sufficient detail and supporting evidence to enable the Committee to arrive at an informed assessment. The Committee therefore took the opportunity to test and examine major reform proposals at two public hearings, especially those which recommended major structural change.

6.7 Some of the proposals are far reaching in their consequences for the broader merits review process; others offer innovative solutions to particular administrative problems that afflict the veterans' review system. Yet there is neither one reform package that has the support of a majority of stakeholders, nor is there one existing report or review from which concrete reforms logically flow. Rather, stakeholders have floated a loose collection of ideas, some of which have not been carefully considered by those most likely to be affected by them—veterans and their families.

6.8 The reform proposals fall roughly into two categories—changes to the current review structure, and administrative reform *within* the existing review hierarchy. In relation to the first category, some organisations argue that structural reform of the veterans' review system is urgently required or at the very least should be considered in more detail. The Committee has identified three reform options:

- Streamline the current review process by removing one external review tier, such as the VRB. This would result in a two-tier system consisting of internal review followed by external review by the AAT;
- Streamline the current review process by merging the VRB/AAT tiers into one external review body. This structure would provide a modified two stage process adopting procedures that are currently in use by the VRB and AAT; and
- Introduce a legislative limitation on the circumstances in which review by the AAT may be sought, focusing on matters involving issues of general principle and cases involving 'manifest errors'.

6.9 The second category consists of proposals for administrative reform *within* the existing review hierarchy. These proposals are of two kinds:

- Introduce a range of incentives to encourage the production of all relevant evidence at the earliest possible stage of the review process. Incentives include increasing the level of assistance for the training of ESO advocates, introducing legal assistance at lower levels of the review hierarchy (for example, payment of capped legal fees in return for the disclosure of information), and providing retrospective payment of benefits to the date when relevant information was obtained; and
- Improve the internal operation of the VRB. This could be achieved by introducing into the VRB some of the practices and procedures of the AAT—for

example, mandatory conciliation and conference registrars. The aim of such measures is to improve the quality of VRB decision-making and dispense with a higher number of less meritorious claims.

6.10 The Committee was keen to test these various proposals by asking the leading players in the system—ESOs, government departments, legal firms and academic experts—which of the proposals they support and why. The chapter now considers the merits of the proposals and specifically asks whether they address the problem areas identified in chapters 4 and 5.

Structural reform

Streamline the review process I: remove the VRB review tier?

6.11 Slater & Gordon and the Legal Aid Commission of NSW strongly recommend removing one of the two tiers of external review. In their written submissions they support the removal of the first external tier—in effect abolishing the VRB.¹ The Commission included in its submission a diagram of an alternative review model. The model shows that decisions by the Repatriation Commission and the MCRS which are contested are reviewed only by the AAT within a period of 3 months (with an AAT discretion to extend the period to 12 months), with an optional internal review at any stage of the process.²

6.12 The Commission raised what it believes are the main problems with the VRB review process: legal aid is not available for applications, the level of disbursements for obtaining medical evidence is too low, the VRB makes a decision on the papers only (does not hear expert evidence), beneficial legislation is sometimes incorrectly applied in decision-making, and s152 of the VEA is not fully utilised ‘which necessitates more thorough investigation of the applicant’s claim at the next tier of review’.³

6.13 Notwithstanding these concerns with the VRB review process, Legal Aid Commission CEO, Mr Grant, told the Committee at a public hearing that the Commission did not have a strong view on whether the first or second tier were removed. Instead, his argument is designed to collapse the review tiers by removing at least one tier to improve the overall efficiency of the review system. How best to achieve this outcome is an open question:

Obviously we would like to see one tier or review, whether it is the VRB wrapped up in the AAT or whether it is the abolition of the VRB...The main

1 Slater & Gordon, Submission no.2 , p.1; Legal Aid Commission of NSW, Submission no. 8, p.6

2 Legal Aid Commission of NSW, Submission no. 8, p.6

3 Legal Aid Commission of NSW, Submission no. 8, p.3

thrust of [our argument] is to collapse the levels of review...and get more efficiency into each level of review, right back to the primary decision.⁴

6.14 Slater & Gordon provides a slightly different argument for removing the VRB stage of the review process. It argues that unlike the current three-tier system, a two-tier review system would reduce overall costs, address the inconvenience experienced by many applicants challenging a decision of the Repatriation Commission, and reduce the overall time it would take to complete the appeals process. Slater & Gordon supports retention of the AAT instead of the VRB because, in its opinion, the AAT:

...provides a variety of informal procedures, such as conferences, mediations and informal hearings, for the resolution of disputes. If the circumstances of a claim require it, however, the AAT can be adversarial and formal. It has considerable discretion and flexibility to change its procedures to suit the claimant.⁵

6.15 While the Committee is interested in the option of streamlining the existing two tiers, and notes the concerns raised by the Legal Aid Commission of NSW about the VRB, it believes there are weaknesses with this reform proposal. To begin with, the argument that retention of a two-tier system is neither economically sensible nor practical—the implication being that the VRB stage is both costly and impractical—contradicts evidence presented to the Committee by various ESOs—the RSL, RDFWA and Legacy—about the current role and function of the VRB.

6.16 The high regard in which the VRB is held by the veterans' community is a consistent theme conveyed in submissions and at public hearings. For example, Mr McCombe, VVFA, claimed 'The beauty of the VRB is that it is a low-cost, informal non-legalistic body'.⁶ The RSL declared the VRB 'a resounding success' and a 'relatively popular review body' due to the informality of its hearings, the avoidance of legalese, the caliber of VRB members and, in particular, the presence of Service Members.⁷ Similarly, Legacy believes that the VRB has stood the test of time by providing war widows 'with an inexpensive avenue to put right the possibility of a decision having been made incorrectly at the initial level'. Legacy also considers VRB hearings to be fair, just and in the majority of cases cost effective.⁸

6.17 Other evidence overwhelmingly portrays the VRB as a relatively quick, informal and economical filtering mechanism between the Repatriation Commission and the AAT. In the words of the ARC: '...a significant advantage of the VRB is its

4 Mr Grant, Legal Aid Commission of NSW, *Committee Hansard*, 25 September 2003, pp.15–16

5 Slater & Gordon, Submission no.2 , p.4

6 Mr McCombe, VVFA, *Committee Hansard*, 25 September 2003, p.41

7 RSL, Submission no. 1, p.2

8 Legacy, Submission no. 4, p.2

capacity to filter cases and to produce speedy and low cost decisions'.⁹ Moreover, the VRB is also rightly seen as a specialist body that over the years has gradually built up a level of expertise in the veterans' jurisdiction that is not easily duplicated within the AAT. In DVA's opinion, if the VRB were abolished and the only recourse for appellants were to the AAT, this 'would substantially increase the cost to the Commonwealth for maintaining an independent external review body'.¹⁰

6.18 The main weakness, then, with the argument for removing the VRB from the review process is that it fails to address the VRB's very high standing amongst the veterans' community. The Committee appreciates that the VRB is viewed by many ESOs as sacrosanct. One only has to recall the controversy surrounding the fate of the VRB in the government's ART proposal, as discussed in chapter 4. On that occasion, the government was forced to retain the VRB as a separate entity rather than incorporate it into the ART following strong pressure from ex-service organisations.

6.19 Mr Grant from the Legal Aid Commission of NSW was candid and realistic about the implications of ESO opposition to abolishing the VRB. He told the Committee: 'If veterans groups are very much in favour or retaining [the VRB], it will just not be politically acceptable. We appreciate that'.¹¹

6.20 The Committee also notes two other important conclusions reached by the ARC and the ANAO, respectively. The ARC maintains that two external tiers are beneficial to the effective functioning of the review system when they each complement the other's distinctive role. Thus, the VRB 'provides a distinct alternative to the AAT in so far as it operates more informally than the [AAT], proceeding on the papers without legal representation and without agency representation at virtually all hearings'.¹²

6.21 When it comes to the VRB's management of the external review process, the ANAO has concluded that the VRB 'is managing those aspects of the review process within its direct control in a timely and effective manner'. The ANAO found that the VRB is managing its part of the external review process 'so as to continually improve its performance'.¹³

6.22 Not all legal firms share Slater & Gordon's view on the role of the VRB in the review system. Indeed, another firm involved principally in the MCRS, Sparke Helmore Solicitors, while critical of the disincentives to early settlement built into the review system, is very supportive of the VRB. When questioned by the Committee

9 ARC, Submission no. 11, p.22

10 DVA, Submission no. 10, p.10

11 Mr Grant, Legal Aid Commission of NSW, *Committee Hansard*, 25 September 2003, p.15

12 ARC, Submission no. 11, pp.14–15

13 Australian National Audit Office, *Review of Veterans' Appeals Against Disability Compensation Entitlement Decisions*, Audit Report No. 29 2000–01, p.78

about the proposal to remove the first tier of external review, Mr Snell offered the following considered perspective:

...whilst a case can be made for obviating one step in a process, there is a general acceptance of the utility of the role of the VRB in the veterans' community. As a specialist jurisdiction, it seems to be generally conceded that the process brings to bear specialist knowledge and an informality which is of benefit to veterans...On balance, whilst we can see some problems with the VRB system and an element of duplication, we think that the better view is that it ought to be retained.¹⁴

Streamline the review process II: merge the VRB/AAT review tiers?

6.23 A second reform option that the Committee explored with stakeholders at public hearings involves melding the VRB and AAT review tiers into one external review body. The Committee questioned key stakeholders about the merits of a modified two-stage process within a single external review body that utilised features of both the VRB and AAT. This option includes the possibility of incorporating the VRB as a division of the AAT, at which point there would be a process of mandatory conciliation. The reform option is distinct from the first option because it does not involve removing the first review tier altogether. Instead, it is designed to eliminate the duplication of administration and process and reduce the cost of the review system.

6.24 The response to this proposal from legal representatives, ESOs and academic experts is mixed. Mr Isolani told the Committee that having the VRB as a division of the AAT in order 'to streamline the administration and the number of people that physically deal with the claim' is a 'workable' option.¹⁵ In fact, a proposal developed in an agenda paper written by Mr Isolani for the Armed Forces Federation of Australia (AFFA), following discussions at an ESO Working Group about the appeals and review system, includes a number of processes that are consistent with this proposal (although the paper retains a three-tier structure).

6.25 In order to gauge the complexity of the proposal to merge the VRB and AAT tiers, it is useful to briefly describe some of the key features of the modified review process under the VEA canvassed in the agenda paper by Mr Isolani:

- Once an application is made to the VRB, an independent review officer is appointed to advise on what further information is required or points that need to be identified before the matter proceeds to VRB conciliation. This is an inquisitorial process to assist all parties;

14 Mr Snell, Sparke Helmore, *Committee Hansard*, 26 September 2003, p.35

15 Mr Isolani, Legal Adviser, AFFA, *Committee Hansard*, 25 September 2003, p.7

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- To avoid delays, a ‘statement of issues’ would be lodged within 30 days of the application, stating the medical, factual and legal issues in dispute to enable a decision to be varied;
 - The applicant, through an ESO or independently, may engage an approved law firm or lawyer to prepare the application before it proceeds to the VRB conciliation;
 - The case proceeds to the VRB conciliation (based on the current AAT Conciliation Conference model) where the ESO representative is allowed to orally outline the written response to the ‘statement of issues’ together with presenting medical and other evidence to be considered; and
 - Assuming the VRB conciliation is unsuccessful, the VRB would conduct a hearing on the papers similar to the current VRB system, except that the applicant could be accompanied by an ESO representative and a lawyer.¹⁶

6.26 Mr Isolani stressed that under this model it was essential that both ESOs and the provision of legal aid form part of the VRB conciliation process in which all relevant material, including medical and historical reports, is available for consideration. This process would help reduce delays and administrative costs, and enable veterans to be part of a review process that was sufficiently independent of DVA. Overall, this review process would uphold the principles underpinning the merits review system. It would remain ‘fair, economical, quick, just and informal. The applicant would be accorded...procedural fairness and natural justice’.¹⁷

6.27 The practical difficulty of merging two distinctive review bodies such as the VRB and AAT was highlighted by Sparke Helmore Solicitors. Mr Snell, a Partner, acknowledges that the difficulty arises from the generous nature of the VEA scheme and the onus of proof arrangements that apply. He concludes that it is difficult to offer a conclusive judgment on whether the review system would be more effective without the VRB in its current form.¹⁸

6.28 ESOs, however, voiced their strong opposition to the concept of merging the VRB with the AAT. ISPA categorically rejected the idea, although it did not provide the Committee with an explanation.¹⁹ The Committee, however, accepts the criticism provided by Mr McCombe, that combining the VRB and the ATT with a compulsory mediation process would create a more formal external appeal system and risk

16 Agenda Paper, *Armed Forces Federation—Review and Appeal*, Ex-Service Organisation Working Group (New Military Compensation Scheme), 26 July 2002, pp.2–3. The paper is attached to the submission by KCI Layers (No. 13).

17 Mr Isolani, Legal Adviser, AFFA, *Committee Hansard*, 25 September 2003, p.7

18 Mr Wallace, Sparke Helmore, *Committee Hansard*, 26 September 26 2003, p.29

19 Mr Brown, ISPA, *Committee Hansard*, 25 September 2003, p.30; Mr McCombe, VVFA, *Committee Hansard*, 25 September 2003, pp.39–40

increasing the amount of time to determine cases. Providing access to legal aid at this level would also, in his opinion, make the process ‘extremely expensive’.²⁰

6.29 As previously discussed, the principal reasons why ESOs reject both abolishing the VRB and merging VRB and AAT functions are twofold: ESOs hold the VRB in very high regard because it has over the years developed into a specialist veterans’ review body. ESOs also strongly defend their right to an appeals process characterised by two distinctive tiers of external merits review.

6.30 The Committee observes that the strongest argument against combining the VRB and AAT is presented by Professor Creyke of the Administrative Review Council. She argues that the benefit of a three-tier review system in a high-volume jurisdiction such as veterans’ appeals outweighs the alleged benefits of any proposals that would streamline or simplify the review process:

...the nature of high-volume review jurisdictions has always been accepted by the [ARC] as justification for having an intermediate review tier to filter out the less meritorious or the simple cases. Our view is...that the two-tier system is appropriate, for the reasons I have given—namely, that a filtration system which operates effectively can enable the Administrative Appeals Tribunal, as it is currently constituted, to perform a function as a high-level merits review body which is dealing with the more difficult and principled cases. It is our view that that would be the optimum way in which the system should operate.²¹

A legislative limitation on access to second tier review?

6.31 The Committee acknowledges that the ARC in its *Better Decisions* report developed a strong argument for introducing a legislative limitation on the circumstances in which second tier review may be sought. The grounds for seeking permission for second tier review were specifically designed to be incorporated within a new Administrative Review Tribunal (ART) which the Council also recommended.

6.32 Towards the end of its submission, the ARC reiterates the argument that ‘consideration might be given to imposing a legislative limitation on the circumstances in which...review [by the AAT] may be sought, focusing on matters involving issues of general principle and cases involving manifest errors’.²² However, the Committee notes that the Council chose not to raise this issue at the public hearing in the context of identifying strategies to encourage the early settlement of appeals.

6.33 The Committee does not at this point in time support the introduction of such a legislative limitation, as recommended by the ARC. Four issues are paramount in the Committee’s decision. First, apart from a passing reference by the Regular

20 Mr McCombe, VVFA, *Committee Hansard*, 25 September 2003, p.41

21 Professor Creyke, ARC, *Committee Hansard*, 26 September 2003, p.54

22 ARC, Submission no. 11, p.17

Defence Force Welfare Association (RDFWA) to how a ‘by leave’ provision would reduce ‘really frivolous appeals’ to the AAT,²³ such a legislative restriction does not appear to have the collective support of the ESO community and, like the proposal to remove the VRB review tier, would be opposed. The unrestricted right to second tier review is viewed by the Committee as a political given within the veterans’ appeal jurisdiction, and is likely to remain so for the foreseeable future.

6.34 Second, while the Committee recognises that ARC recommendations were partially designed to introduce a strong incentive for veterans to present their best information at the earliest stages of the review process, it believes that other measures raised during this inquiry that have the support of the veterans’ community could achieve the same outcome (some of these measures are canvassed in the next section).

6.35 In other words, the Committee supports a cautious and incremental approach to reform if this can avoid the need to pursue more difficult systemic reform. It believes that every opportunity should be provided to test the effectiveness of administrative reform before heading down the path of far-reaching structural reform.

6.36 Third, a number of conceptual and practical issues raised by critics of proposals to limit the right of access to second tier review have not yet been resolved, and could possibly be detrimental to the review system. One example will suffice. The Senate Legal and Constitutional Committee’s report on the proposed ART legislation found that use of the word ‘manifest’ in both the ARC and government proposal was tautological. If all parties involved in the review process agreed that there has been a mistake, this suggests that the mistake is in fact ‘manifest’. The report recommended that the word be deleted from the proposed legislation because it is unnecessary.²⁴

6.37 Finally, the case articulated by the ARC in *Better Decisions* was overshadowed by the Government’s subsequent attempt to overhaul the Commonwealth merits review system. As discussed in chapter 4, the ART proposal included a ‘by leave’ provision which would have limited the grounds upon which an application for second tier review could be made. However, the government’s ‘by leave’ provisions were widely considered to be more restrictive than the ARC’s proposal.

6.38 The Committee concludes that resistance to the proposed ART reforms will, for the foreseeable future, make it difficult for government to resurrect the ARC’s proposal and convince the ESO community of its merits in the veterans’ appeals jurisdiction. Taking all these circumstances into account, the Committee believes that it is not appropriate to lend support to a proposal first articulated under different circumstances nearly a decade ago and one that probably requires further examination.

23 Mr Adams, RDFWA, *Committee Hansard*, 26 September 2003, p.68

24 Senate Legal and Constitutional Legislation Committee, *Inquiry into the Provisions of the Administrative Review Tribunal Bill 2000 and the Provisions of the Administrative Review Tribunal (Consequential and Transitional Provisions) Bill 2000*, February 2001, p.49

Administrative reform

6.39 Not all stakeholders support structural reform. As already indicated, a number of ESOs are critical of proposals to reduce the number of review tiers because this in effect would limit the veterans' right to appeal adverse decisions of the Repatriation Commission. The ARC is of the view that the current review structure operates effectively because the VRB and AAT provide distinctive yet complementary layers of review which are underpinned by two core principles: *de novo* review and application of the 'correct or preferable' standard against which the facts, law and policy is judged.²⁵

6.40 However, a number of proposals for administrative reform were raised during the inquiry, not all of which received unanimous stakeholder support. They are mostly designed to facilitate early settlement of appeals at the primary/internal review and VRB stages, enhance the quality of decision-making and dispense with less meritorious claims at the first tier of external review. These proposals fall neatly into two categories: incentives to encourage the production of all relevant evidence, and improvements to the internal operation of the VRB.

Introduce incentives to encourage early settlement of claims

6.41 The Committee notes that the issue of incentives to encourage settlement of appeals at the earliest possible stage was a key recommendation of ANAO Report No. 29 of 2000–01. The report suggested that DVA develop strategies that 'could include making available appropriate allowances or incentives which encourage applicants to obtain adequate medical or other evidence as early as possible in the claims and/or review process'.²⁶

6.42 Significantly, both DVA and the VRB agreed with this recommendation. In its follow-up audit No. 58 of 2002–03, the ANAO found that DVA had partially implemented this recommendation but had not articulated any formal strategies to encourage early settlement of appeals. In particular, the report found that DVA had initiated a number of new programs and revised a number of existing programs to improve the quality of investigation and reasons for decision at the primary level. For example, during 2001 DVA had introduced the new 'Reasons for Decisions Initiative' to improve standardised letters informing veterans of the outcomes of primary decisions, and the 'Quality Decisions Every Time' (QDET) training program to improve DVA's advice to the veteran with regard to the disability compensation primary claim decision.²⁷

25 These are described more fully at paragraphs 3.2 and 3.3.

26 Australian National Audit Office, *Review of Veterans' Appeals Against Disability Compensation Entitlement Decisions*, Audit Report No. 29 2000–01, p.21

27 Australian National Audit Office, *Veterans' Appeals Against Disability Compensation Decisions: Follow-up Audit*, Audit Report No. 58 2002–03, p.30

6.43 The Committee endorses the ANAO recommendation and encourages DVA and the VRB to further pursue reforms already undertaken, and provide a mechanism to assess the effectiveness of these reforms and to report on their outcomes. In line with ANAO findings, the Committee also encourages DVA, in consultation with the VRB, to develop formal strategies to facilitate the early settlement of appeals.

6.44 Consistent with the approach adopted by the ANAO, a variety of incentives to encourage the early settlement of claims were raised in submissions and at public hearings. However, unlike the narrow focus of ANAO reports, most of these incentives go beyond the management of the internal review process by DVA and address a wider range of issues that impact on different stages of the review process. In this regard, four incentives are noteworthy:

- increase the level of assistance for the training of ESO advocates;
- introduce legal representation and access to legal aid at lower levels of the review hierarchy, including at the primary/internal review and VRB stages;
- provide retrospective payment of benefits to the date when relevant information was obtained; and
- increase the amounts available for the provision of medical evidence prior to the VRB.

6.45 To begin with, nearly all submissions support improving the level of assistance for training ESO representatives. This acknowledges the key role that ESOs play in the review process, especially at the early stages. Further assistance to ESOs, as the Legal Aid Commission of NSW points out, should ensure ‘a better standard of application up front...a better prepared application and...a better assisted applicant to advocate their decision up front’.²⁸

6.46 Another important issue concerns the extent to which the availability of legal aid at the AAT acts as a disincentive for applicants to present their best case and all relevant evidence earlier in the review process. As noted in chapter 5, there is a widely held view that the availability of legal aid and up to \$2,500 of disbursements for medical examinations at the AAT provides, in the words of the ARC, ‘important incentives for claimants to delay of production of new evidence until the highest and most expensive level of review’.²⁹ This contrasts with the \$467 that is currently available from DVA for each medical condition claimed at the VRB. This view is supported by findings of the Australian Law Reform Commission’s (ALRC) review of the federal civil justice system. It is worth quoting the review at some length:

Legal aid in veterans’ matters is targeted to representation at a hearing, rather than to interlocutory stages of the reconsideration, primary review or AAT process. Targeting aid in this manner can discourage parties from

28 Mr Grant, Legal Aid Commission of NSW, *Committee Hansard*, 25 September 2003, p.14

29 ARC, submission no. 11, p.16

seriously considering resolution of the matter until legal aid is available. The early dispute resolution events in veterans' matters can thus be rendered less effective and matters proceed unnecessarily to the AAT.³⁰

6.47 To address this issue, a number of stakeholders, particularly representatives of legal firms and legal aid commissions, argued that provision of legal assistance earlier in the review process for claims under both the VEA and MCRS would help facilitate the early settlement of appeals. Legal assistance could be in the form of costs (for representation before a tribunal hearing) and disbursements (for preliminary conferences and obtaining medical reports) as currently provided under the Commonwealth Guidelines. The Committee notes that this need not necessarily result in increased legalism or adversarial behaviour as accredited lawyers could be required to operate as 'friends of the court'—as is the practice elsewhere.

6.48 National Legal Aid provides arguably the clearest justification for providing more effective legal assistance to veterans at earlier levels of the review process:

The provision of legal advice and independent medical reports early in the decisions making process is likely to increase the chances of the decision maker at the first instance finding in the veterans' favour. Cases that are better prepared in the earlier stages of a decision making process are more likely to lead to the correct decision being made and are less likely to go to review...NLA suggests that the most useful expansion of services to veterans would be the provision of ongoing advice and assistance to veterans...³¹

6.49 However, opinions differ over when exactly legal aid should become available—at the VRB stage or right up front with the lodgment of a claim—and how it should best be utilised within the review system—for representation at a tribunal hearing or for obtaining important medical documents. The Legal Aid Commission of NSW argues that non-means tested legal aid should be available for VEA applicants following rejection of a primary claim to assist with the early resolution of disputes. It also argues that this measure by itself is not sufficient; it should form part of a package that includes payment of disbursements in line with evidentiary requirements and the facilitation of information.³²

6.50 Sparke Helmore solicitors also supports the provision of legal aid at earlier stages of the review process, but it does not develop an argument for introducing legal assistance at a particular stage of the process. Rather, it makes a general observation to

30 Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Discussion Paper 62, August 1999, p.215

31 National Legal Aid, Submission no. 6, p.3

32 Legal Aid Commission of NSW, Submission no. 8, p.4

the effect that the present arrangement for access to legal aid at the AAT is not optimal for discouraging appeals.³³

6.51 Mr Isolani, KCI Lawyers, observed that a high number of MCRS determinations are varied in the veterans' favour at the AAT stage due to the introduction of relevant medical evidence collated by private law firms acting on their behalf. This situation highlights the need for adequate funding for veterans to obtain legal representation that '...is at least on par with the representation that the Commonwealth can afford when defending their decisions at *both* the primary level and upon review to the AAT'.³⁴

6.52 Slater & Gordon is more forthright about the importance of independent legal advice being made available at the claims and internal review levels under the MCRS. It supports a process whereby capped legal costs are paid to legally represented applicants in return for complete disclosure when submitting a claim: 'In a nutshell, the way the system is now there is no incentive on any applicant to provide information to the initial claims officers in allowing them to make their initial determination'. The end result is that 'many matters that end up in the Administrative Appeals Tribunal...should never get there'.³⁵

6.53 Mr Richards informed the Committee that, as a member of the Commonwealth Compensation Liaison Committee,³⁶ he had drafted a 'Determination and Reviewable Decision Protocol' which recommends that amendments be made to the procedure for conducting determinations and reviewable decisions.³⁷ It is likely the Protocol will be implemented on a trial basis with Comcare. Apparently, the concept is modeled on the Victorian WorkCover impairment policy, which was first introduced under the Victorian WorkCover scheme. According to Mr Richards, the Protocol:

...will mean that if there is full and proper disclosure to the decision maker at the initial claim then very limited legal fees and disbursements will be recoverable and paid. I strongly believe that if the system is adopted and implemented it will dramatically reduce the number of Administrative Appeals Tribunal applicants that we have in the present system.³⁸

33 Mr Snell, Sparke Helmore, *Committee Hansard*, 26 September 2003, p.32

34 KCI Lawyers, Submission no. 13, p.8 (original emphasis)

35 Mr Richards, Slater & Gordon, *Committee Hansard*, 26 September 2003, p.62

36 The Commonwealth Compensation Liaison Committee was established by Comcare in June 2003 to discuss policy changes to improve the military compensation system. Membership includes senior legal representatives of Comcare, representatives from Telstra, Australian Post and APPLA, representatives from the current legal panel firms representing Comcare, and an officer from DVA's MCRS.

37 Further information provided to the Committee, 26 September 2003

38 Mr Richards, Slater & Gordon, *Committee Hansard*, 26 September 2003, p.62

6.54 Slater & Gordon believes such a Protocol will improve the preparation of claims and reduce the number of primary and secondary decisions that are made on the basis of insufficient and poor quality evidence.³⁹ At a public hearing, Mr Richards also stated that legal representation should be extended to the VRB. The present VEA system, he maintained, results in a ‘fundamental denial of justice’ because the process affects the rights of a person who has been injured as a worker ‘without allowing legal representation’.⁴⁰

6.55 Not all stakeholders, however, share the views of the legal representatives. The ARC has adopted a pragmatic position on the issue of when legal aid should become available in the review process. On the one hand, it argues that there should be no prohibition against lawyers from advising or representing parties in review tribunal proceedings to the extent that it is permitted in the relevant tribunal. It is also of the view that lawyers ‘should be discouraged from importing unnecessary legalism into the tribunal process’.⁴¹ On the other hand, Professor Creyke told the Committee that because the veterans’ system has a very long history, ‘there are interests which constrain those who would introduce more legalism into the system’. Professor Creyke offered her personal view that ‘there would be little prospect of introducing more legal assistance at, for example, the intermediate-tier review level’.⁴²

6.56 The ARC’s position on legal aid is summarised in its submission. It holds the view that there is more to gain in extending assistance for training of ESO personnel and for ESO representation at hearings ‘than in directing increased levels of aid at legal representation at lower levels in the review hierarchy’.⁴³

6.57 Professor Creyke’s view that introducing legal assistance at earlier stages of the review process would not have the support of the veterans’ community was more or less confirmed by evidence presented to the Committee by representatives of the VVFA, the RSL and Legacy. Mr McKenzie, RSL, was adamant in expressing his opposition to introducing legal representation at lower levels of the review process: ‘We must not have any lawyers coming near the system until you get to the AAT. They really are not required in the system until you get to the AAT’.⁴⁴ Mr Wills agreed by saying that Legacy has consistently opposed introducing lawyers into the VRB.⁴⁵

6.58 Interestingly, the RDFWA has adopted a more flexible position on the question of legal aid. National President, Mr Harold Adams, argued that while legal

39 Slater & Gordon, Submission no. 2, p.4

40 Mr Richards, Slater & Gordon, *Committee Hansard*, 26 September 2003, p.63

41 ARC, Submission no. 11, p.18

42 Professor Creyke, ARC, *Committee Hansard*, 26 September 2003, p.55

43 ARC, submission no. 11, p.22

44 Mr McKenzie, RSL, *Committee Hansard*, 26 September 2003, p.80

45 Mr Wills, Legacy, *Committee Hansard*, 26 September 2003, p.81

representatives should not adopt the role of the advocate, ‘there should be somebody...to bounce an opinion off so that you can tighten up that initial application’.⁴⁶ Consistent with this approach, the RDFWA suggested that legal assistance with the preparation of claims could come in the form of a Veteran’s Affairs Shopfront where:

...legal officers are provided on a part time...basis to examine initial cases prepared by ESO advocates and claimants. After review by a qualified legal practitioner, these legal experts can then advise on the efficacy of the claim, its presentation and its chance of success. This would lead to improved primary determination and a reduction in appeals.⁴⁷

6.59 Other practical measures to enhance the production of evidence earlier in the review process were suggested by different stakeholders. For example, the Legal Aid Commission of NSW argued that an appropriate disincentive for matters to proceed to the AAT would be the introduction, for VEA matters, of cost orders one way to the Repatriation Commission, as currently exists for MCRS matters.⁴⁸ According to Mr Grant, this might help ‘focus the mind earlier’ in the review process and be an aid to efficient decision making.⁴⁹ Cost orders would apply in circumstances where a claim had not been appropriately dealt with early in the review process because all relevant information was not made available. It appears that ESOs would broadly support a move to award costs against the Repatriation Commission, but they would strongly oppose a system where costs could be awarded against both parties.⁵⁰

6.60 The ARC also suggested that retrospective payment of benefits to the date when relevant information was obtained would be one small positive incentive. And the ARC reminded the Committee of the existing incentive of payment of costs for the production of medical evidence before the VRB under the VEA.⁵¹

6.61 The Committee recognises the ex-service community’s resistance to the introduction of legal assistance at the VRB, and finds that the current arrangements for legal aid should remain in place. However, the Committee would like to see the issue of legal aid in the veterans’ jurisdiction kept under review. It believes that non adversarial and non legalistic models of legal representation in the VRB may be worth considering in the future.

46 Mr Admas, RDFWA, *Committee Hansard*, 26 September 2003, p.80

47 RDFWA, Submission no. 5, p.1

48 Legal Aid Commission of NSW, Submission no. 8, 2003, p.4

49 Mr Grant, Legal Aid Commission of NSW, *Committee Hansard*, 25 September 2003, p.16

50 Mr McCombe, VVFA, *Committee Hansard*, 25 September 2003, p.42

51 Professor Creyke, ARC, *Committee Hansard*, 26 September 2003, pp.56–57. Provision is made in ss170A, B and C of the VEA, respectively, for payment of medical expenses, travelling expenses for obtaining medical evidence, and the advance of travelling expenses.

6.62 The Committee finds that the disbursements for medical evidence at the VRB stage are inadequate. However, in the event that the level of disbursements was increased, the Committee believes they should not be repeated for further appeals to the AAT. The Committee believes that augmentation earlier in the review process would encourage provision of better evidence, and the non availability of disbursements at the AAT would be a sound complementary initiative (except perhaps for a modest level of reimbursement in the event a decision was overturned).

Improve the internal operation of the VRB

6.63 The importance of retaining the VRB in the veteran's review system is emphasised by the ARC. However, the ARC drew the Committee's attention to some practical measures that would improve the quality of decision making at the VRB level. For example, the ARC is very impressed with the use of preliminary conference registrars within the AAT system and suggests that '...an equivalent system could be adopted with the Veterans' Review Board'. Approximately 80 to 85 per cent of cases that go the AAT are settled or conceded at the conference stage of the AAT process.

6.64 According to Professor Creyke, if a similar system were adopted within the VRB, '...many of the less meritorious cases might be removed or...alternatively, many of the cases which do not appear to be very meritorious when they are first presented, for example, before the board could be substantially improved...'.⁵²

6.65 Support for the introduction of a conciliation process at the VRB stage is also provided Mr Isolani. He outlines features of one particular conciliation process in his agenda paper for the VVFA.⁵³ The key point is that a preliminary conference should remain largely informal with both sides having an opportunity to present arguments orally. Evidence would be presented 'on the papers' without any witnesses being called to give *viva voce* evidence.⁵⁴

6.66 A difficulty surrounding the proposal to introduce a conciliation process into the VRB was raised briefly by DVA during a public hearing. Dr Johnston told the Committee that the possibility of introducing a conciliation process into the VRB had been floated by DVA in a discussion paper circulated to an ESO working group considering the appeals system under the proposed new MCRS.⁵⁵ Apparently, 'there was interest in that as a possibility'. However, DVA believes that an important obstacle remains. Bringing forward some of the AAT processes into the VRB—in effect, adding more weight to the VRB—would require placing a restriction on

52 Professor Creyke, ARC, *Committee Hansard*, 26 September 2003, p.56

53 Mr Isolani, Adviser, VVFA, *Committee Hansard*, 25 September 2003, p.5

54 KCI Lawyers, Submission no. 13, attachment A, p.3

55 DVA, Submission no. 10, pp.14–22

automatic access to the AAT, otherwise the process becomes too costly and time consuming.⁵⁶

6.67 As discussed earlier, and acknowledged by DVA, this option does not have the support of the ESO community. According to Dr Johnston, it is very hard to make new arrangements that are cost effective if key players are not willing to make concessions and trade between the external review tiers: ‘In effect, different organisations are quite happy to try and improve or strengthen each level but are very reluctant to trade between levels. That runs the risk of making the whole process more expensive...’⁵⁷

6.68 The Committee, however, does not accept this cautious view, noting that processes of this sort are already being employed within the VRB framework, and it believes that every attempt must be made to settle cases earlier in the review process—including at the VRB. The dramatic cost differential between the VRB and the AAT indicates that introducing a conciliation process in the VRB should be cost neutral to government.

Findings

- The Committee finds that removing the VRB tier altogether or collapsing the VRB and AAT tiers into one streamlined process would be premature at this point in time because these options do not have the political support of ESOs. It follows that the VRB should be retained as the first tier of external review, with the AAT continuing as the final body of merits review available to veterans or widows.
- The Committee supports a cautious and incremental approach to reform if this avoids the need to pursue more difficult systemic reform. It believes that every opportunity should be provided to test the effectiveness of administrative reform before heading down the path of far-reaching structural reform.
- The Committee believes that it is not appropriate to support a proposal, first articulated under different circumstances by the ARC nearly a decade ago, to introduce a legislative limitation on the circumstances in which second tier review may be sought. However, the Committee believes that such a proposal should be kept under review.
- The Committee recognises the ex-service community’s resistance to legal assistance being introduced at the VRB, and finds that the current arrangements for legal aid should remain in place. However, the Committee would like to see the issue of legal aid in the veterans’ jurisdiction kept under review. It believes that non adversarial models of legal representation in the VRB may be worth considering in the future.

56 Dr Johnstone, DVA, *Committee Hansard*, 26 September 2003, p.23

57 Dr Johnston, DVA, *Committee Hansard*, 26 September 2003, p.23

- The Committee finds that disbursements for medical evidence at the VRB stage are inadequate. However, in the event that the level of disbursements is increased, the Committee believes they should not be repeated at higher review levels. The Committee believes that reimbursements earlier in the review process should encourage provision of better evidence, and that the non availability of disbursements at the AAT would be a sound complementary initiative (except perhaps for a modest level of reimbursement in the event a decision is overturned).
- The Committee finds that every attempt must be made to settle cases earlier in the review process, particularly at the VRB, using conciliation and mediation processes similar to those used at the AAT. The Committee believes that the current practice of conference registrars in the AAT in ensuring quality assurance is working well. The dramatic cost differential between the VRB and the AAT indicates that the use of such processes at the VRB, together with an expansion of the current role of VRB Registrars, should be cost neutral to government.

Chapter 7

Which way forward?

Practical and political considerations

7.1 The purpose of this inquiry has been to assess the current three-tier review structure for veteran and military compensation cases and analyse options for reforming the review structure and improving the system's administration. The Committee notes that since the creation of the VRB in 1985, reform of the veterans' review system has focused on DVA's administration of the primary and internal review processes and VRB's management of the first external review tier.

7.2 In considering proposals to reform the structure of the veterans' appeal system, the Committee has been mindful of the broader objectives which underpin the Commonwealth merits review system. In particular, the Committee takes note of the assessment provided a decade ago by the then President of the AAT, Justice Dierdre O'Connor:

Review systems should provide the optimum means of recognising the rights of individuals in dealing with government, having regard particularly to the overall public interest in economical and efficient administration. Systems should be kept as simple as possible from the point of view of the individual.¹

7.3 Since the mid 1980s, there have been no less than six reviews of aspects of the veterans' appeals system by both the Auditor-General and the ARC. These reviews have taken place in the shadow of a complex review structure that has largely remained unchanged since recommendations of the Toose report were implemented in 1979. Except for a far-reaching proposal in the late 1990s to overhaul the Commonwealth's merits review tribunals, the structure of the veterans' review system has not been challenged.

7.4 One of the implications flowing from the assessment of reform options in this report is that radical proposals to restructure the veterans' review process do not have the support of the veterans' community and for this reason should not be pursued in the short to medium term. A number of options canvassed during the inquiry, such as abolishing the VRB and merging VRB and AAT appeal processes were widely criticised by various ESOs. Even proposals that create a perception that the VRB's current low cost, informal and non-legalistic procedures might be compromised, would in all likelihood be strongly opposed by the veterans' community.

1 The Hon Justice Deirdre F. O'Connor, 'Effective Administrative Review: An Analysis of Two-tier Review', *Australian Journal of Administrative Law*, Vol. 1, No. 1, November 1993, p.11

7.5 Many of the administrative complexities that such reform proposals entail, some of which were raised during the inquiry, have not yet been thoroughly examined. While the Committee can see both the advantages of a streamlined and simplified review system as well as the practical difficulties, it finds there is currently almost no support from ESOs to warrant recommending wholesale structural reform.

7.6 During public hearings the Committee witnessed a degree of uncertainty amongst some legal firms and ESOs about the extent to which the three-tier review structure was a major factor contributing to the high rate of appeals and the number of cases progressing to the final and most expensive AAT stage of review. While there was a perception that too many cases were filtering through to the AAT and that the number of review tiers was a contributing factor, there was little in the way of consistent and reliable data to enable the Committee to make a firm conclusion.

7.7 The Committees' analysis of figures provided by DVA relating to the review of decisions under the VEA and SRCA was fruitful. While DVA cautioned that its own figures were open to interpretation, the Committee nonetheless found that the figures show the review structure to be working effectively. In fact, they demonstrate that an overwhelming number of claims are settled prior to the AAT and that the VRB is operating as an effective filter. Under the VEA approximately only 1 in 30 claims progress to the AAT.

7.8 The Committee finds that the figures reveal a high overturn rate at the VRB and a significant number of cases being withdrawn prior to AAT hearings. This trend is most likely caused by the production of new medical evidence. This explains the high level of stakeholder support for strategies and incentives to encourage the production of evidence, and hence the settlement of appeals, at earlier levels in the review system, particularly at the VRB.

7.9 The Committee acknowledges that the introduction of legal aid at the final review tier (AAT) is regarded by the ARC, the ALRC and other stakeholders as a major factor that perpetuates a culture of appeal where claimants are likely to treat the VRB as a stepping stone to a higher level of review. Thus the Committee is keen to reconsider the issue of legal aid in the veterans' review process.

7.10 The Committee is of the view that two reform options in this area are worth considering. The first option involves the use of legal aid in circumstances where a strategic application of funds is crucial to the early resolution of a dispute.² This would occur, for example, if a case turned on a dispute concerning a medical condition and the issue could be resolved early by securing an independent medical report.

7.11 The Committee believes that in these circumstances, which occur frequently in the veterans' jurisdiction, it would be good administrative practice for the major

2 Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Discussion Paper 62, August 1999, p.215

parties—DVA, the VRB and the AAT—to devise a speedy and cost effective way to obtain the relevant reports, medical or otherwise, with the assistance of legal aid if it is required.³ This would most likely have the effect of significantly reducing both the high overturn rate at the VRB and the high number of cases withdrawn prior to AAT hearings.

7.12 The Committee further believes that the method and timing of introducing legal aid and medical disbursements into the review process should be subject to negotiation between all the major stakeholders.

7.13 The second option involves challenging a dominant mindset amongst a number of ESOs which automatically equates legal aid with a quasi-judicial and adversarial process, similar to that which operates at the AAT. The Committee is of the view that it would be possible, under a revised VRB model, for legally qualified advocates to assist with the preparation of VRB claims, as is currently the case, but participate in mediation and conciliation processes at the VRB as ‘friends of the court’—that is, speak on invitation only without any legal argument or adversarial input whatsoever. This would enable lawyers to inject their expertise and resources into earlier stages of the review process without the risk of importing unnecessary legalism into the VRB.

7.14 After weighing the arguments, the Committee is reluctant at this point in time to embrace either of these reform options. It therefore does *not* recommend the introduction of legal aid at the primary or VRB levels. The Committee believes the options have not yet been thoroughly investigated and that stakeholders, especially ESOs, remain unconvinced that the benefits of reform outweigh the potential risks.

7.15 Specifically, the Committee acknowledges the concern that introducing legal representation too early in the process risks undermining the widely acknowledged benefits that flow from the VRB’s current informal and non-legalistic review procedures. Furthermore, there has not been any analysis of the likely overall cost to the review system of introducing legal aid at early review stages. On the one hand, it is possible that early legal assistance would significantly reduce legal and operational costs by reducing the need for veterans to access the most expensive review tier. On the other hand, this view should be balanced by the likely substantial rise in administrative cost of the early review tiers due to the high volume of primary claims in the veterans’ jurisdiction.

7.16 Like the ARC, and as recommended in chapter 5, the Committee would prefer to see more resources directed towards training highly skilled ESO representatives to enable them to provide veterans with an ongoing professional advocacy service, particularly across rural and regional Australia. These measures would probably reduce the need for legal assistance to be introduced earlier in the review process. The

3 Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Discussion Paper 62, August 1999, p.215

Committee considers that in terms of encouraging settlement of appeals at the earliest possible stage, a substantial rise in the level of ESO funding would be a more efficient and effective way to allocate scarce resources than increasing the level of legal assistance.

7.17 In all likelihood, the incentive to access the review hierarchy arising from the current provision of legal aid can be satisfactorily addressed by introducing other incentives to settle appeals at the VRB stage, thus avoiding the need for veterans to exercise their right of appeal at the AAT. The Committee would like to see consideration given to the likely consequences of introducing alternative dispute resolution techniques at both the primary level and VRB review tier. There does not appear to be a solid reason why, for example, mediation and conciliation should not be utilised before the final and most expensive review tier.

7.18 The Committee, however, realises that mediation can be difficult in the veterans' jurisdiction. While there may be some capacity for mediation in relation to claims assessment, it is not relevant to claims for entitlement.

7.19 The Committee believes that consideration should also be given to the use of case managers to assist in dispute resolution prior to the VRB. Case managers, for example, could play a valuable role in assisting veterans prepare their case before a VRB hearing.

7.20 The Committee overall supports the principle of alternative dispute resolution within the current merits review system. To this end the Committee would like to see mediation and conciliation processes introduced as practical measures to settle conflicts before they escalate and parties become entrenched in dispute. The Committee believes that every opportunity should be provided to resolve disputes *before* cases proceed to hearing by a formal tribunal, whether it be the VRB or AAT.⁴ This could be achieved by introducing into the VRB a preliminary conference registrar and support staff to perform a function similar to that which currently operates at the conference stage of the AAT process.⁵

Fostering a culture of reform

7.21 It is important to return briefly to the issue of the government's proposal for a new Administrative Review Tribunal (ART) to focus attention on the pressing question of the prospects of reform of the veterans' review system. An important lesson of the ART proposal is captured by Professor Creyke's assessment of its likely impact on Australia's administrative tribunal system. Writing immediately before the demise of the ART bills in the Senate, Professor Creyke cautioned that any attempt to bring the VRB under the umbrella of the ART in the same way as the other specialist

4 John Handley, 'Internal Review and Alternative Dispute Resolution: The Hidden Face of Administrative Law—II', *Canberra Bulletin of Public Administration*, no. 79, 1996, pp.87–91

5 Professor Creyke, ARC, *Committee Hansard*, 26 September 2003, p.56

review tribunals ‘would require considerable effort to educate the veterans’ community of the advantages of the move’.⁶

7.22 Later in the same article, Professor Creyke suggests abandoning the idea of a single review structure comprising all appeal tribunals, principally on the basis of the veterans’ unwillingness to participate in any integrated structure. This unwillingness was reflected in the government’s decision not to include the VRB as part of the ART, following intense lobbying by the veterans’ community. The article concludes that ‘the cultural diversity amongst the established specialist tribunals is too great for the attempt to impose uniformity’.⁷

7.23 This assessment highlights the strong cultural barrier within the veterans’ community that stands between it and any future structural reform of the review process. In fact, during a public hearing, Professor Creyke touched very briefly on the importance of cultural change as a precondition for bringing about administrative reform within the VRB. After providing the Committee with a range of constructive suggestions for improving the review system, Professor Creyke offered the following assessment:

As I have said, the principal avenue, it seems to me, to improve the evidence gathering [at the VRB stage] would be a change of culture. That can only be done by improving the system at the earlier levels...in particular at the Veterans’ Review Board level.⁸

7.24 In light of this assessment, the Committee is concerned about the tendency for some ESOs to reject reform proposals outright without even conducting an assessment of their strengths and weaknesses. ESOs sometimes appear to offer a blanket rejection of reforms if they are viewed as threatening the appeal rights that veterans have been exercising for over half a century. The Committee believes that this perpetuates a cultural barrier to reform caused by a resistance to change that is understandable yet not always justified.

7.25 The Committee caught a glimpse of this cultural barrier in evidence provided by Mr Isolani in relation to his involvement, as legal adviser to AFFA, in the ESO working group to consider the appeals structure for the new military compensation scheme. According to Mr Isolani, the paper that he prepared on behalf of AFFA ‘was tabled, it was discussed for about 15 minutes and then it was quietly put to one side and we got on with the real business’.⁹

6 Robyn Creyke, ‘Tribunals: Divergence and Loss’, *Federal Law Review*, vol. 29, no. 3, 2001, p.421

7 Robyn Creyke, ‘Tribunals: Divergence and Loss’, *Federal Law Review*, vol. 29, no. 3, 2001, p.422

8 Robyn Creyke, ARC, *Committee Hansard*, 26 September 2003, p.59

9 Mr Isolani, Adviser, AFFA, *Committee Hansard*, 25 September 2003, p.7

7.26 Underlying what appears to have been a polite dismissal of the paper's main thrust is, as previously discussed, a prevailing mindset amongst ESOs about the role of lawyers in the review process. As Mr Isolani put it:

As part of the ESO working Group, I was largely condemned for trying to infect the VRB with lawyers, as I think one of the representatives said. I think he thought that lawyers should be buried 50 feet underground...So there was a prevailing mentality about lawyers. It is just about working with ESOs, not excluding them, as opposed to their mentality of excluding lawyers.¹⁰

7.27 The Committee acknowledges that the veterans' community cannot be held solely responsible for causing and perpetuating this cultural barrier to reform. The Committee accepts that it is as much a product of the complexity of the veterans' jurisdiction, the number of players involved in the process, the interests at stake, and the history of reform, all of which suggest that certain preconditions for reform must not go unnoticed. In particular, change will most likely emerge only after long periods of consultation in which mutual understanding and trust is forged between the major stakeholders.

7.28 The Secretary of DVA, Dr Johnston, provided a cautiously optimistic assessment of the prospect of reform. He stressed that time, patience and understanding were key ingredients for reform agendas to receive the support of stakeholders. After observing the diverse range of views in the submissions from the veteran and professional communities, he stated:

It is our experience from our dialogue with the veteran community that, over time, as we together share a more evidence based consideration of issues we do move forward. I think we would be optimistic that, over time, we will make some further improvements... .

Until there is a wider understanding of what [the] choices might be and, as I say, until there is a bit more confidence about the balancing of those choices, it will be difficult to make change.¹¹

7.29 The Committee finds that ESOs on the whole are suspicious of proposals they perceive, rightly or wrongly, are a threat to their long-standing entitlements and appeal rights. However, it appreciates that not all ESOs are resistant to reform. With regard to the proposed new Military Rehabilitation and Compensation Scheme, there is overwhelming ESO support for streamlining VEA and MCERS review processes, providing all veterans and ADF personnel with access to the VRB and the same legal aid entitlements, and for *all* appeals before the AAT to be heard by Veterans' Division, unlike the current arrangement where MCERS appeals are heard by the AAT's Compensation Division. The widely held view is that a uniform and

10 Mr Isolani, Adviser, AFFA, *Committee Hansard*, 25 September 2003, pp.6-7

11 Dr Johnston, DVA, *Committee Hansard*, 26 September 2003, p.21

streamlined review system will make the process of claiming compensation and rehabilitation benefits easier and more user-friendly, and reduce the anomalies and confusion that currently surround the review process.¹²

7.30 This is a good example of ESOs identifying a major weakness and supporting change to provide for a uniform appeals process for veterans and all ADF personnel. It was pointed out in much of the evidence that the MCRS does not provide a fair and reasonable reconsideration process because of the significant legal resources at the Commonwealth's disposal.

7.31 Furthermore, the RSL argued that the long standing policy distinction between qualifying service and peacetime service should no longer be used as the justification to maintain different review streams under the VEA and MCRS.¹³ The Committee understands the importance of overseas service, whether it be warlike or non warlike, and that it is recognised through a higher level of benefits. Yet whether that policy distinction continues to be relevant in the review process is doubtful.

7.32 On a positive note, the Committee concludes that ESOs are serious about reducing the culture of appeal and hence the need for veterans to exercise their appeal rights—'getting it right the first time' was a motto expressed on numerous occasions during the inquiry. The Committee notes that ESOs prefer to work towards this goal from within the existing review hierarchy by focusing on improvements to the system's administration and practical incentives for the early settlement of claims.

7.33 The Committee considers that reforms aimed at bringing about cultural change in this jurisdiction should harness the support among ESOs for administrative reforms and measures that promote early settlement of claims. The Committee believes that progress on these fronts will improve the likelihood of not only reducing any culture of appeal but also the wider prospects for creating a culture of reform among the key stakeholders in the system.

Findings

- The Committee finds that a total restructure of the review process at this stage is not possible because it does not have the political support of ESOs at this time. The Committee, however, believes that structural reform is essential to overcome weaknesses that have been identified in this report, and that reform can best be achieved incrementally with the support of all leading stakeholders.
- The Committee believes that there are worthy reforms which could be initiated to give effect to the strong criticisms of the review process that have been raised within the veteran's jurisdiction over many years. Moreover, the Committee would like to see priority given to incentives to assist with the early provision of information and hence the earliest possible settlement of appeal cases. The

12 ISPA, Submission no. 3, p.2

13 Mr McKenzie, RSL, *Committee Hansard*, 26 September 2003, p.75

Committee would also like to see an increased use of VRB Registrars to ensure that applications are not deficient with regard to all necessary supporting material, including medical evidence.

- For all of the reasons considered in this report, the Committee finds that the best way to approach reform of the veterans' review system is to support incremental reforms rather than impose a major reform agenda onto a system that, in the Committee's view, performs effectively. Specifically, the Committee would like to see a modified review process trialled in one State over a two year period to test the effectiveness of a number of modest changes to the VRB stage of the review process.

Recommendation 4

7.34 The Committee recommends that a two year trial be initiated in one State with the agreement of the veterans' organisations in that State for a variation to the existing review process. That new process should include:

- **the introduction into the VRB of pre-hearing mediation and conciliation processes as currently employed in the AAT including the presence of the claimant, the advocate and the DVA;**
- **an increased use of VRB Registrars to ensure that applications are not deficient with regard to all necessary supporting material, including medical evidence;**
- **enhancement of medical disbursements prior to the VRB. The disbursements are to be equivalent in value to those currently available at the AAT, but once they are taken they are not to be made available a second time should there be a further appeal to the AAT; and**
- **the same legal aid provisions that exist under the current review model.**

7.35 The Committee also recommends that DVA undertake a review of the trial at the conclusion of the two year period. The review should assess the outcomes of the trial against a set of performance indicators to determine whether there is scope either to extend the trial period or introduce the revised VRB process in other States and on a permanent basis. The review and any decision to introduce a revised process should proceed in consultation with all major stakeholders.

**Senator Michael Forshaw
Chair**

Appendix 1

List of Submissions

1. Returned and Services League of Australia
2. Slater & Gordon
3. Injured Service Persons Association National Inc
4. Legacy Australia
- 4a. Legacy Australia
5. Regular Defence Force Welfare Association Inc
6. National Legal Aid Secretariat
7. Veterans' Review Board
8. Legal Aid Commission of NSW
9. Sparke Helmore Solicitors
10. Department of Veterans' Affairs
11. Administrative Review Council
12. Vietnam Veterans' Federation of Australia
13. KCI Lawyers
14. Attorney-General's Department

Appendix 2

Public Hearings

Thursday, 25 September 2003—Sydney

KCI Lawyers

Mr Gregory Isolani, Partner (Legal Adviser, Armed Forces Federation of Australia)

Legal Aid Commission of New South Wales

Mr Bill Grant, Chief Executive Officer

Ms Jodie Buchanan, Senior Advocate, Veterans Advocacy Service

Injured Service Persons Association Inc

Mr Raymond Brown, National President

Vietnam Veterans Federation of Australia

Mr Timothy McCombe, President

Wednesday, 26 September 2003—Canberra

Department of Veterans' Affairs

Dr Neil Johnston, Secretary

Mr Mark Johnson, Branch Head, Disability Compensation

Mr William Maxwell, Division Head, Compensation and Support

Mr Paul Ontong, Director, Disability Compensation, Military Compensation and Rehabilitation Service

Sparke Helmore Solicitors

Mr Michael Snell, Partner

Mr John Wallace, Special Counsel

Department of Defence

Mr Mal Pearce, Director-General, Military Compensation

Ms Anne Miller, Director, Military Compensation

Attorney-General's Department

Ms Philippa Lynch, First Assistant Secretary, Family Law and Legal Assistance Division

Administrative Review Council

Ms Margaret Harrison-Smith, Executive Director

Professor Robin Creyke, Member

Slater and Gordon

Mr David Richards, Partner

Regular Defence Force Welfare Association Inc

Commodore (ret) Harold Adams, National President

Returned and Services League of Australia

Mr Kenneth McKenzie, Immediate Past Chairman, National Veterans' Affairs Committee

Legacy Australia

Mr Ian Wills, Chairman, National Pensions Committee