



Australian Government
Department of Veterans' Affairs
CHIEF OPERATING OFFICER

Mr David Sullivan
Committee Secretary
Foreign Affairs, Defence and Trade Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Sullivan

Enclosed is a submission from the Department of Veterans' Affairs to the Foreign Affairs, Defence and Trade Legislation Committee inquiry into Schedule 2 of the Veterans' Affairs Legislation Amendment (2015 Budget Measures) Bill 2015.

If you wish to discuss the submission please contact Neil Bayles of the Department of Veterans' Affairs on (02) 6225 4572.

Yours sincerely

Shane Carmody
Chief Operating Officer

14 September 2015

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Senate Standing Committee on Foreign Affairs, Defence and Trade – Inquiry into Schedule 2 of the Veterans' Affairs Legislation Amendment (2015 Budget Measures) Bill 2015

Department of Veterans' Affairs Submission

1. Introduction

Schedule 2 of the Veterans' Affairs Legislation Amendment (2015 Budget Measures) Bill 2015 amends the *Military Rehabilitation and Compensation Act 2004* (MRCA) to give effect to initiatives that form part of the Government response to the Review of Military Compensation Arrangements (the Review).

The Bill is the result of extensive consultation with the ex-service community, both during the review process and during the development of the single appeal pathway process. There is strong support in the ex-service community for the move to a single appeal pathway.

2. Review of Military Compensation Arrangements

The *Military Rehabilitation and Compensation Act 2004* (MRCA) brought together rehabilitation and compensation provisions for all members of the Australian Defence Force (ADF), including cadets, cadet instructors and members of the Reserve Forces, for injuries/diseases or deaths resulting from all types of service post 1 July 2004. When introduced, the MRCA adopted the most beneficial features from the *Veterans' Entitlements Act 1986* (VEA) and the *Safety, Rehabilitation and Compensation Act 1988* (SRCA). Unlike the VEA and the SRCA which provide whole of life compensation and health care, the MRCA focuses on whole person rehabilitation in addition to the provision of compensation and health services.

In 2007 the former government committed to review the operation of the MRCA and in 2009 the Review of Military Compensation Arrangements (the Review) began. It had broad terms of reference to examine not only the MRCA but also supporting policies and the performance of the Departments of Veterans' Affairs and Defence in administering the Act. It also examined specific issues raised by stakeholders about transition from the SRCA and the VEA to the MRCA, and interaction between the VEA and SRCA. The Review received 68 submissions, 52 of which raised matters that were within the scope of the Review.

The Review consulted extensively over 18 months with serving and former members of the ADF, their families, Ex-Service Organisations (ESOs) and members of the public. This broad consultation also included holding public meetings and visiting ADF bases in each state and territory capital city as well as Townsville. The Review Steering Committee met frequently during the course of the Review. Mr Frank Benfield and Mr Ken Kipping AM, members of the then Prime Ministerial Advisory Council on Ex-service matters (PMAC), attended most Steering Committee meetings.

The Steering Committee and the Review Secretariat met with a subcommittee nominated by the Ex-Service Organisation Round Table (ESORT)¹ on several occasions. This subcommittee comprised Mr John Hodges of the Returned & Services League of Australia (RSL), Mr Michael Quinn of the Australian Peacekeeper and Peacemaker Veterans Association, the late Mr Tim McCombe OAM of the Vietnam Veterans Federation of Australia, and Mr Ian Wills of Legacy.

In addition to the formal consultation undertaken as part of the Review, the Military Rehabilitation and Compensation Commission (MRCC) members also sought feedback on issues being considered under the Review during their regular attendance at ex-service meetings and other forums.

The Review commenced on 8 April 2009 and its report was presented to the then Minister for Veterans' Affairs on 25 February 2011. The report concluded that the objectives of the MRCA are sound. It also confirmed that the unique nature of military service justified rehabilitation and compensation arrangements specific to the needs of the military. However, not unexpectedly given the relative complexity and period of operation of the MRCA (five years before the start of the Review), the Review found opportunities for improvements. It made 108 recommendations (eight of which were four pairs of recommendations with alternate options) ranging from retaining the status quo, support for current initiatives, clarification of policy, further work and monitoring, to legislative change.

The then Minister publicly released the report on 18 March 2011 and invited feedback up to 30 June 2011. There was substantial consultation with the ex-service organisations (ESOs) on the Report between March and August 2011 to inform Government consideration of the recommendations.

The then Government responded to the report in the 2012-13 Budget. It decided to implement 96 of the 108 recommendations, accepting 94 recommendations, either in full or with modification/enhancement, and replacing two recommendations with favourable outcomes. In addition, the Government addressed an anomaly that was identified from an observation in the report, but that was not addressed with a recommendation.

¹ The aim of ESORT is to address issues of strategic importance to the ex-service and defence communities and assist in setting directions for the medium to long term. This includes acting as the main forum for dialogue between the MRCC, Repatriation Commission, Department of Veterans' Affairs and the leadership of the ESO and Defence communities.

3. Recommendations relating to the Single Appeal Pathway

Chapter 17 of the MRCA Review considered issues involving the reconsideration and review process for claims under the MRCA. The review made three recommendations relating to the single appeal pathway - 17.1, 17.2 and 17.3:

Recommendation 17.1

The MRCA determining system be refined to a single appeal path to the VRB and then the AAT, as a means of a more timely review that is less complex and less costly.

Government's Response

The Government accepts this recommendation in principle but defers its response (along with a response to Recommendation 17.2) pending the outcome of consultation with stakeholders and full consideration of the detail and implications of this complex change. The planned implementation date is 1 July 2014, subject to consultation with stakeholders, further decision by Government in the 2014 Budget, and legislative change.

Recommendation 17.2

Internal reconsideration by the MRCC be the first step in the review process, and the process for section 31 reviews under the Veterans' Entitlement Act 1986 (VEA) be adopted, to help ensure the quality of decisions that are considered by the VRB and reduce VRB workloads and costs.

Government's Response

The Government accepts this recommendation in principle but defers its response (along with its response to Recommendation 17.1) pending the outcome of consultation with stakeholders, consideration of resource and other implications and a further decision in the 2014 Budget.

Recommendation 17.3

There be access to a case conference process by the VRB so that, wherever possible, the key questions and relevant evidence are established as early as possible and the hearings can proceed without any unnecessary delay.

Government's Response

The Government accepts this recommendation. Case conferencing is part of the Alternative Dispute Resolution (ADR) process, increasingly used in the broader legal community. The VRB issued a General Practice Direction (GPD) in January 2011 allowing the VRB to refer a case to an ADR process, including conferencing or neutral evaluation.

4. Issues raised by the MRCA Review

The Review Steering Committee examined the issues around the parallel pathways raised by submissions to the Review. The submissions raised the significant differences in approach to legal aid and the award of costs as one of the main reasons that ESOs were seeking a revision to a single path. In addition, the submissions outlined the confusion that arises from the different time limits applying for lodgement of applications at the first tier, and for subsequent actions within each path. The current pathway is outlined in Section 5.

The Committee believed that a review by the MRCC should be the first step in the review process, and should be carried out in the same way that a section 31 review² is carried out for all appeals to the VRB under the VEA. The Committee believed this would help ensure the quality of decision that are considered by the VRB and reduce VRB workload and costs.

The main suggestions from the submissions to the Review were that the appeals process be simplified by removing the reconsideration pathway and directing all appeals to the VRB. The Committee believed that a single pathway through the VRB would achieve more timely reviews at a lower cost. However, the Committee also believed that this should be combined with significant alterations to the current VRB processes, including the introduction of active case management and improvements to timeliness for MRCA reviews by the VRB.

The present dual pathway was a position reached by default through an impasse in 2003-2004 when agreement could not be reached with ex-service organisations on the preferred appeals pathway.

5. Schedule 2 of the Veterans' Affairs Legislation Amendment (2015 Budget Measures) Bill 2015

The amendments in Schedule 2 will create a single appeal path for the review of "original determinations" made under the MRCA. Under the existing arrangements, the two pathways for a reconsideration or review of an "original determination" under Chapter 8 of the MRCA are:

- internal reconsideration by the MRCC under Part 3; or
- review by the VRB under Part 4.

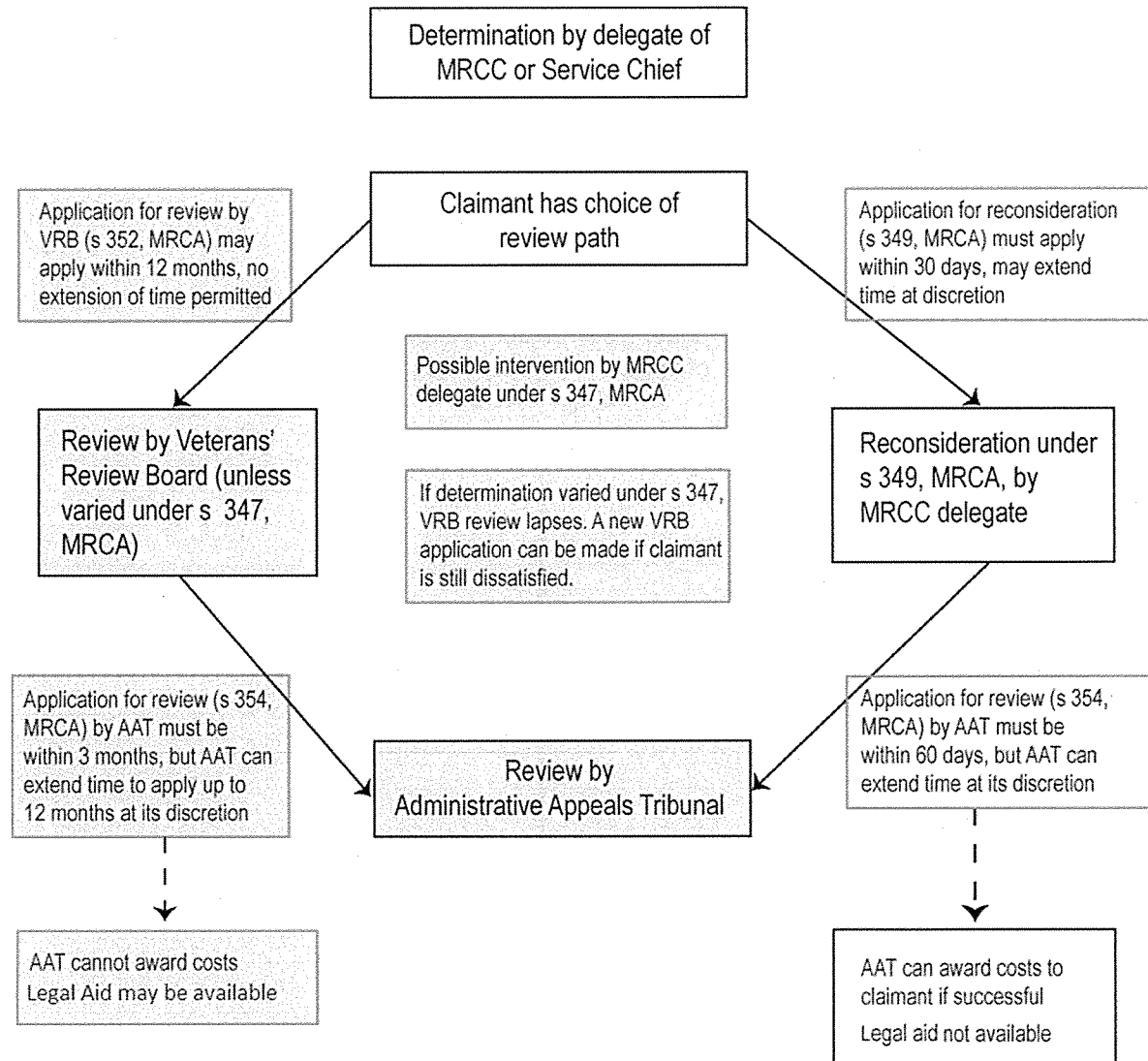
If the claimant is dissatisfied with the reconsideration by the MRCC or the review by the VRB, Part 5 provides for the claimant to apply to the Administrative Appeals Tribunal (AAT) for a review of what is referred to as a "reviewable determination".

There are complexities in the dual path that can make the choice less than straightforward and add a level of concern for the applicant. The choice a person makes, which is irrevocable, also impacts on their entitlement to legal aid or award of costs at the AAT. Under the current pathway through the VRB, veterans may be able to access legal aid, but legal costs are not able to be awarded at the next tier of review to the AAT. Those that choose reconsideration of the original decision by the MRCC at the first tier are unable to access legal aid but may be

² Section 31 of the VEA provides for a discretionary review mechanism of primary decisions of the Repatriation Commission, in certain circumstances, including where there is a VRB application extant.

awarded costs at the next tier of review to the AAT if unsuccessful. The current appeal pathway is described below.

Chart 1: Current Appeal Pathway



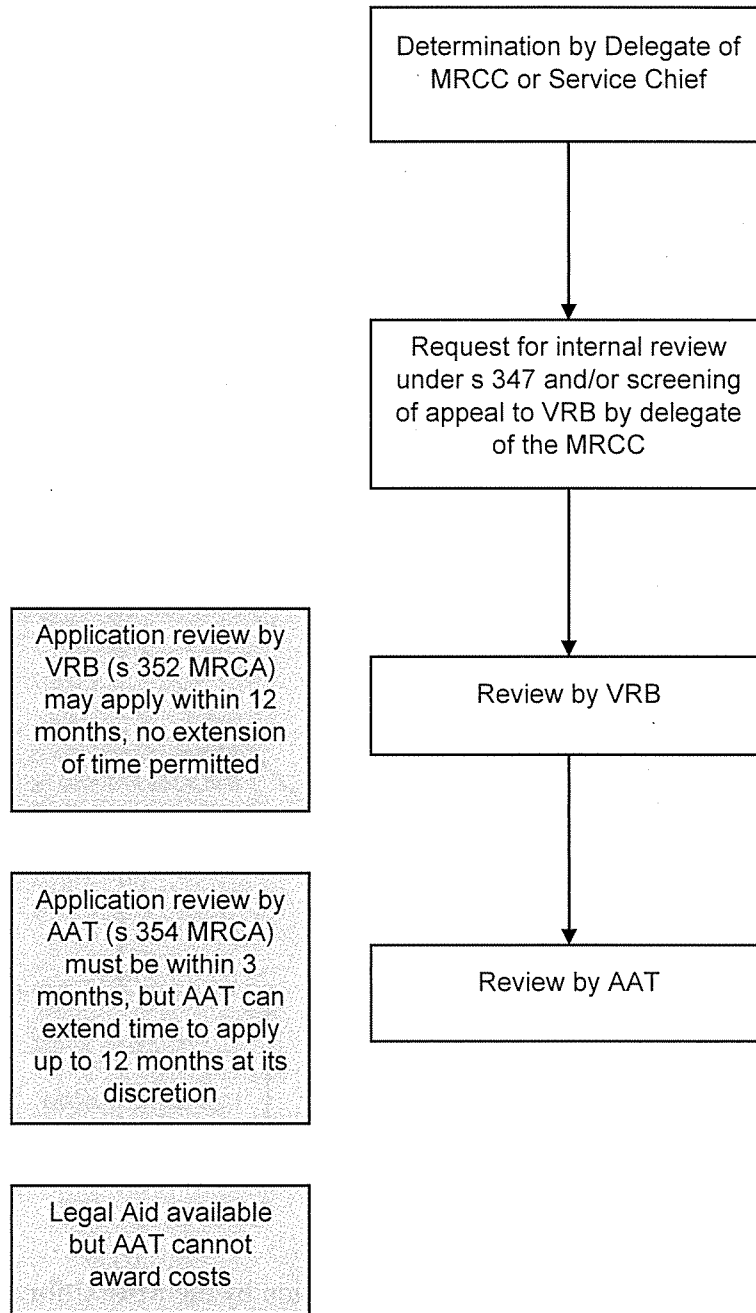
The single appeal path will remove formal internal reconsideration by the MRCC for claimants and enable a claimant to appeal an original decision of the MRCC to the VRB with a second tier of external appeal to the AAT.

However, section 347 of the MRCA retains the option for review by the MRCC, similar to section 31 of the VEA. This section will be utilised to internally review all decisions that are appealed to the VRB prior to consideration by the VRB and the process is outlined in Section 6.

The amendments refine the current dual appeal path under the MRCA, to a single path of review. Clients who are dissatisfied with the primary decision as determined by MRCC will

be able to seek a review of that decision by the VRB, with the next right of appeal being to the AAT. The proposed appeal pathway is described below.

Chart 2: Proposed Single Appeal Pathway



6. Implementation of Recommendation 17.2 – internal review of decision

The appeal process under the VEA allows for an internal review under section 31, a VRB review, or both at the same time. The reason for this is tied to the way appeals under the VEA are structured and the date of effect for entitlement claims. The VEA does not legislate for claimants to request a review under section 31, only for the Repatriation Commission to conduct a review on its own motion. In practice, the Commission allows claimants to request

a review under section 31 and the Commission's section 31 delegates will respond to a request.

ESOs were keen to ensure that a power similar to section 31 was an intrinsic part of the single appeal pathway process. Section 347 of the MRCA already confers this power on the MRCC, and this section was deliberately retained unaltered under Schedule 2 of the Bill.

The MRCC has decided that all appeals to the VRB will undertake a "screening process", similar to that currently undertaken with section 31 reviews under the VEA, upon receipt of a VRB application. The review will involve an examination of the evidence on file, including any additional statements/arguments or evidence that may have been provided. The purpose of this process is to check that the primary decision was correct and, where new evidence is provided, whether a different decision can be made.

The MRCC review delegate will also have discretion to decide which appeals will benefit from a thorough investigation and which are best "screened" and passed on to the VRB for a hearing before the Board. The internal review process will be finalised before the appeal is processed by the VRB. If the delegate, after investigation of the evidence, decides that a different decision could be made, then this decision will replace the original decision.

This process will ensure that any cases that are appealed to the VRB are examined prior to the commencement of the VRB process and incorrect decisions are replaced with the correct decision. This will save the claimant from having to undertake the VRB process, if they are satisfied with the new decision.

7. Implementation of Recommendation 17.3 – alternate dispute resolution (ADR)

Appeals to the VRB are heard by a panel of three members, including at least one former member of the ADF. Further, new evidence can be presented to the VRB during the hearing which was not considered during the primary claims process. Veterans appealing their claim to the VRB can be supported by an advocate, but not by a lawyer³. Further, DVA is not present at VRB hearings. This model has been supported by the veteran community for many decades.

The Review recommended (Recommendation 17.3) that case conferencing should be introduced at the VRB so that, wherever possible, the key questions and relevant evidence are established as soon as possible. The provisions for ADR at the VRB, single member decisions, remittal powers, power to give directions and other amendments were included in the *Veterans' Affairs Legislation Amendment (Mental Health and Other Measures) Act 2014* which passed Parliament in June 2014.

These major changes to processes are expected to substantially reduce the time taken for an appeal to the VRB to be finalised. Case conferencing is just one tool under the broad ADR umbrella. The full suite of ADR powers, including case appraisal and neutral evaluation, provides the VRB with modern and effective ADR processes similar to other Commonwealth merits review tribunals.

³ Lawyers can assist clients with preparation for VRB hearings but cannot attend a hearing.

While the legislation enables ADR to take place, it is a discretionary action. The Principal Member of the VRB is responsible for the arrangement of business of the Board including directing the operations, procedure and conduct of reviews including ADR processes and procedures. The legislation does not mandate ADR, but provides the framework to support ADR. Consistent with the passage of legislation, and an undertaking that was made to the ESO community during consultation, an ADR trial commenced in the New South Wales and ACT Registries on 1 January 2015.

The intent of the introduction of ADR is to improve the quality of service provided to applicants before their application is considered by the VRB. The VRB conference registrars are responsible for facilitating the ADR process at the VRB and undertake an initial "outreach" contact with applicants and/or their representatives. Conference registrars facilitate case conferences where it has been determined that this is the appropriate next step in the ADR process, following the "outreach".

The Commissions are represented by DVA Officers in the case conferencing process. They are responsible for carrying out further investigation if required and making appropriate concessions. The Departmental officers may also make a request to the VRB for a matter to be remitted to enable the Commissions to make a new decision on the evidence.

While the ADR trial is continuing, early results are encouraging. The VRB has advised that over half of cases have been finalised at the outreach stage.

Under the ADR guidelines the VRB will allow lawyers to appear during the ADR process and make submissions. Lawyers cannot appear at hearings, as has always been the case.

8. Consultation on the single appeal pathway

Extensive consultation was undertaken with ESOs and former members of the ADF as part of the Review between 2009-2011. There was also extensive consultation with the ex-service community post release of the MRCA Review Report. Written submissions were accepted from ESOs from March to August 2011. After the Government response to the MRCA Review and the acceptance of recommendations 17.1, 17.2 and 17.3 in the 2012 Budget, a discussion paper was prepared in order to engage with stakeholders.

The discussion paper, Refining the Appeal Process to a Single Pathway (Attachment C), was designed to explore the various issues anticipated in moving to a single appeal path and was released to key stakeholders on 18 June 2013. The paper was also made available on the Department's website for any other interested party to access and provide feedback. The paper was also sent to the Law Council of Australia and a number of law firms for comment.

On release of the June 2013 discussion paper, another round of consultation, specifically on the single appeal pathway and advocacy, was undertaken. This included meeting with a number of key stakeholders including: the Returned & Services League of Australia (RSL); Vietnam Veterans Federation of Australia (VVFA); Australian Peacekeepers & Peacemakers Veterans Association (APPVA); Legacy; and Australian Veterans & Defence Services Council (AVADSC). Meetings were also held with representatives from the Training and Information Program (TIP).

The discussion paper was considered by the Ex-service Organisation Round Table (ESORT), a peak ex-service organisation consultative body, at the meeting of 15 August 2013. The paper was also sent to members of other ESO consultative forums as part of the original release. The single appeal pathway was also discussed with ESOs at ESORT on 24 November 2013.

Throughout 2012-2013, in addition to consultation with ESORT, the single appeal pathway was discussed at a number of meetings of DVA/ESO consultative groups such as the Emerging Issues Forum and the Operational Working Party.

There was overwhelming support for a move to a single appeal path for claims under the MRCA. The feedback supported a model similar to that under the VEA, with the discretionary use of a section 31 type review.

ADR powers for the VRB were also broadly supported.

The single appeal pathway was announced as a Budget measure in the 2015-16 Budget. ESORT members were informed of the timetable for introduction of enabling legislation at Budget briefings.

9. DVA review of VRB Decisions

In order to ensure that there are no systemic deficiencies in the primary decision making process, DVA regularly conducts an analysis of the set aside decisions of the VRB. The latest analysis conducted in 2015 confirms the findings and conclusions of previous exercises (2008, 2010, 2011 and 2013), that the predominant reason that decisions are set aside relates to the VRB obtaining new evidence in support of an appealed claim. In the latest review, the analysis of a sample of set aside cases showed that 75% had new evidence submitted and 8.5% had new contentions. A significant amount of this new evidence related to medical opinion that was not available at the primary assessment or internal review stage. Also, the ability of the applicant to give oral evidence to the VRB aided members in their decision making process.

10. Legal Aid

The Explanatory Memorandum to the Bill refers to the provision of access to legal aid for all eligible claimants.

The Australian Government funds legal aid commissions and community legal centres to help vulnerable and disadvantaged people with their legal problems. This funding is provided via states and territories under the National Partnership Agreement on Legal Assistance Services (the Agreement), which commenced on 1 July 2015. This replaces the previous National Partnership Agreement on Legal Assistance Services which was in place from 1 July 2010 to 30 June 2015.

Legal aid commissions are independent bodies established under state and territory legislation. Commissions determine eligibility for their legal services and the extent of

assistance they will provide in individual cases. In general, applications for legal aid are means and merits tested against guidelines determined by each legal aid commission.

Clauses B24(h) and B31 of the Agreement convey Commonwealth support for assisting ex-service personnel without the application of a means test, where a person is seeking merits review at the AAT for entitlements and/or compensation under the following legislation:

- *Veterans' Entitlements Act 1986* (VEA)
- *Military Rehabilitation and Compensation Act 2004* (MRCA)
- *Safety, Rehabilitation and Compensation Act 1988* (SRCA)

In addition to representation in the AAT, legal aid commissions may also provide advice and/or legal task assistance for people preparing an application to the VRB. As a general rule, these services are not means tested for any client.

More information about legal aid commissions and the types of services they provide can be found on each commission's website (centrally located at <http://www.nationallegalaid.org/>).

In practice, under the current appeal pathways, legal aid is generally accessed in two key instances: representation of people seeking merits review of a VRB decision in the AAT; and advice and legal task assistance to people preparing for appearances before the VRB. Legal aid is not available to people selecting the MRCC pathway - either at the internal review stage or the AAT stage.

The streamlining process may increase demand upon the provision of advice and legal task assistance by legal aid commissions to clients who now appear before the VRB, who would have otherwise sought review by the MRCC (and therefore been ineligible for legal aid). The Department will work with the Attorney-General's Department (which administers the National Partnership Agreement on Legal Assistance Services) to monitor any increased demand on legal aid commissions resulting from these changes.

The single appeal pathway, the enhanced case management powers for the VRB as legislated in 2014 and the use of alternative dispute resolution by the VRB, in combination, are expected to reduce the number of applications made to the AAT on veterans' matters.

11. Awarding of Costs at the AAT

The *Tribunals Amalgamation Act 2014* updated the objectives of the AAT. The updated objectives require the AAT to provide a mechanism of merits review that is fair, just, economical, informal and quick. Other objectives include that the AAT is accessible, proportionate to the importance and complexity of the matter, and promotes public trust and confidence in the decision-making of the Tribunal. The objective is to allow for the merits review of government decisions in an informal, low cost tribunal.

Under the dual pathway, applicants who seek a review by the AAT of a MRCC reconsideration may be entitled to payment of all or part of any legal or associated costs they have incurred, providing that the AAT makes a decision that is more favourable than the reconsideration decision. In these circumstances, the AAT can order that the Commonwealth pay all or part of the applicant's costs but only those that relate to the AAT application, not

those that may have been incurred at the primary decision or reconsideration stage. The award of costs can include the reasonable costs of medical reports obtained for the purpose of the AAT appeal.

In contrast, applicants to the VRB may have access to legal aid (see Section 10) and are able to seek reimbursement for the costs of medical reports up to \$467.50 irrespective if used by the Board, but the report must provide new medical evidence. The VRB can also request that DVA obtain and pay for medical reports required by the VRB. In addition, at the AAT a report can be obtained at DVA's expense if agreed by the parties, regardless of the pathway chosen.

12. Conclusion

The move to a single appeal pathway was a recommendation of the Review of Military Compensation Arrangements that reported in 2011. As outlined, there has been extensive consultation with the ex-service community both during and after the review process and the design of the proposed single appeal pathway.

The move to the single appeal pathway has been combined with the introduction of new processes into the VRB, such as active case management and ADR, which are designed to improve the timeliness and quality of service provided by the VRB.

The move to a single appeal pathway will align the MRCA appeal process with the VEA and make the process less complex for clients. It has widespread support from the ex-service community.

List of Appendixes

Appendix A: MRCA Claims and Appeals Statistics

Appendix B: Recent public comments from ESOs supporting the single appeal pathway

Appendix C: 2011 Discussion Paper – Refining the Appeal Process to a Single Pathway

Appendix A

MRCA Claims and Appeal Data for 2014-15

Total primary determinations*	20,070
VRB decisions	515
VRB set aside rate (248)	48.2%
VRB set aside rate as percent of total determinations	1.23%
MRCC Reconsideration decisions	518
MRCC set aside rate (116)	22.45%
MRCC set aside rate as percent of total determinations	0.57%
AAT Decisions	40
AAT set aside rate (13)	32.5%
AAT set aside rate as percent of total claims	0.06%

* *Determinations includes all the decisions that are made in a claim. For example, a single liability claim could have five separate conditions, each of which is a determination. The figure above includes Liability, Permanent Impairment and Incapacity claims.*

Historical MRCA Claims and Appeals Data

	2010-11	2011-12	2012-13	2013-14	2014-15
Primary Liability Claims Received	3404	4154	4804	5829	6448
Primary Permanent Impairment Claims Received	1935	2384	3073	3990	4315
Total Primary Claims Received	5339	6538	7877	9819	10763
MRCC Reconsiderations Received	477	633	369	427	485
Percent of Primary Claims	8.9%	9.7%	4.7%	4.3%	4.5%
VRB Applications Received	237	345	426	482	582
Percent of Primary Claims	4.4%	5.3%	5.4%	4.9%	5.4%
Total Recon & VRB Received	714	978	795	909	1067
Percent of Primary Claims	13.4%	15.0%	10.1%	9.3%	9.9%
AAT Applications	44	34	75	76	71
Percent of all Appeals	6.2%	3.5%	9.4%	8.4%	6.7%
Percent of Primary Claims	0.8%	0.5%	1.0%	0.8%	0.7%

This table does not include Incapacity and Rehabilitation claims as the majority of appeals relate to Liability and Permanent Impairment.

Appendix B

**Public comments from Ex-service Organisations supporting the
introduction of the Single Appeal Pathway.**

**KEN FOSTER OAM JP
NATIONAL PRESIDENT
VIETNAM VETERANS ASSOCIATION OF AUSTRALIA**

**MEDIA RELEASE
8 September 2015**

STREAMLINING VETERANS SINGLE APPEAL PATHWAY

As National President of the Vietnam Veterans Association of Australia I believe the members of the senate that blocked what has been seen by the ex-service community as a progressive step for veterans wellbeing have either been misled by vested interests or do not, in fact, support the best interests of veterans and serving men and women of the defence forces.

I would call on those members of the senate, and those in the labour party, with any reservations regarding the proposed changes to legislation to discuss the merits with those in the ex-service community that currently, on a voluntary basis, are serving their fellow veterans and those still serving as advocates.

As a practicing advocate I have no doubts in my mind of the benefits to individual servicemen and women of the proposed changes and look to a speedy adoption of a single appeal pathway as soon as possible.

Media Contact. Ken Foster - 0413 046 077

The following media article quotes Mr John Hodges from the RSL in support of the single appeal pathway.

news.com.au National

Leading lawyer warns that new law will cut veterans' rights and add to appeal cost and time

BY: BY IAN MCPHEDRAN NATIONAL DEFENCE WRITER

FROM: NEWS CORP AUSTRALIA NETWORK

SEPTEMBER 07, 2015 6:57AM



One path ... The Government believes a single pathway would be easier to manage than the current multiple appeal paths. Picture: Supplied Source: News Corp Australia

THE Federal Government and Opposition will join forces on Monday in the Senate to support a new law that a leading military compensation lawyer warns will have a dire impact on the appeal rights of war veterans.

The amendment to the Military Rehabilitation and Compensation Act 2004 will remove one of two appeal paths for veterans whose claims have been knocked back by the Department of Veterans Affairs (DVA).



War on rights ... A veteran on Anzac Day in Alice Springs. Picture: Supplied Source: News Corp Australia

In addition, decisions that are taken from the VRB to the Administrative Appeals Tribunal by veterans without overseas service are not eligible for legal support.

Military compensation specialist with Slater and Gordon Brian Briggs said many veterans would not be able to appeal to the AAT because even if they won their legal costs could not be covered.

"The DVA is taking independent review lawyers out of the system," he said.

Mr Briggs said he could not understand how the RSL and other ex-service organisations could support the measure that he predicted would add up to two years to already very slow appeal times.

"People's rights are being stripped here and the independent veterans' compensation review process will be slashed."



Speed claim ... Minister for Veterans Affairs Michael Ronaldson says the government is fulfilling an election promise. Picture: Valeriu Campan Source: News Corp Australia

A spokesman for Veterans Affairs Minister Michael Ronaldson said the government was fulfilling an election commitment and doing exactly what the ex-service organisations wanted with the changes.

Labor spokesman David Feeney said he believed the amendment would actually speed up the appeals process.

He said the review process began under Labor back in 2007 and to date no one had made any strong arguments against the changes.



Supports the change ... Labor Veterans Affairs spokesman David Feeney thinks the new rules will speed up, not slow down, the appeals process. Picture: Supplied Source: News Limited

"It makes sense to have a single appeal pathway via the Veterans Review Board," Mr Feeney said.

He said there could be further reviews of the system down the track to look at the length of time appeals were taking.

"That is not a reason not to do something constructive now."

National veterans affairs adviser with the RSL John Hodges said the League had been after this change for years.

"The VRB is independent and we are very comfortable with the VRB process," Mr Hodges said.

Mr Briggs said the new system would be bad for veterans.

"This is Ceasar judging Ceasar," he said.

MEDIA STATEMENT

Leaders of Ex-Service Organisations Appalled by Delay in Veterans' Reform Bill

The leaders of the Ex-Service Organisations listed below¹ are concerned that the passage of the **Veterans' Affairs Legislation Amendment Bill 2015** has been delayed in the Senate. The Bill introduces much needed reforms that have not only been discussed by that leadership group but has their full support, including the support of their families. The group is a National Defence Ex-Service Round Table consultative one that represents some 150,000 to 200,000 serving and former members of the ADF. The Bill even passed unopposed in the House of Representatives on 20 August 2015.

The catalyst for referral to the Senate Committee appears to have been a published opinion piece titled '**Bill Strips Veterans of Appeal Right**' that emanated from a law firm. In essence, that opinion literally flies in the face of what had all along been the biggest complaint within the Ex Service community, that being that the MRCA review system was overly restrictive, cumbersome in nature and time consuming in practice.

There has been criticism of the Bill on the grounds of an apparent removal of a veterans' right to request internal reconsideration of an adverse decision by the Military Rehabilitation and Compensation Commission.

The National Ex-Service Organisations Leaders believe that:

- the single path set out in the Bill, and
- the firm and enduring assurance given by the Minister that every adverse decision by the Commission that is the subject of an application to the Veterans Review Board will be reviewed by the Commission before the VRB process begins,

adequately safeguard veterans' rights and interests. The Ex-Service Organisations Leaders also believes that, in the event of the current trial of Alternative Dispute Resolution procedures in NSW and the ACT being extended to all Review Board proceedings, veterans' interests will be further protected.

The 'Single Path' for reconsideration of decisions contained in the Bill was recommended by the Review of Military Compensation Arrangements Committee and has received widespread support from the veteran community.

The ongoing concern for the Ex-Service Community is the imbalance in legal resources with the Department being able to fund expensive legal advice and assistance to contest claims while legal aid funds available to veterans and ex-service men and women are restricted. The cost of justice is often out of the reach of ordinary people.

Media Contacts

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Note 1: Defence Force Welfare Association; Naval Association of Australia; Australian Special Air Service Association; Royal Australian Regiment Corporation; Royal Australian Air Force; Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women; Partners of Veterans Association of Australia; Vietnam Veterans Association of Australia; Legacy Australia Council; and War Widows Guild of Australia.



DISCUSSION PAPER

Military Rehabilitation and Compensation Act 2004 Refining the Appeal Process to a Single Pathway

Background

1. The Department of Veterans' Affairs (DVA) is developing the detail for a single appeal pathway for claims under the *Military Rehabilitation and Compensation Act 2004* (MRCA). This is in line with Chapter 17 of the Review of Military Compensation Arrangements (the Review) and the Government's response to the recommendations.
2. The purpose of this paper is to outline some options for the structure of a new single appeal pathway model for distribution and consultation with stakeholders to enable the Military Rehabilitation and Compensation Commission (MRCC) and Government to reach a position on how they would work.
3. The main issues being considered are:
 - the extent of review to be undertaken at the MRCC reconsideration level;
 - alternate dispute resolution processes and case conferencing at the Veterans' Review Board (VRB);
 - VRB remit powers;
 - implications for Ex-Service Organisations (ESOs) representatives/advocates;
 - implications for legal firms;
 - Legal Aid;
 - awarding of costs; and
 - costs for medical reports.
4. In order for the single appeal pathway model to work effectively a number of incentives and disincentives are considered necessary to encourage the early provision of all the relevant evidence.
5. The conclusions reached in Chapter 17 (paragraphs 17.122 to 17.124 of the Review) are informative and help set the context in which the single pathway model is being considered. They are:

17.122 The MRCA determining system should be refined to provide a single appeal path. This recommendation is aimed at more timely results and a less complex process with lower costs. There will be up-front costs in recruitment, training and systems needs, and a change management plan and comprehensive finance model should be developed for the whole process.

17.123 The option of a single path that excludes the VRB would be inconsistent with the provision of a specialist tribunal at the first level, as is available to Centrelink beneficiaries, and may also be a higher-cost option. It would also be strongly opposed by ESOs.

17.124 The preferred single path should provide access to case conferences. If the applicant still seeks adjudication, there should be access to the VRB, with a more streamlined method so that key questions and relevant evidence are established prior to, or at, the VRB hearing. A further review by AAT would then be available by application by the claimant or by the Commission.

6. The recommendations and the Government's response are detailed in the following table.

Rec	Review Recommendation	Government's Response
17.1	The MRCA determining system be refined to a single appeal path to the Veterans' Review Board (VRB) and then the Administrative Appeals Tribunal (AAT), as a means of a more timely review that is less complex and less costly.	The Government accepts this recommendation in principle but defers its response (along with a response to Recommendation 17.2) pending the outcome of consultation with stakeholders and full consideration of the detail and implications of this complex change. The planned implementation date is 1 July 2014, subject to consultation with stakeholders, further decision by Government in the 2014 Budget, and legislative change.
17.2	Internal reconsideration by the MRCC be the first step in the review process, and the process for section 31 reviews under the <i>Veterans' Entitlement Act 1986</i> (VEA) be adopted, to help ensure the quality of decisions that are considered by the VRB and reduce VRB workloads and costs.	The Government accepts this recommendation in principle but defers its response (along with its response to Recommendation 17.1) pending the outcome of consultation with stakeholders, consideration of resource and other implications and a further decision in the 2014 Budget.
17.3	There be access to a case conference process by the VRB so that, wherever possible, the key questions and relevant evidence are established as early as possible and the hearings can proceed without any unnecessary delay.	The Government accepts this recommendation. Case conferencing is part of the Alternative Dispute Resolution (ADR) process, increasingly used in the broader legal community. The VRB issued a General Practice Direction (GPD) in January 2011 allowing the VRB to refer a case to an ADR process, including conferencing or neutral evaluation.

Rec	Review Recommendation	Government's Response
17.4	In advance of the adoption of a single path, a formal service level agreement between the MRCC and the VRB be negotiated to define a comprehensive case conference process within current legislation.	The Government accepts this recommendation with the modification that the VRB and the MRCC should establish agreed national administrative and procedural arrangements, including case conferencing and other alternative dispute mechanisms, designed to improve timeliness. To respect the independence of the VRB, this recommendation will be achieved by mechanisms other than a formal service level agreement. The arrangements are to be in place before 1 July 2014.
17.5	The MRCA be amended to provide the VRB with explicit powers to remit a matter to the MRCC for needs assessment and compensation.	The Government accepts this recommendation. This will overcome the current situation where the VRB has to adjourn a case to ask a delegate of the MRCC to conduct investigations and relay the evidence to the VRB. The implementation date is 1 July 2013, subject to legislation being passed.

MRCC Reconsideration

7. MRCC reconsideration is to be the first step in the review process and, as noted above, the extent of this process is being investigated. The Attorney-General's Department's document "*A Strategic Framework for Access to Justice in the Federal Civil Justice System, September 2009*" states:

"The cost to Government of providing dispute resolution services varies according to the component of the justice system used and, as a general rule, increases in line with the formality and complexity of the services provided and the institutional arrangements used."
8. Based on figures for 2011–12 the average cost for appeals was \$19,111 for the AAT (finalised at hearing), \$4,190 for the AAT (finalised prior to hearing) and \$1,655 for the VRB.
9. The amounts quoted above do not include the cost of DVA representation to the AAT or the cost of preparing section 137/37 reports and undertaking further investigations for the VRB.

10. In addition to the cost of appeals another consideration is the time taken to process (TTTP) the appeals. Again based on the figures for 2011-12, the average time taken was:
 - AAT 66% finalised within 12 months (actual days average is not reported)
 - VRB 424 days
 - MRCC 116 days
11. The VRB TTTP is not truly reflective of the actual time from lodgment to decision due to many liability and permanent impairment cases being adjourned as there is no mechanism for remittal. This skews the overall TTTP. By way of comparison, the VEA TTTP averages 354 days, which may be a better indication of actual time from lodgment to decision.
12. Additionally, there are matters outside of the control of the VRB that affect the TTTP, the main one being the time for applicants and/or their representatives to be ready for hearing. For 2011-12 this accounted for, on average, 251 days.
13. The statistics quoted above support the Review's conclusions that a move to a single appeal path will provide more timely and cost effective outcomes. The various options being considered are detailed below.

Option One – Full MRCC Reconsideration

14. Option one is that the reconsideration by the MRCC be a thorough investigation of the issues and be more than just a screening process. The aim of Option One is to move the bulk of the investigation to the front end as is currently done when a client requests a section 349 review by the MRCC. The MRCC review should seek to engage with the client/representative to gather all the evidence involved in the appeal including:
 - a detailed statement from the client as to why they believe that the original determination was wrong;
 - any additional contentions that are to be considered;
 - any additional evidence; and
 - additional medical reports if needed.

Advantages	Disadvantages
1. To a large extent this represents business as usual for the reconsiderations area and would involve less disruption and a smoother transition for DVA.	1. This model will have implications for resourcing the increased number reconsiderations received, i.e. those that currently go directly to the VRB. In 2011-12 the MRCC received 633 appeals and the VRB received 345. Therefore, there would potentially be about a 50% increase in workload for the Commission.

2. MRCC reconsiderations are finalised in a significantly shorter time than VRB reviews, giving the applicants a quicker review decision. In 2011–12 the average time taken to process an MRCC reconsideration of a MRCA decision was 116 days compared with 424 days for a VRB review. (As noted above, this may not be a true reflection of VRB TTTP and 354 days may be a better indication.)	
3. Another benefit will be a reduction in the amount of work required to have a case ready for review by the VRB, resulting in improvements in the timeliness of that process.	

Option Two – Screening Process

15. Option two is that the reconsideration by the MRCC be a screening process similar to that currently undertaken with section 31 reviews under the VEA.
16. This process would not be exactly the same as for appeals under the VEA, as the structure of the appeals process is slightly different. Under the proposed changes to the MRCA appeals process, reconsideration by the MRCC is the first step in the process. However, under the VEA, an applicant can request a section 31 (internal) review, a VRB review, or both. That is, there is no requirement for internal reconsideration to be the first step in the process under the VEA.
17. In practice, all appeals to the VRB are subject to a section 31 review. That is, even if a claimant appeals directly to the VRB, a section 31 review officer will examine the claim and any additional evidence provided to see if a more favourable decision can be reached. If the Review Officer decides to intervene, a new decision will be issued setting out the reasons for the decision. The claimant can still proceed with the VRB appeal if they are not satisfied with the new decision. If the Review Officer decides not to intervene, no decision will be issued and the VRB appeal will proceed as normal.
18. Where the claimant specifically requests a section 31 review, a decision is issued setting out the reasons for the decision, in both intervention and non-intervention cases.
19. Therefore, under the proposed single pathway, the review would involve an examination of the evidence on file, including any additional statements/arguments or evidence provided with the request for reconsideration. No further investigation would be undertaken at this stage. A determination, based on the available evidence, would then be issued setting out the reasons for decision, regardless of whether the original determination was altered or not.

20. The applicant then has the option to appeal to the VRB if they are not satisfied with any element of the decision.
21. For 2011–12 the VEA section 31 TTTP was 22 days and 48% of the decisions were varied. No data is available on the number of these varied decisions that continue on to the VRB.

Advantages	Disadvantages
1. This option has the advantage of requiring less investigation at the MRCC stage, allowing for a greater volume of cases to be processed. Clearly incorrect decisions would be redressed in a timely manner.	1. If the MRCC reconsideration must occur before an appeal to the VRB can be lodged this will potentially mean a more drawn out process for the applicant as the work on preparing the appeal would not have commenced (section 137 reports etc).

Option Three – Combinations of Options One and Two

22. The third option is a combination of options 1 and 2 where the MRCC reconsiderations delegate exercises discretion in which appeals are thoroughly investigated and which are just screened and passed on to the VRB. Guidelines to assist in determining which appeals would be investigated would need to be developed. As an indication, they may include appeals where additional evidence is provided or is reasonably obtainable, or appeals that involve dispute around interpretation of the evidence used.

Advantages	Disadvantages
1. The advantage of this option would be targeting Departmental resources to those claims that would most benefit from MRCC reconsideration.	1. Should resourcing become an issue, it is possible to envisage the process becoming a basic screening with the workload being passed on to the VRB. This may result in resourcing issues for the VRB and delays for clients.
	2. Advocates may not provide evidence at the MRCC reconsideration level in order to progress to the VRB where they can claim re-imbursement of a fixed amount for medical reports. <i>Note: Issues relating to reimbursement of costs for medical reports are addressed later.</i>

Option Four – Same process as an appeal to the VRB

23. Option four involves making the appeal for MRCC reconsideration part of the same process as an appeal to the VRB, or allowing an appeal to the VRB at the same time as an appeal to the MRCC.

Advantages	Disadvantages
1. This would allow for the VRB process to begin and the preparation of section 137 reports to commence at an earlier time. Where the applicant is satisfied with the outcome of MRCC reconsideration the VRB appeal can be withdrawn.	1. There is the risk that resources would be expended on preparing a VRB appeal that does not eventuate, which could be seen as an inefficient process.

VRB Review

24. Option One for the MRCC reconsideration (thorough review) would have implications for the VRB, as it represents a significant departure from current practice and does not align with VEA appeals experience. Ideally, by the time the review gets to the VRB level, all the extra evidence should already have been submitted through the MRCC reconsideration process.
25. This should include any changes in approach by the applicant/representative as to the matters on which the review will be sought, for example, the contention or Statement of Principles (SoP) factor relied upon, changes to the SoP and worsening of impairment since the original determination.
26. As any new evidence should have already been gathered during the MRCC reconsideration process, the main difference between the two levels of appeal will be interpretation of the evidence that is considered during an ADR process and/or by a board of at least three members, one of whom has service experience, and the fact that the claimant can provide oral evidence. That is not to say that additional evidence could not be presented to the VRB, but it raises the question as to why it was not presented earlier.

VRB Remit

27. The construction of the MRCA is such that an applicant can submit a claim for liability and compensation and, even where liability has been denied, the claim for compensation must also be determined.
28. The VRB does not currently have remittal powers for MRCA claims other than to assess the rate of pension (VEA section 139(4)). The practical implications are that where the VRB accepts liability on appeal it must also determine any original application for compensation lodged with the claim for liability. There is often insufficient information for the VRB to make such a determination and the hearing is adjourned so the MRCC can be requested to conduct an investigation.

29. Broad remit powers for the VRB, as per recommendation 17.5, are essential for efficient processing of review cases. They will allow the VRB to remit cases to the MRCC at the primary level to determine benefits that flow from the appeal determination. For example:
- liability accepted – remit for Needs Assessment and determination of benefits such as Permanent Impairment and Incapacity Payments;
 - degree of permanent impairment increased – remit for calculation of entitlement; and
 - incapacity payments granted for a certain period – remit for calculation of entitlement.
30. This is only a small sample. The VRB advises that there are over 50 different types of matters that can come before the VRB.

Alternative Dispute Resolution

31. The National Alternative Dispute Resolution Advisory Council provides the following advice on its web site:

Resolving your dispute through ADR is different from asking a court or tribunal to resolve your dispute.

Using ADR to resolve your dispute can benefit everyone. It means that courts and tribunals can spend their time considering disputes that need a court or tribunal decision.

There are many reasons why you might choose ADR:

- *flexibility*
- *privacy and confidentiality*
- *self-directed*
- *cost*
- *focus on what's important to you*
- *less formal*
- *skills*
- *outcomes.*

32. The VRB issued a General Practice Direction effective from 1 January 2011 (Attachment A) that included instructions on "Case appraisal and other forms of alternative dispute resolution". It also issued Alternative Dispute Resolution Guidelines dated 2 September 2012 (Attachment B).

Case Conferencing

33. The Government has agreed to case conferencing as per recommendation 17.3 and provided funding to implement it from 1 July 2014.
34. The VRB's General Practice Direction refers to neutral evaluation and conferencing. However, without express legislative authority, the VRB is unable to undertake facilitated conferencing or neutral evaluation. The primary ADR process used by the VRB, with the consent of the parties, has been case appraisal.
35. Legislative amendments are required to provide the VRB with conferencing powers similar to the AAT.
36. Case conferencing MRCA reviews at the VRB will have resourcing implications for DVA to provide staff to represent at the case conference. However, this will depend on the nature and extent of the conferencing model. If conferencing is conducted in a similar manner to that at the AAT, the cost may be offset by reducing the number of cases that proceed to the AAT. That is, the conferencing process is being brought forward to the VRB level. While this may mean an increased cost for the Department, when considering the cost of having matters appealed to the AAT, it may result in a saving in a whole of Government context.

Advantages	Disadvantages
1. This option would help identify the issues to be resolved and the evidence required at an early stage and assist in resolving matters without the need for a hearing. For those matters that proceed to hearing, the cases should be fully prepared for hearing in a timely manner.	1. If case conferencing is introduced for MRCA cases, it will create pressure for VEA cases to also receive case conferencing. This could have significant resource implications for both the VRB and DVA due to the higher number of VEA cases heard.
2. If during the process it becomes apparent that there is sufficient evidence to change the MRCC decision the VRB can issue a decision on the papers or remit the matter to the MRCC.	

37. The options for case conferencing are:

A. Conference all cases

Advantages	Disadvantages
1. Provides equitable access for all applicants.	1. Potentially resource intensive, especially considering the amount of work that would have already gone into the MRCC reconsideration.
2. Potential cost and time saving if able to be resolved without going to a full Board hearing.	
3. Applicants can avoid the stress of participating in a full hearing.	

B. Conference selected cases

Advantages	Disadvantages
1. Less resource intensive, focusing on cases that would benefit the most from the process.	1. Would depend on the criteria for selecting which cases would be conferenced. Presumably this would be at the VRB's discretion, although agreement on the types could be reached through discussion with DVA. Possible criteria could include: • liability only • complex claims • complex multi Act claims • claims with new evidence • a specific request from the applicant or the MRCC.
	2. Could be seen as inequitable by not allowing the same access for all applicants.

38. Whatever model is finally adopted, the process could be a staged implementation to allow for the necessary changes and assess the appropriate level of involvement to achieve the best outcome for all parties. The conferencing model should involve a different DVA officer from the one who made the reconsideration determination. This would allow a fresh set of eyes to view the evidence and not be influenced by any investment in the previous determination.

39. To facilitate this change, perhaps case conferencing could begin with option B, selected cases only, with the intent to progress to option A, all cases. This would allow for a gradual adjustment to the new model.

Neutral Evaluation

40. Neutral evaluation would be undertaken by a VRB board member or a conference Registrar and is intended to give applicants an indication of the strength of their case, including where any deficiencies may lie, providing a non-binding opinion on the possible outcome if the case proceeds to hearing. It is undertaken without prejudice and applicants can proceed to hearing or may choose to withdraw the appeal following the evaluation.

Advantages	Disadvantages
1. If case conferencing is universally adopted, the neutral evaluation could become a standard part of the process. This should result in better prepared submissions for hearings and potentially cases without merit being withdrawn prior to hearing.	1. If a Board member is required to be involved in the neutral evaluation process, there could be issues with having them available and an issue of cost. Alternatively, if a VRB conference Registrar was to undertake the evaluation, they would need sufficient knowledge and experience to provide quality advice.

Case Appraisal

41. Current practice at the VRB following a case appraisal, where the member is able to make a favourable decision, the VRB will make a decision on the papers without going to a full hearing. While this process is not expressly covered in legislation, the Federal Court has upheld it in *Anderson v Commonwealth* [1998] FCA 580, (1998) 51 ALD 72.
42. The VRB reports that the current model of Case Appraisal is working well. A draft decision is issued to the applicant/representative before the final decision is published. Both the applicant and the Commission still have a right of appeal to the AAT if there are any outstanding issues. If the applicant/representative is not happy with the draft decision the case can proceed to a full VRB hearing.
43. Case appraisal allows for timely decisions without the need for a full VRB hearing, the benefits of which include improved processing times, cost effectiveness and, for cases that proceed to a full hearing, the issues being more clearly defined.

Legal Representation

44. Another important consideration is that a person with legal qualifications cannot represent the claimant before the VRB. The VRB holds itself to be an informal non-adversarial review process and it is important to maintain this. However, it is also important to keep solicitors engaged at this level and not just seeing it as a hurdle to be overcome to get to the AAT.
45. Alternative dispute resolution processes may have an important role to play here. While legally qualified representatives cannot appear before the VRB, there is nothing preventing them from being involved at a case conference and requesting a case appraisal should this be made available. It may also be possible, through an elective process, to request a case appraisal without ever having to appear in any way. This would allow for the solicitors to prepare a written submission for the claimant to lodge. Potentially this may lead to a faster review time and still allow appeal to the AAT. Where case appraisal does not lead to a decision on the papers, the case will need to proceed to a hearing.
46. For these cases that proceed to hearing, one option may be for a paralegal to appear before the VRB with the client. However, this may raise the issue of costs to the client as there is currently no provision to award costs or apply for legal aid at this level.
47. To mitigate this, a payment of a nominal amount, say \$200, could be paid to a legal firm that provides lay representation to a VRB hearing.

Advantages	Disadvantages
1. Would help keep legal firms involved in the process.	1. This would incur additional cost for DVA. It is highly unlikely that there will be any change to Legal Aid funding that could be directed to this. However, costs may be offset by DVA not having to appear at an AAT hearing.
2. May assist in resolving cases before getting to the AAT rather than just seeing the VRB as a “stepping stone”.	2. There may be pressure from ESOs to also receive the payment for representing at the VRB, especially since the changes to BEST funding.

48. In addition to ADR, the VRB needs greater case management powers which include the power to give directions and dismissal and reinstatement powers.
49. Should these changes be made, the VRB would be able to give directions requiring parties to attend for conferencing. To ensure effective engagement at this level of review, if the representative failed to appear at the conference (either in person or by phone) to progress the matter, the application could be dismissed. The matter would not be able to proceed to the AAT in respect of the substantive claim, therefore providing an

incentive for effective engagement by representatives at both the internal review stage and at the VRB.

ESO representatives

50. The new single pathway will also have implications for ESO advocates. Where a client is represented by a solicitor, it is normal for the solicitor to be involved in providing the additional evidence at the MRCC reconsideration stage. For this process to work effectively, it will also need the early involvement of the VRB level ESO representative/advocate at the MRCC reconsideration level. This may be the same person who acted as the representative on the primary claim or a new advocate.
51. While ESOs are active at the section 31 level, this will be a change from what the ESOs are used to. They will be expected to bring all the evidence and argument forward at the reconsideration level. This will need to be communicated clearly in conjunction with an education program to ensure a smooth transition.
52. The quality of representation impacts on the timeliness of the appeal process and the outcomes achieved. Anecdotal evidence suggests that some ESO representatives are not as knowledgeable about the SRCA and MRCA as they are about the VEA.
53. A separate paper dealing with recommendations 7.7 and 7.8 (from Chapter 7 of the Review) addresses the issue of alternate representation models, training and accreditation.
54. The relevant recommendations from the review are:

Rec	Review Recommendation	Government's Response
7.7	Ex-service organisation (ESO) pension officers who have access to Australian Defence Force (ADF) members should have a demonstrated understanding of the MRCA and transition and rehabilitation programs.	The Government accepts the recommendation. The Government has asked DVA to scope a more professional advocacy service for claims under the MRCA and <i>Safety, Rehabilitation and Compensation Act 1988</i> (SRCA) and multiple Act claims, to complement the existing network of ESO pension officers. Implementation is expected from 1 July 2014 in conjunction with a single appeal pathway for MRCA, as per Recommendation 17.1.

Rec	Review Recommendation	Government's Response
7.8	DVA initiatives for MRCA training and accreditation of staff be considered for extension to Defence transition and advisory officers, and to ESO pension officers and advocates.	The Government accepts the recommendation and DVA will work with Defence to provide opportunities for Defence transition and advisory officers to receive training and accreditation, as well as continuing to work with ESO pension officers. This will be included in the scoping work planned with Recommendation 7.7.

55. The scoping for alternative models will focus on representation for SRCA, MRCA and multiple act claims but may need to encompass VEA matters. While the move to a single appeal pathway is not reliant on any changes to representation models, it should be recognised that improved representation is beneficial for all involved. It is planned that an approach will be made to Government in the 2014 Budget context with details of a new model, proposing implementation from 1 July 2014.

Resourcing

56. The number of MRCA review cases received for 2011–12 was 345 for the VRB and 633 for the MRCC. If the ratio remains similar, this would indicate an increase in workload for the MRCC reconsideration delegates of approximately 50% under the single pathway.
57. On average, over the last two years approximately 10% of the MRCC reconsiderations that were affirmed were appealed to the AAT. Assuming the same proportion continues, this would mean under the new single pathway the VRB would receive approximately 40 appeals. This represents approximately an 88% reduction in workload. However, this is only an extrapolation and different trends may emerge under the new model. For example, it may be that more claimants will appeal to the VRB than currently do to the AAT, following rejection by the MRCC reconsideration.
58. Therefore, it is not possible to predict with any degree of accuracy the number or percentage of claims that will be appealed to the VRB as there is no current comparative model. As such, any workload and resourcing implications will be difficult to determine in advance and will require monitoring when the new pathway is introduced, regardless of whichever model is finally chosen.
59. Additionally, further analysis of factors leading to overturn of the primary decision by the VRB for each type of review may reveal information that would be useful in identifying the impact of a changed model.

Legal Aid

60. Discussions with the Attorney-General's Department have indicated that there is unlikely to be changes to the way Legal Aid is allocated. DVA cannot expect to offset any initiatives such as costs for paralegals to attend the VRB from Legal Aid.
61. However, one of the unexpected gains of the single appeal pathway is that all AAT appeals will have been through the VRB, therefore making Legal Aid available to all MRCA applicants to the AAT. The current merit test for applicants with warlike/non-warlike service and merit and means test for applicants with peacetime service would still apply.

Costs

62. Costs can be awarded at the AAT in certain circumstances, where an applicant chooses the section 349 MRCC reconsideration pathway. Costs are not able to be awarded if the applicant chooses the section 352 VRB pathway.
63. As noted above, all appeals will have been through the VRB prior to going to the AAT. Therefore, as the legislation currently stands, there will not be any provision to award costs at the AAT.
64. The Review Committee expressed a "preference for a full costs jurisdiction for all MRCA applicants at the AAT level. This would allow legal and other representatives to assess the merits of cases and pursue them on a 'no win, no fee' basis."
65. DVA is currently liable for costs at the AAT for many MRCA appeals. If the single appeal pathway works as intended, that is, most cases being resolved at a lower level, it could be expected there will be a reduced number of appeals to the AAT.
66. Should a full costs model at the AAT be supported there will be a disincentive for legal firms to have the case determined by the VRB. By not presenting the best case to the VRB and holding evidence until the AAT hearing, they can apply to have costs awarded. This is not in keeping with the intention of the single appeal pathway.
67. One option proposed for mitigating this is the introduction of a disincentive where costs are reduced or not awarded where new evidence, that is at least partially determinative, is introduced at the AAT.

Advantages	Disadvantages
1. This should encourage the early provision of all the relevant evidence and allow for a more timely decision for the applicant.	1. As noted above, costs are not awarded at MRCC reconsideration or VRB level. This option can expect to receive significant opposition from law firms.
2. Resolution at an earlier level of appeal is more cost effective.	2. The flow on from this is that legal costs will most likely be passed on to clients. However, being responsible

	for legal expenses could be seen as the normal cost of engaging legal representation.
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68. Another option that could work in conjunction with that above would be to separate the award of the costs from award of compensation, so that legal costs are restricted to those agreed between the parties or by reference to a regulated schedule. The recovery of additional amounts from the applicant would be prohibited. Similar schemes are already in practice under other workers' compensation legislation and could be used as a model here.

Costs for Medical Reports

69. Currently, depending on the pathway taken, reimbursement of costs for medical reports provided by the applicant are treated differently. Under the VRB pathway the applicant can receive up to \$467.50 per medical report. Under the MRCC reconsideration pathway the applicant can be reimbursed the cost of the medical report if the appeal is successful and the report was used in making the determination.
70. With the intention to move the bulk of the investigation to the front end, i.e. MRCC reconsideration, consideration needs to be given to providing similar costs for medical reports at this early stage. This will facilitate the early resolution of appeals at a lower level.

Option One

71. Provide for \$467.50 per report to be reimbursed whether or not the appeal is successful and whether or not it was used for the determination.

Advantages	Disadvantages
1. Allows for access to medical opinions for all claimants.	1. May not cover full cost of the report.
2. Most likely it will just bring forward costs that would otherwise be incurred at the VRB level.	2. Solicitors are used to claiming for full cost of the report (when used).
	3. May encourage applicants to seek ambit reports.

Option Two

72. Reimburse the cost of the medical report if the appeal is successful and the report was used in making the determination.

Advantages	Disadvantages
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1. Only paying for reports that are of determinative value.	1. Not all applicants can afford to pay up front for medical reports.
	2. If claim progresses to the VRB, DVA may still need to pay for a claimant report.

Option Three

73. Provide for \$467.50 per report whether or not the appeal is successful and whether or not it was used for the determination. Reimburse up to double that amount (\$935.00) if the appeal is successful and the report was used in making the determination.

Advantages	Disadvantages
1. Allows for access to medical opinions for all claimants.	1. May not cover full cost of the report.
2. Most likely it will bring forward costs that would otherwise be incurred at the VRB level.	
3. Only paying the higher amount for reports that are of determinative value.	

Option Four

74. A variation on option three would be to provide for \$467.50 per report whether or not the appeal is successful and whether or not it was used for the determination, plus reimbursement of the full amount if the appeal is successful and the report was used in making the determination.

Advantages	Disadvantages
1. Allows for access to medical opinions for all claimants.	1. May encourage applicants to seek ambit reports.
2. Most likely it will bring forward costs that would otherwise be incurred at the VRB level.	2. Potentially greater cost to DVA.
3. The higher amount for reports is only paid for those that are of determinative value.	

75. The reimbursement amount has not been increased since it was originally set at \$425.00 in 1994, other than an increase of 10% to \$467.50 following the introduction of the

Goods and Services Tax. At the time, \$425.00 probably reasonably reflected the cost of medico-legal reports. However, the costs from major medico-legal firms currently range from around \$1,200 to over \$2,000 per report depending on the type and complexity.

76. It may be timely to consider increasing the amount for reimbursement to better reflect the current costs.
77. In deciding what the amount should be, it should be noted that reports from private practitioners are often less expensive than those from medico-legal firms. The fee schedule under the VEA allows for \$495.00 (incl GST) for an extended consultation and report.
78. Whichever option is supported, it is recommended that the reimbursement be limited to only one level of appeal, whichever it is claimed at.

Time targets

79. While not current practice, previously all MRCA cases that were appealed to the VRB underwent an internal review first under section 347. The effect of this was to delay the section 137 reports to the VRB and the 42 day target was not being met. Under the single appeal pathway model this should not be an issue as the process will be sequential. That is, an appeal to the VRB will not be able to be lodged until the MRCC reconsideration has been completed.
80. The timeframes for VRB appeals should be improved by the single appeal pathway. As noted previously, most of the additional evidence gathering should already have been done by the MRCC reconsideration. To assist further, improved case management powers for the VRB should be considered. Currently, the VRB can only dismiss a claim after two years. Amendments that would allow the VRB to give more direction to applicants and dismiss cases that are not being progressed should be considered an important part of the new model. The end aim should be to enable the VRB to meet the objective of being fair, just, economical, informal and quick. The amendments would enable the VRB to continue to process matters within the limited financial means available. It would also bring the VRB legislative framework in line with other Commonwealth merits review tribunals, as recommended in the *Report of the Strategic Review of Small and Medium Agencies in the Attorney-General's portfolio* (Skehill Review).

Transition issues

81. Consideration should be given to changing the appeal right under the SRCA for Defence members to include the VRB. The VRB has raised this issue in the context of the SRCA Review.⁴

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On 24 July 2012, the Minister for Workplace Relations, the Hon Bill Shorten MP, announced an independent review of the *Safety, Rehabilitation and Compensation Act 1988* (the **Review**).

The Review was undertaken by Mr Peter Hanks QC and Dr Allan Hawke AC. It was supported by a Secretariat led by the Department of Education, Employment and Workplace Relations. The Secretariat also included

82. A significant number of MRCA claimants also have eligibility under the SRCA and VEA. While MRCA and VEA matters can be appealed to the VRB, SRCA matters can not. The situation can arise where issues of liability or benefits can potentially relate to all three Acts, particularly where transitional provisions apply.
83. For example, an applicant who has service before, on and after 1 July 2004 develops lumbar spondylosis in 2008. The question of whether service after 1 July 2004 contributed to the contraction of the condition is highly relevant to which Act/s apply. If the condition was rejected under the VEA and SRCA and accepted under the MRCA, and these determinations are being appealed, the cases will be heard by separate jurisdictions.
84. This leads to the possibility that one jurisdiction may find differently to the other. For example, the VRB affirms the determinations under the VEA and MRCA and the AAT sets aside the SRCA determination finding the service after 1 July 2004 did not materially contribute to the development of lumbar spondylosis. The result is that liability for the condition now exists under both MRCA and SRCA, which should not be possible.
85. Allowing SRCA appeals to the VRB would promote consistency in decision making and would give the same appeal path for all military claims. However, it should be noted that SRCA is a non-SoP jurisdiction with different heads of liability and is not military specific.
86. Traditionally, legal firms have had a large involvement in SRCA claims and some opposition to this move could be expected.

Test cases to Federal Court

87. In certain cases it may be advantageous for the MRCC to be able to proceed directly to the Federal Court without the need of a VRB and AAT hearing first. Some of the circumstances where this might be relevant are when clarification is needed on:
 - the application of an ambiguous section of the Act;
 - an unusual and persuasive interpretation of the Act submitted by a legal firm with the reconsideration;
 - interpretation of untested or not commonly used sections of the Act; and
 - application of a precedent court case.
88. Giving the MRCC the power to appeal directly to the Federal Court, with leave from the VRB, would help to provide quick access to a forum that includes legal representation for resolution of ambiguous or contentious issues.
89. It is not expected that this provision would need to be exercised very often, but it would be useful to have the authority to do so when required.

officers from Comcare and the Department of Finance and Deregulation. On 28 March 2013 this report was released for public consultation.

Summary

90. On the face of it, a move to a single appeal path under the MRCA seems a simple process. Further investigation shows there are a number of issues that must be addressed for this to work effectively and this paper has attempted highlight those issues. The overriding intent is to have the right decision made as early as possible so that DVA's clients will receive their entitlements in a timely manner.
91. The main issues identified are as follows:
- the extent of investigation at the MRCC reconsideration level;
 - VRB remit powers;
 - ADR processes;
 - engaging legal practitioners in the VRB process;
 - implications for ESO representatives;
 - resourcing;
 - award of costs at the AAT;
 - reimbursement of costs for medical reports;
 - transition issues; and
 - test cases to the Federal Court.
92. The deadline for providing feedback will be 30 September 2013, to allow sufficient time to provide advice to the Government for consideration in the 2014 Budget context, subject to the Minister's agreement.

ATTACHMENT A



Veterans' Review Board

General Practice Direction

Introduction

The role of the Veterans' Review Board's (**the Board**) is to provide independent merits review of particular types of decisions and determinations specified in the *Veterans' Entitlements Act 1986* (Cth) and the *Military Rehabilitation and Compensation Act 2004* (Cth).

The Board aims to do this in a manner that is fair, just, informal, economical and quick.

This practice direction sets out the procedure to be adopted for all applications for review before the Board.

The practice direction is designed to assist the Board in managing cases with the aim that they be finalised within 12 months of lodgement, as well as giving the applicant and their representative every reasonable opportunity to present the case.

This practice direction has effect on and from **1 January 2011**.

Information for unrepresented applicants

If you do not have a representative, the Board would encourage you to find and engage a representative to assist you to prepare and present your case.

A number of ex-service organisations and the Legal Aid Commission in some states and territories provide representatives free of charge, whether the applicant is a member of their organisation or not. A list of these organisations is available from the VRB.

Please note that lawyers cannot represent you at a hearing before the VRB, but they can help to prepare your case.

To find out more please contact your local VRB Registry.

Responsibilities of representatives

Representatives are an integral part of the work of the Board and play an important role in assisting veterans and their dependents. As a representative, you should present the case to the best of your ability and promote the timely resolution of the case consistent with the best interests of the applicant. This includes:

- only taking on work that you can efficiently undertake in order to comply with timetables made by the Board;
- have the case ready to be heard as soon as practicable; and
- present the identified issues and relevant evidence clearly and succinctly.

In addition, as a representative before the Board you have a duty:

- to not mislead the Board;
- to maintain your objectivity and exercise independent judgment in the conduct and presentation of the case to the Board;
- to be aware of the relevant legislation and case precedents so to be able to advise the Board of any sections of the Act(s), SoPs and factors, case law and policy which are relevant, regardless of whether they support or detract from the case; and
- to act courteously and behave in a proper manner before the Board.

1. Section 137 Documents (Departmental Report)

1.1 Time limit for lodging the Departmental Report

DVA or the MRCC are required to provide the Board, the applicant and his or her advocate with a copy of the Departmental report, within 6 weeks of an application being lodged. The report must contain a copy of all of the documents relevant to the claim.

1.2 Freedom of Information Request

The Board must be satisfied that all material relevant to the review is available for their consideration. As such, the Board will request all Departmental files for review prior to a hearing.

If you consider that all the relevant information is not contained in the section 137 report you should consider making a Freedom of Information (**FoI**) request of DVA to obtain access to the files to ensure that your case is fully prepared.

Please consult the DVA website page regarding FOI.

If your appeal relates to a claim under the MRCA, you should not use the DVA FOI Application form when seeking access to documents under these access provisions. Contact the claims assessor, that made the original determination that you now wish to be reviewed or TMS officer for further information on how to use the MRCA access provisions.

2. Obtaining further evidence

You should consider carefully the need for further material / evidence to support your case. For example, further evidence might include statements about events relevant to your case, or additional medical reports.

Within 10 weeks of receiving the section 137 report, you should advise the Board of the investigations you are undertaking. You do not need to disclose the name of person with whom an appointment is being made, or the particular speciality. You only need to advise the Board of the particular date or dates and when you anticipate the material being available.

If there are any special circumstances and you cannot advise the Board of the appointments you have made, you may make a request to the Board to provide that advice at a later date. If you need additional time, you should make this request as soon as possible.

2.1 Costs

If you have already obtained medical evidence in support of your application and provided it to the Board, you can apply to the Department for reimbursement of the costs (including associated travel costs). Certain conditions and time limits apply and you should contact the Department for details. The Board is not involved in the processing of these claims.

2.2 Assistance from a VRB Registrar

Applicants and/or representatives are expected to obtain the material/evidence they consider to be important. However, if you are having difficulties in obtaining material/evidence, which you consider is important to the case, a VRB Registrar may assist you to obtain relevant material.

In making a request to a VRB Registrar for assistance, you must:

- Make the request as soon as possible after you receive the section 137 report;
- Set out good grounds for seeking the particular evidence; and
- Make it clear how the material/evidence would assist the Board in determining a relevant issue.

In the circumstances where a VRB Registrar is satisfied the material will assist the Board in its determination and he or she makes a request for further evidence:

- the costs will be paid by the Department;
- while you need to identify the type of evidence/material that is required it is important to bear in mind that you cannot nominate specifics (such as a particular medical practitioner to provide a report or second opinions); and
- the material/evidence, whether favourable to your case or not, will be added to the section 137 report and provided to the Board.

Contact details for VRB Registrars in each state are available on our website.

2.3 Summoning witnesses or documents

A summons is an order for a person to appear at the Board and/or produce documents.

The Board will only issue a summons where there is no other practical way to obtain relevant material that will assist the Board.

It is a matter for the presiding member of the VRB Panel hearing your case to issue a summons, at his or her discretion.

If you ask for a summons to be issued you are responsible for providing the person summonsed with expenses to travel to the Board and for paying the witness fees for any experts.

Please see the [Fact Sheet](#) available on the Board's website for further information regarding summons.

3. Lodging your submissions, further evidence and certificate of readiness.

By lodging a certificate of readiness (CoR), you are telling the Board that you are ready to go to hearing. Along with your certificate of readiness you should lodge the following:

- A submission addressing the specific issue(s) that you consider to be in dispute (see the Board's submission templates); and
- the evidence/material (eg. expert reports and the statements of all witnesses) referred to in your submission and on which you wish to rely.

The lodgement of all material/evidence ensures that it will be taken into consideration by the Board when reviewing your case.

You should lodge your CoR and accompanying documents within the time requested by the Board. In fixing a time for when your CoR should be lodged, the Board will consult with you and consider the dates of any medical or other appointments which you have made.

If you consider that your case could be referred for an Alternative Dispute Resolution (ADR) Process, please advise the Board in your CoR (see paragraph 4 below for more information on ADR processes).

If there are any special circumstances and you cannot lodge your CoR and accompanying documents within the time specified by the Board, you may make a request to the Board to provide that advice at a later date.

If a CoR or reasons why you are not ready to proceed are not provided, the Board may list your matter for a hearing and it may proceed in your absence if you do not attend the hearing.

4. Case appraisal and other forms of alternative dispute resolution

Once your CoR, submissions and evidence have been received, a Senior Member of the Board may appraise your case.

Cases will not be fixed for hearing unless a Board member is satisfied that they are ready for hearing.

The Board will write to you within 28 days of receiving your CoR and advise that:

- Your matter has been listed for hearing and notify you of the date and time; or
- The member has directed that further investigation or evidence will be sought by the Board. Once the further evidence is received, you will be sent a copy and you will have 28 days to provide any amended submissions in response to the new material; or
- If you consent, a Board member may make a favourable decision on the papers in your case. If you are successful in part, you will have 28 days to make submissions in relation to matters such as the date of effect, remittal for assessment etc; or

- Your case will be referred for an ADR process including (but not limited too) conferencing or neutral evaluation.

The aim of referring a case for an ADR processes is to resolve or limit the issues in dispute and finalise cases as early as possible.

A matter may be referred for conferencing if further information or investigation is needed, you are waiting for a decision to be made in an unrelated but relevant matter, or further applications need to be joined to your current application.

A matter may be referred for neutral evaluation where a member has identified a legal and/or factual issue that is decisive and you are willing to have your case or the identified issue evaluated.

In the circumstances where the Board makes a request seeking further evidence or investigation, the costs will be paid by the DVA.

If your matter is not resolved via an ADR process it will be listed for hearing and we will notify you of the date and time.

5. At the hearing:

5.1 Telephone or Video Proceedings

At the discretion of the presiding member hearing your case, part of any hearing may be conducted either by telephone or video link. The Board will consult with your prior to arranging a hearing by telephone or video link.

Please note the Board pays for the cost of video hearings.

Using a telephone or video link hearing will usually enable a hearing to be listed at an earlier date than might otherwise occur.

Registry staff will check if you require a video or telephone hearing (or part of a hearing). You can also make a request at any time.

It is important that you provide Registry staff with relevant telephone numbers and advise any witnesses (including the applicant) of the date, time and estimated duration if they are to give evidence by telephone or video.

5.2 Adjournments

Once a matter has been listed for hearing before the Board, an adjournment will not be granted unless there are good reasons to justify the adjournment.

An application for an adjournment must be made at the earliest possible opportunity. The application is to be made in writing addressed to the Registrar. The application must set out in writing the reasons why an adjournment is necessary and be signed by the person or representative seeking the adjournment.

The application must be accompanied by any documents that support the reasons for seeking an adjournment.

An application for an adjournment will be referred to the Presiding Member of the VRB panel for consideration.

An application for an adjournment made less than ten working days prior to the hearing date will not be granted unless there are particular and compelling reasons for the matter to be adjourned. Applications made the day of a hearing, even when advance notice has been given, will not be granted unless there are exceptional reasons.

Doug Humphreys
Principal Member



Veterans' Review Board

Alternative Dispute Resolution Guidelines

In carrying out its functions the Board must pursue the objective of providing a mechanism for review that is 'fair just economical informal and quick.' The VRB has, as a national approach, decided to make Alternative Dispute Resolution available to all VRB appeals.

What is Alternative Dispute Resolution?

Alternative Dispute Resolution (or **ADR** as it is commonly known) is a term which describes "alternative" process which can help parties to finalise a case, without the need for a Board hearing, so the expense and time of a hearing can be avoided.

If I participate in ADR, do I forego the right to a hearing?

No, the involvement in an ADR process does not mean that the parties forgo their right to a hearing if the matter is not finalised.

What alternative processes are available to help finalise a case?

Currently, case appraisal or neutral evaluation is available to all VRB appeals. The Board is considering making conferencing and mediation available in the future.

Who will make a referral to an ADR process?

As noted in the General Practice Direction, you can request that your case be referred for an ADR Process. Alternatively, Registry staff may refer a case for consideration of whether the matter maybe suitable for an ADR process. If this occurs, the Board will consult with the representative (or in the case of unrepresented matters, the applicant), to obtain consent to refer the matter for an ADR process.

Please note, in relation to MRCA appeals, it was previously the Board's national policy to refer all matters for a case appraisal prior to hearing. These matters are now treated the same as VEA appeals. If you want the Board to conduct an appraisal in a MRCA application, you must specifically make this request to the case manager handling your application.

What should I consider in referring a matter for Case Appraisal?

- Does the matter turn on a particular evidentiary or factual issue?
- Would the hearing be complex and lengthy?
- Would additional independent investigation assist in finalising the matter?
- Would it be more convenient to evaluate on the papers?

What do I need to provide for a Case Appraisal?

You should provide material in support of the application, along with your submissions to clarify issues of diagnosis, kind of death (where applicable), medical and other evidentiary matters. The case appraisal will be expedited, where there is relevant material is provided to assist the member conducting the appraisal.

How does Case Appraisal work?

Case Appraisal is a process of assessing the facts in a case and by that process assisting the parties to finalise the matter. The process is outlined below:

1. The Case Appraisal process is undertaken in confidence and without prejudice to the parties.
2. The appraiser (usually a VRB member) reads all of the documents, including any submissions sent by the parties.
3. The appraiser assesses the merits of the case.
4. An outcome of Case Appraisal may be that a favourable decision can be made on the papers. However, this is a decision for the individual Member assessing the case and cannot be pre-determined.
5. If a favourable decision can be made, the applicant or representative will be sent a draft copy of the decision. If the applicant or representative accept the draft decision, it will be published in the usual way. If not accepted, the matter will proceed to hearing.
6. If a favourable decision cannot be made on the papers, at the request of a party, the appraiser may give a written opinion about the factual issues in dispute. This will only be a summary of the likely outcome at a hearing of the factual issues based on the evidence available at the time of the Case Appraisal. The opinion may be admitted in evidence at the Board hearing unless a party objects to the admission of the opinion.
7. Further, the appraiser may make directions for the Registrar to obtain relevant information which may assist in finalising the matter on the papers or to progress the matter to a hearing. Once the further evidence is received, you will be sent a copy and you will have 28 days to provide any amended submissions in response to the new material.
8. Unless a favourable decision can be made on the papers, the matter will normally proceed to a hearing.

What should I consider in referring a matter for Neutral Evaluation?

- You can identify a legal and/or factual issue that is decisive.
- You are willing to have the identified issue evaluated.
- Most investigations and gathering of evidence has been completed.

How does Neutral Evaluation work?

Neutral Evaluation is different to case appraisal. It is where an evaluator provides you with an opinion about the outcome of a case, which can help you work out if there is a setback in the application. The Neutral Evaluation process is undertaken in confidence and without prejudice to the parties.

Before participating in Neutral Evaluation, you are strongly encouraged to prioritise the issues for consideration.

The evaluator will focus specifically on key issues raised by the facts of a case (as presented by the parties) as well as relevant questions of law.

At the conclusion of the evaluation, the evaluator will offer the parties a non-binding opinion either on:

- What they think the possible or probable outcomes may be; or
- A particular point of law.

The purpose of the non-binding opinion is to provide an objective basis to assess how to proceed.

If the matter is not finalised, the evaluator may recommend further relevant information be sought, which may assist in achieving finalisation through the use of some other ADR process or to progress the matter to a hearing.

Doug Humphreys

Principal Member

5 September 2012

