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SENATE

FINANCE AND PUBLIC ADMINISTRATION REFERENCES COMMITTEE

Reference: Review of veteran and military compensation

THURSDAY, 25 SEPTEMBER 2003

SYDNEY

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SENATE

FINANCE AND PUBLIC ADMINISTRATION REFERENCES COMMITTEE

Thursday, 25 September 2003

Members: Senator Forshaw *(Chair)*, Senator Watson *(Deputy Chair)*, Senators Heffernan, Moore, Ridgeway and Wong

Substitute members: Senator Bartlett to replace Senator Ridgeway and Senator Mark Bishop to replace Senator Wong

Participating members: Senators Abetz, Brandis, Carr, Chapman, Conroy, Coonan, Crossin, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Harradine, Harris, Knowles, Lees, Lundy, Mackay, Mason, McGauran, Murphy, Murray, Payne, Sherry, Tchen and Tierney

Senators in attendance: Senators Forshaw, Bishop and Moore

Terms of reference for the inquiry:

To inquire into and report on:

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

(a) an examination and assessment of the causes for such extensive demand for administrative review of decisions on compensation claims in the veterans and military compensation jurisdictions;

(b) an assessment of the operation of the current dual model of internal review, Veterans' Review Board/Administrative Appeal Tribunal, its advantage, costs and disadvantages;

(c) an assessment of the appropriate model for a system of administrative review within a new, single compensation scheme for the Australian Defence Forces and veterans of the future, including compensation claim preparation, evidentiary requirements, facilitation of information provision and the onus of proof;

(d) identification of policy and legislative change required to amend the system at lowest cost and maximum effectiveness; and

(e) an assessment of the adequacy of non-means tested legal aid for veterans, the appropriateness of the current merits and its administration, and options for more effective assistance to veteran and ex-service claimants by ex-service organizations and the legal industry.

WITNESSES

Subcommittee met at 9.31 a.m.

CHAIR—Good morning, ladies and gentleman. I declare open this public hearing of the subcommittee of the Senate Finance and Public Administration References Committee. Today is the first of two days of hearings for the inquiry into administrative review in the area of veteran and military compensation and income support. We are meeting in Sydney today and in Canberra tomorrow. The Senate referred this reference to the Senate Finance and Public Administration References Committee on 19 June 2003. The committee has received 14 submissions, all of which have been made public. Today's hearing involves representatives from the legal profession, the ex-service organisations and the Legal Aid Commission of New South Wales.

I remind officers that the Senate has resolved that there are no areas in connection with the expenditure of public funds where any person has a discretion to withhold details or explanations from the parliament or its committees unless the parliament has expressly provided otherwise. I further remind officers that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. All those appearing today before the committee should have received advice on the protections and obligations that apply to witnesses under parliamentary privilege. The subcommittee prefers to conduct its hearings in public; however, if there any matters which a witness wishes to discuss with the subcommittee in private, we will consider such a request.

[9.33 a.m.]

ISOLANI, Mr Gregory, Legal Adviser, Armed Forces Federation of Australia

CHAIR—I now welcome Mr Greg Isolani, a partner at KCI Lawyers, as our first witness this morning. We have received your written submission, which we appreciate, and I now invite you to make some opening comments. We will then proceed to questions from members of the subcommittee.

Mr Isolani—Thank you. I welcome the examination into and assessment of the current review models. I think it is an opportune time, given the bill proposing to bring in wide-ranging changes to the current mix of benefits. Importantly, if it is going to be bottlenecked at the review stage using the current systems of review and the polemics that go with it, I think the veteran community as a whole will feel somewhat dissatisfied and disenfranchised from the process, and still feel that they are denied their benefits, if they are not given adequate right of review, funding, representation and an equitable outcome.

Senator MARK BISHOP—Welcome, Mr Isolani. You said that you represent the Armed Forces Federation. You might put on the record your background interest and expertise in this rather arcane area of law.

Mr Isolani—I am a legally qualified solicitor from Melbourne. I have practised in Commonwealth compensation since 1992, specifically with respect to military compensation since 1993, and I specialise in that jurisdiction primarily with respect to the Safety, Rehabilitation and Compensation Act. I have represented the Armed Forces Federation, together with other ex-service organisations—the Victorian chapters, if you like, of the RDFWA—and other veterans regarding the polemics of the scheme. I have a lot of experience in the appeals process to the AAT, internal review, and limited cases to the Federal Court. So I have an active interest. I have a private practice in which I specialise in the area of Commonwealth administrative appeals work, but primarily military compensation.

Senator MARK BISHOP—Your submission was quite critical—indeed, it was the most critical of all the submissions we received—of the Military Compensation and Rehabilitation Scheme administration. You alleged that they take every opportunity to make it hard and harder for the claimant. Can you give us an overview of your management experience of the Veterans' Entitlements Act contrasted with the MCRS and compare the two processes for both efficiency and fairness?

Mr Isolani—My paper delved into the minutia of the claims administration of military compensation—as I mentioned, that is my primary area of practice—the reason being that, when a veteran or a current or ex-ADF member comes to me and they have a dual entitlement to claims under the VEA, invariably, if the claim has been rejected, I have to refer them to an ex-service organisation welfare officer or pensions officer to assist them regarding the case preparation of the VRB, so I only really see the client after they have gone through the VRB process. For the record, I have limited experience with respect to the AAT applications, a reason being that, by the time they come to me, the ESO pensions officer and I have come to an opinion

that, notwithstanding our best efforts to investigate and obtain medical evidence or historical reports, there may be little scope to continue with the AAT process.

In terms of efficiency, the VRB has certain efficiencies connected with it, in that the veteran can have the cost of a medical report paid for. That is in contrast to the military compensation scheme at the internal review stage where there are no costs for disbursements or legal representation—neither is there any legal aid for a veteran at the VRB, but at least they have the assistance of an advocate who can attend the hearing.

So, to take a step back, my main paper and focus are on the military compensation review process, and the minutia I have highlighted is that certain ambiguities are perpetuated that go against the grain of beneficial and remedial legislation to assist veterans or current ADF members to receive their compensation benefits. It embroils them in litigation. The system perpetuates the AAT review model because, quite simply, there is nothing in it for a veteran to spend the $500-odd on a medical report or the legal costs—for example, I were to charge them for my time to prepare a submission, which I do not. If I were to spend half a day on an internal review and the veteran were to spend $500 on a medical report and we overturn the decision, they do not get any of that back—they do not get the disbursement paid back.

So, unfortunately, the internal review process becomes a leapfrog process to the AAT, whereby if we are going to spend money and time to prepare a case there is a reasonable chance that we may have it reimbursed—and similarly, I understand, with the VRB going to the AAT. Some practitioners who specialise in VEA type claims at the AAT encourage veterans to use the VRB merely as a stepping stone to get to the AAT, apply for legal aid and then get stuck into the merits of the case.

Senator MARK BISHOP—Are the hearings at the AAT on both the VEA side and the MCRS side hearings de novo?

Mr Isolani—Yes, they are.

Senator MARK BISHOP—So essentially from the VEA side, after internal review, VRB hearing and appeal to the AAT, you can adduce and bring forward new evidence?

Mr Isolani—That is right; right up to, literally, the day before the hearing.

Senator MARK BISHOP—And it is the same on the MCRS?

Mr Isolani—That is right.

Senator MARK BISHOP—So you say arising from that factual situation there is little incentive to have proper preparation of claims prior to the AAT hearing?

Mr Isolani—Overall I would agree with that, yes.

Senator MARK BISHOP—Although a huge number of claims are settled and agreed at VRB level, aren't they?

Mr Isolani—I am not sure if the statistics bear it out that they are in fact settled at the VRB. I understand that through the conciliation process of the AAT military compensation matters are settled there.

Senator MARK BISHOP—I was more referring to the VEA side.

Mr Isolani—Okay. I would have to look at the statistics but I understand that a large number of the VRB applications are in effect affirmed and then subject to review at the AAT, when they are then overturned in substantial numbers. I think there are figures—

Senator MARK BISHOP—I am not arguing that there are not significant numbers of claims that go on to the AAT on the VEA side. But in the order of 40,000 to 45,000 of 50,000 applicants in the last two years have been settled prior to AAT involvement—that is, they are solved at the two internal review times or at the hearings of the VRB. Are you aware of that?

Mr Isolani—Perhaps I am looking at different figures in terms of those cases that are resolved—sorry, the number of claims that are lodged, rejected and then subsequently overturned. The paper from the secretary, Mr Neil Johnstone, provided statistics.

Senator MARK BISHOP—It did.

Mr Isolani—There were two attachments. Attachment A dealt with reviews of decisions made under the VEA.

Senator MARK BISHOP—There is a document here that says in the year 2002—I presume it is the financial year 2002—there was a total of 37,000 primary claims accepted and that 6,800 were finalised at the VRB and 1,000-odd went on to the AAT. That is attachment A of the DVA submission.

Mr Isolani—Yes, I have those figures.

Senator MARK BISHOP—That suggests that the overwhelming bulk of claims through the VEA side are settled prior to effective appeals at AAT level. Do you agree with that?

Mr Isolani—I agree with the statement broadly, but I do not quite understand: in one of the columns the VRB set aside varied rate is 30 per cent.

Senator MARK BISHOP—Yes.

Mr Isolani—So we are saying that is the bulk of them set aside, whereas at the AAT, in that column, the AAT set aside varied rate is 58 per cent, using the 2001-02 figures at the bottom.

Senator MARK BISHOP—Yes.

Mr Isolani—I am not sure if we are saying perhaps that at the AAT there is almost double the amount that are set aside and varied than at the VRB.

Senator MARK BISHOP—I think the set aside varied rate at the AAT is very high as well. It may well be as high as almost 60 per cent. But it is 60 per cent of 1,000.

Mr Isolani—Compared to 30 per cent of—

Senator MARK BISHOP—Yes. If you take the bottom line, you have 37,000 claims settled at first instance; 6,800 are finalised at VRB—that is, in the order of 44,000 are dispensed with one way or the other at the first two of the three stages—and you have an appeal rate of 1,057. I am not suggesting that is not a high number but in the scheme of things the overwhelming bulk appear to be settled prior to AAT hearing. Do you agree with that?

Mr Isolani—Looking at those figures I would have to agree.

Senator MARK BISHOP—That is fine. But your complaint was that in terms of the VEA there was little incentive on the part of veterans or their representatives to have the claim properly heard or fully heard by way of evidence prior to AAT stage.

Mr Isolani—As I understand the VRB process, it prohibits legal representatives. It also does not provide for a conciliation process. Those two things may aid and assist the department and the veteran to come up with a better outcome without the need for the percentage figures that we are looking at to then go on to review at the AAT.

There has also been some concern with respect to the quality of decisions by the members presiding on the VRB. As I have referred to in my paper, largely looking at the New South Wales Legal Aid Commission paper and their reflections that I have seen, the board may be scant in their reference to the evidence that is before them. Sometimes you go to the AAT and you do not have to adduce new evidence; it is a case of interpreting what is already there. They are the cases that concern me. That can happen at—

Senator MARK BISHOP—But that happens in a lot of jurisdictions, doesn't it?

Mr Isolani—In the MCRS jurisdiction it does.

Senator MARK BISHOP—As well as the VEA jurisdiction.

Mr Isolani—Yes.

Senator MARK BISHOP—Certainly my experience before this life is that appeal level tribunals often overturn decisions in the first instance because they were not dealt with properly or the evidence was not interpreted properly or whatever. That is why we have appeal levels.

Mr Isolani—Yes.

Senator MARK BISHOP—Tell me this: has the new administration of the MCRS by DVA in more recent years made any appreciable difference? Have you observed any difference?

Mr Isolani—I have. My concern—and I used to say this quite flippantly but in all earnestness—is that the MCRS type mentality may in fact infect the general goodwill and nature

of the delegates at DVA regarding the processing of claims and the attitudes towards claimants. Prior to the Tanzer report and the co-locating of the two departments there was a particular mindset that permeated within MCRS, and I think that has been softened since there has been a co-location, because of the attitude that DVA generally showed towards veterans.

Senator MARK BISHOP—When you say 'softened', do you mean on the margins or is there a significantly revised attitude?

Mr Isolani—I think there is a palpable difference from a micro-level in how claimants are spoken to over the telephone and the quality of the decisions. There is less reliance on proforma letters with slabs of legislation being regurgitated and a bit more of an amenable approach to referring applicants out to medico-legal practitioners to answer certain questions as opposed to relying on strict interpretation of legislation and some narrow Federal Court decisions regarding lump sum claims, for example. I think there has been an improved difference.

Senator MARK BISHOP—A significant number of the submissions were arguing for getting rid of the VRB process. From my reading of the submissions it was mainly because lawyers or legal representatives were not permitted to appear at that level. Why do you think there is also such strong support within the ex-service community for retention of the VRB? If you look at the submissions of the RSL, the RDFWA, Legacy and like organisations, one, they were most adamant that the VRB process should be retained and, two, particularly in respect of those three organisations, they were quite fulsome in their praise of the system—the process and the VRB activity. So the question is: what is the argument for getting rid of it, apart from the fact that lawyers are not allowed to appear?

Mr Isolani—It is not a self-serving argument. I think that historically and culturally the VRB has been within the province of the ESOs you have referred to, which enable them an active and vital role to attend the hearings and to bring to life, I guess, some of the issues about definitions of incurring danger or the manifestation of conditions and so forth, that as a lay lawyer with no service experience I have no knowledge of. It is not an argument about getting rid of the VRB. In fact, on behalf of the Armed Forces Federation, as an ESO working group representative, I proposed a model, which is annexed to my paper—

Senator MARK BISHOP—Yes, I am going to come to that.

Mr Isolani—to keep the VRB, but for all ADF members, current and former, to retain the special and unique nature of the board. I think a big role in the ART bill discussions was that there are specialist tribunals that should remain. The problem that I have, which is really not so much of a problem, is that, if we are talking about trying to reform a system to make it more equitable and to produce outcomes that reduce the ensuing cost of litigation, the delays and what may be seen as the majority of cases that do overturn the primary decisions, there may not be a lot to do to make the VRB model a truly workable and equitable model, without excluding lawyers. Invariably, lawyers are a part of the system—we are just part of it at a later end. It is the lawyers who run cases, and the judges who decide them in the Federal Court, for example, who define, clarify, restrict and expand the entitlements.

As part of the ESO working group, I was largely condemned for trying to infect the VRB with lawyers, as I think one of the representatives said. I think he thought that lawyers should be

buried 50 feet underground because, deep down, we are really good people! So there was a prevailing mentality about lawyers. It is just about working with ESOs, not excluding them, as opposed to their mentality of excluding lawyers.

Senator MARK BISHOP—You referred to the ArFFA paper and the MCRS working group in July of last year. That paper outlined a model that was proposed by your client, ArFFA, and which included legal representation at the VRB. Can you just put on the record what happened to that model and what the reaction was at the working group level?

Mr Isolani—I think, as I indicated, it was seen by some that there was an agenda to make the VRB a legalistic model that would not assist in the review process and would maybe exclude the ESOs. In fact, another comment that was made was: what would be the role of ESOs in that VRB process in the proposed model. The paper was tabled, it was discussed for about 15 minutes and then it was quietly put to one side and we got on with the real business.

Senator MARK BISHOP—Is there any value in going the whole hog and simply combining the VRB and the AAT? Is that practicable?

Mr Isolani—I think it could be workable. I have thought about different scenarios and how that could work. Currently you have three members of the VRB. Then it goes on to another body—the AAT, for example, where you have up to another three members. So you have six people looking at the same decision and you have two administrative bodies that are not sitting side-by-side. One of the considerations would be to have the VRB as a division of the AAT to streamline the administration and the number of people that physically deal with a claim. You would have the internal review as part of that process. At any time the DVA can review their decision or, at a point in time when they have to produce the statement of issues that I proposed in my model, they would have to say that there was no scope to overturn it at that level.

I would then keep the VRB model with the ESOs and with Legal Aid for purpose of a conciliation, perhaps. After obtaining all the relevant material, medical reports and historical reports and, together with lawyers or with an ESO representative, you could then have a conciliation before a VRB member. That may be a service member who has expertise in the issue at hand. Following the conciliation, given that you have done most of the groundwork to prepare the case, if there was no scope to resolve it then the conciliator could make a recommendation for the case to go on to hearing at the AAT.

I think that process would hopefully reduce the delays and the administrative costs. It would also enable the veterans to still be part of an independent review process. The VRB would not have an enhanced status, but this would ensure that it remained independent of the department by working with the AAT, where, ultimately, they will make the decision on a de novo hearing, where you do call witnesses to give evidence and so forth.

Senator MARK BISHOP—If you went down that path, you would have the application at first instance, the section 31 internal review, you would go off to the VRB as a division of the AAT and you would have essentially a forced conciliation?

Mr Isolani—Yes, that is right.

Senator MARK BISHOP—With a view to getting all the evidence out?

Mr Isolani—It would be like you have now: by the time you come to a conciliation or a compulsory conference you have obtained all your medical evidence and that has been assured, because you have had the preliminary conferences and so the parties have worked out what it is that is outstanding and what will be provided. There are practice directions to comply with in regard to providing all of that information and then, quite simply, after the conciliation, as you have in the AAT, the case is remitted to a tribunal member to be listed for hearing. You have already done 80 per cent of the groundwork.

Senator MARK BISHOP—Thank you, Mr Isolani.

CHAIR—I have one question, and then I will go to Senator Moore. In paragraph 8.4, when talking about the MCRS, you say that they have:

... on occasion engaged private law firms from the Attorney-General's panel of approved solicitors ...

and that this is an:

... unlawful delegation of MCRS' powers.

Could you elaborate on that? How common is that practice? Has any complaint been lodged about it?

Mr Isolani—Senator Bishop's question to Senator Hill on 27 June 2003 regarding the amount of money spent by the panel firms for the Commonwealth in these matters—

CHAIR—I usually follow all of Senator Bishop's questions, but that is one I cannot recall.

Mr Isolani—I have got it here if you want it.

CHAIR—I am sure it was an excellent question.

Mr Isolani—I refer to it because it did tease out—

CHAIR—It is good to see someone is reading the *Hansard*, too.

Mr Isolani—Yes, more diligently. For me, anyway, it teased out the $5 million that is spent on private law firms. In my reading, it did not differentiate where the amounts were actually spent. There is one internal review amount of $1,000,072—that is in answer to question 1(a) with respect to the amount of money spent on internal reviews. Obviously, MCRS undertake a reconsideration and there are delegates who are employed for that purpose. The decision comes back, and I can see that it is a legalistic document—it is like a treatise on a point of law and it is a very thorough examination, which is great. But what I asked them is, 'Can I please have a copy of the legal opinion that you have relied upon.' They sign off on it, so it is not a true delegation—in fact, someone has done their job. I have threatened to issue a summons for MCRS' file—for the legal advice—once I have gone to the AAT, and I am told that, quite

correctly, it is covered by legal professional privilege. So I do not push the point as a futile legal exercise, but I do make the point.

CHAIR—But do you say it is unlawful?

Mr Isolani—The act does expressly prohibit delegating their role.

Senator MARK BISHOP—It expressly prohibits solicitors appearing at certain levels, such as VRB, but it does not expressly prohibit the tribunal or the department seeking legal advice on points that arise, does it?

Mr Isolani—No.

CHAIR—That was my question.

Mr Isolani—In the Safety, Rehabilitation and Compensation Act there is a section with respect to reviews. I am sorry I do not have it at my fingertips. Can I take the question on notice to expand it?

CHAIR—Yes.

Mr Isolani—There is a section that says Comcare or the commission cannot delegate certain functions, and that is one of the functions.

Senator MARK BISHOP—That is probably right. But are you arguing that the receipt of legal advice—sought by persons at a departmental level or once the matter goes through the various appeal processes under the Safety, Rehabilitation and Compensation Act—and the use of that advice at either a departmental or tribunal level is unlawful per se?

Mr Isolani—Not at the tribunal level. At the primary level, before the reviewable decision is made, it is not unlawful for the department to seek legal advice. I understand that, obviously, it is at their discretion to use their funds as they wish. However, it is reasonable for an applicant to have before him or her all the information that was before the delegate when they made that decision, so that should include the legal advice if it is done at a primary level. Also, the amount of money being spent by the department at that level of decision making by engaging law firms to assist them in making decisions that they should have the capacity to make without recourse to law firms raises a question: is it the same law firm that is then engaged to go to the AAT and, in effect, to defend their decision on behalf of the department, and does that create a conflict of interest? The law firm should stand at arm's length.

Senator MARK BISHOP—I had noted in your submission the issue that the chair has raised for you to comment on and I have a note to raise it with the DVA—that is, the use of law firms.

CHAIR—I was concerned about that comment and I tried to understand what was happening. In effect, they were delegating their responsibility to a law firm to write the decision, or to decide. I can see an argument, putting aside for the moment the question of whether it is a breach of the act—lawful or unlawful. If somebody says, 'Give us some advice,' they get a written

advice and that written advice becomes the decision. What the applicant gets is the written decision. That is what you were trying to get at.

Mr Isolani—Yes. It reads like an advice from a law firm.

CHAIR—Whether or not it is technically lawful or unlawful—

Mr Isolani—I put that in the section dealing with reconsiderations, because at that level the applicant has no entitlement to reimbursement.

CHAIR—I appreciate that that was your argument. There is a question of equity here.

Mr Isolani—That is right.

CHAIR—Maybe, from your perspective, the word 'unlawful' might be stronger than—

Mr Isolani—Intended?

CHAIR—Yes.

Senator MARK BISHOP—Are you alleging that the case officers at first instance are seeking legal advice and, in effect, using it as the major basis of their decision and that that is a delegation outside the act and, hence, unlawful? Is that your argument?

Mr Isolani—It is not so much the primary decision maker; it is the independent review officer who reviews the primary decision. That is what I am suggesting under the act may constitute an unlawful delegation. There is a fine line between getting an opinion and saying, 'This is one particular view of the factual medical and legal circumstances and I will incorporate this view.' I am suggesting that in my experience—I will not pre-empt—

CHAIR—It sounds a bit like plagiarism.

Senator MOORE—That is what it is.

CHAIR—I think we understand.

Senator MOORE—I have only a couple of questions. The culture of appeal within this particular government area has been much spoken about in the submissions. It is said that there is an acceptance that appeal is their right, that people in the veterans and military environment are aware of their rights and that they access appeals. Having worked in the area, is it your perception that people see their appeal as a natural step in the decision-making process?

Mr Isolani—There is an interesting dichotomy between the VEA decisions that are made and the number of appeals that flow from them versus the military compensation appeals. There is some speculation, for example, that under the VEA veterans can lodge claims a second and third time with new evidence. They are encouraged and assisted through ESOs to pursue their rights and to pursue them vigorously. They may have legal aid if they qualify or have qualifying service. They are supported financially to do that. Contrast that with military compensation. In

my experience there is a fairly litigious and adversarial approach, and some decisions do recite large paragraphs of legislation. Claims are rejected because of the latency of the medical condition manifesting, given that it may have occurred many years beforehand. So I think there is a certain culture within the VEA. Also, in my experience, it has only been in recent times that the TIP and the other program offered by DVA to advocates have tried to train them up with respect to military compensation claims as well.

Senator MOORE—That is the BEST one.

Mr Isolani—I think BEST provides the support—the finance and so forth—for the actual officers and administrative support, computers and accommodation; TIP is the training programs—

Senator MOORE—To know the law.

Mr Isolani—Yes. It could also include welfare and housing.

Senator MOORE—It interests me, because in the other jurisdiction in which I have worked appeal has always been a very stressful process and not one that you encourage people to take up. One of the roles of the advocate, whether they are legally trained or not, is to be very straight with the applicant and to say whether the case does or does not have merit, and, if it does have merit, to say, 'These are the downsides of taking it further.' In your experience here, is there that culture, or is it one—from what seems to be the case, in these submissions anyway—that does not have the same disincentive to go through the process as perhaps other compensation areas or industrial areas have?

Mr Isolani—Again, the dichotomy is that, under the VEA, it is very much supported to pursue the appeals. If the person has warlike or non-warlike service, they may be entitled to legal aid; so there is that culture of 'You may as well give it a go—

Senator MOORE—You have got nothing to lose.

Mr Isolani—Yes. Also, you have got a beneficial standard for people within that classification, a reasonable hypothesis, so cases are arguable. Whereas in military compensation I think there has been, on the one hand, a certain reluctance to take cases on, because they are protracted and they involve all the negatives of litigation; but, on the other hand—and unfortunately—that produces contingency type litigation. If someone does not qualify for legal aid but the case has merit, a lawyer may be able to successfully settle the case or proceed to hearing and have a favourable outcome, and the client will have their legal costs paid. So it is unfortunate that it can produce that result as well.

Senator MOORE—The other thing I am interested in is the internal review process, which is a natural step in other jurisdictions. When a decision is made, the next step is to go to the internal review. There is an expectation that there is some benefit in doing that. Your paper is not particularly complimentary about the quality of the internal review process, in at least side of it—in particular, the providing of standard questions for people to follow up; if you have got a case, having some kind of guidance to take, in particular, to a medical practitioner that says that if you are taking on a case these are the kinds of answers you need to have, stipulated by the

department. I am interested in your view on why that process is not stronger within the department. It would seem to me that that would be the best place to solve something—at the very first step.

Mr Isolani—I am not sure why there is a certain culture about referring someone off to a medico-legal practitioner, as opposed to giving them an opportunity to ask their treating specialist or surgeon, for example, a series of questions that will give them the answer. MCRS may argue that their medico-legal specialists are trained up to answer the questions.

Senator MOORE—They may argue that.

Mr Isolani—In terms of the internal review process—and I think the figures bear this out—not a lot of cases are overturned on reconsideration. On occasion I tell clients that, with cases involving pre and post 1988 conditions which may be denied for lump sum claims, it is akin to tobacco litigation: you have got to fight every case—each one on its own—look at your particular factual and medical considerations and review that in the context of the most recent Federal Court decision or one that might be pending. This is why I gave a bit of detail to the minutiae of the problems with claims being rejected in this sort of systemic way. There are not clear policies and there is not a beneficial application, in my view, of the legislation to these claims.

Senator MOORE—The process just keeps going if you have no faith in the first step. It continues with the process.

Mr Isolani—That is right.

CHAIR—Thank you very much, Mr Isolani, for your appearance here this morning. If there are any further matters that we need to get back to you on, we will contact you and ask you to respond.

[10.16 a.m.]

BUCHANAN, Ms Jodie, Senior Advocate, Veterans Advocacy Service, Legal Aid Commission of New South Wales

GRANT, Mr Bill, Chief Executive Officer, Legal Aid Commission of New South Wales

CHAIR—I call to order this public hearing of this subcommittee of the Senate Finance and Public Administration References Committee, which is inquiring into veteran and military compensation and income support.

I welcome Mr Bill Grant and Ms Jodie Buchanan from the Legal Aid Commission of New South Wales. You should have been made aware of the rules and rights relating to hearings of Senate committees, including provisions for parliamentary privilege. If, at any stage, you wish to give evidence in camera, you may request to do so and we would consider that at that time, but we do prefer our hearings to be in public. I might also indicate that we have had a request from a representative from a media organisation to record these proceedings and the committee have agreed to that request. These are public proceedings and they are being recorded for the production of *Hansard*. I thank you for your attendance here this morning and for your written submission. I invite you to make an opening statement and then we will proceed to questions.

Mr Grant—Thank you. There are some four or five propositions that come out of our submission that we have an interest in. I would like to quickly go through those propositions rather than going through the detail of the submission, which I am sure you have had a look at. One of the key points we make in our submission is the need for early intervention: for veterans to be able to get appropriate assistance right up front, for obvious reasons—to make their applications better; to have their applications supported, so earlier spending of disbursements, as we call them, particularly for medical reports and other reports; and generally to make sure that it is a better quality application at the earliest possible time. The second point that arises from our submission is that we need to expand the ability of legal aid to act for more veterans. We are restricted at the moment in relation to war veterans, as is defined under our Commonwealth guidelines. I do not believe I need to go into the arrangements under which legal aid situations are organised under our agreement with the Commonwealth and the guidelines which we are bound to follow—I am sure the committee knows about those. We would like to actually expand the range of matters in which we can get involved and on which we can act for veterans.

We would like to have an ability to review the statement of principles in relation to law reform to be able to take appropriate cases forward. It is very difficult for individual veterans, and even for some veterans organisations, to have the resources to do that. We do a little bit of that, but we would like to do more of those sorts of matters where we can actually test the field. We would like a different model of administrative review, and we have set out in diagrammatic form attached to our submission the sort of thing that we see as being of benefit to veterans generally. I think that summarises the main points that flow from our submission.

CHAIR—Thank you, Mr Grant. Ms Buchanan, did you wish to make any additional comments?

Ms Buchanan—No, that is an apt summary.

CHAIR—Thank you very much. We will go to questions now.

Senator MARK BISHOP—Welcome. We might start off with your final point about your model of admin review, attachment 1. Your model of reform necessarily involves the abolition of the VRB, as I read it. Given that the VRB is treated as sacrosanct by a lot of people in this jurisdiction—and I refer in passing to submissions of the RSL, RDFWA and Legacy and the views held by other vets organisations which have not made submissions that the VRB is a very worthwhile institution—how would you go about abolishing it? What would the consequences be of doing so? What alternative do you propose?

Mr Grant—I suppose what we are primarily interested in is collapsing the number of review processes. That is really the thrust of our submission. The most obvious way to do that, from a technical point of view, is to get rid of one level of review. I am certainly aware that there have been suggestions that, instead of abolishing it, in a sense you wrap it up with the AAT and make it an arm of the AAT. That does not run contrary to our submission, it simply allows the expertise that is gathered in that body to be moved further up the ladder, if you like, but it still removes one tier of review. The essence of our submission is that you have better informed decision making by primary decision makers. You then have an ability to have an internal review, again based on better information being before the reviewer in terms of a better prepared application with better reports attached to it et cetera. Then you would have a right of review to one body with all the processes that apply in terms of ADR et cetera in an attempt to try and get the right decision quicker.

Senator MARK BISHOP—So your argument is really about a more efficient system and the better provision of information in the first instance and at case review level as opposed to necessarily seeking the abolition of the VRB?

Mr Grant—Yes, we are looking to collapse the processes to take one level of review away from things. It is fundamental to that that it is a better standard of application up front, that it is a better prepared application and that it is a better assisted applicant to advocate their decision up front. Unfortunately, we do not keep accurate statistics on our representation before the AAT, but our advocates' own record keeping suggests that for 80 per cent or 90 per cent of matters there is some outcome in favour of the applicant.

Senator MARK BISHOP—At the AAT level?

Mr Grant—At AAT level.

Senator MARK BISHOP—I would not have thought it was that high; I thought it was in the order of 60 per cent or 65 per cent. It is nonetheless very high.

Mr Grant—Because we do not have accurate information, I could not dispute that. Our own advocates were a bit higher than that; nonetheless, it is too high in any event.

Senator MARK BISHOP—Yes, that is right. You also make the suggestion, at page 4 of your paper, that the appeal system for the VEA and the MCRS ought to be brought into line. Does that comment apply to the current dual system as well as the future under the proposed new scheme?

Ms Buchanan—Could you ask that question again?

Senator MARK BISHOP—At page 4 of your submission you suggest that the appeal system for the VEA and the MCRS ought to be brought into line—in other words, made uniform, if I understood what you were saying. Does that apply to the current dual system as well as to the future under the proposed new scheme?

Ms Buchanan—Yes, it does. It essentially simplifies the appeal periods and the model of review. It seems overly complex as it currently stands.

Senator MARK BISHOP—You would say one system into the future—VEA and MCRS—for all people?

Ms Buchanan—Yes.

Senator MARK BISHOP—And that goes for the earlier comment by Mr Grant to abolish the VRB, and more up-front, efficient processing of claims?

Ms Buchanan—Yes, and use the expertise of the Veterans Review Board for one tier of review.

Senator MARK BISHOP—Wouldn't it strike significant opposition from within the veterans community?

Ms Buchanan—The veterans community are not exempt from appearing at the Administrative Appeals Tribunal.

Senator MARK BISHOP—No, but wouldn't your proposal strike significant resistance from within the veterans community?

Ms Buchanan—I have not had the opportunity to read other submissions that have come forward from the veterans ex-service organisations so I cannot comment on that.

Senator MARK BISHOP—It would strike significant resistance. They have made that quite clear in all their submissions. All the peak organisations, including the RSL, the RDFWA, the VBAA and Legacy—almost to an organisation—oppose the proposition you are putting. I am not saying that you are wrong; I am just asking you for a way through that mire.

Mr Grant—Part of the way through the mire is to move everything up front and to have much better prepared applications. Then you will find more matters, one would think, being dealt with appropriately at primary decision making level and then perhaps on internal review. Obviously we would like to see one tier of review, whether it is the VRB wrapped up in the AAT or whether it is the abolition of the VRB. If veterans groups are very much in favour of retaining it, it will just not be politically acceptable. We appreciate that. The main thrust of it is to collapse

the levels of review at the moment and get more efficiency into each level of review, right back to the primary decision.

Senator MARK BISHOP—I understand that argument. Do you have any understanding of how BEST funding works at the moment from the Department of Veterans' Affairs to advocates?

Mr Grant—We certainly know how legal aid funding operates. I will ask Jodie to answer that.

Ms Buchanan—I am not familiar with their funding.

Senator MARK BISHOP—I asked that question because the proposal in your submission is for legal aid to be made available earlier in the process, and that is consistent with a more efficient system. But, given the likely cost of that, it would be many millions of dollars a year, simply based on the number of applications that proceed through the system. Do you have any comment on the current role of BEST funding in that process?

Mr Grant—I will make some general comments relating to our set of circumstances. We would rather be in earlier than later. We think we can get a higher degree of better decisions at primary level and then, perhaps, at internal review level, therefore obviating the need for it to go all the way through the system. But there is also a human cost in all that. It is much less stressful if veterans can be assisted right up front, be given an appropriate level of advice and support and assistance to prepare their applications than if we simply picked them up. We provide a lot of advice—we call it minor assistance—which helps them with applications but it is not to the level that they or we would like, in our experience. If we move everything further forward, hopefully we will take legal aid funding—that is what I am now talking about—off things before the AAT. The whole intent and purport is to get better decisions made up front, rather than a 65 per cent or 80 per cent success rate or a partial success rate before the final appellate body.

Senator MARK BISHOP—At page 4 of your submission you also suggest that costs be awarded at the AAT. What do you think the veteran reaction would be to that?

Mr Grant—We were suggesting costs one way only—so the veterans may be in favour of that.

Senator MARK BISHOP—Not both ways?

Mr Grant—No, a restricted costs order was what we had in mind. I suppose it is just another way of trying to focus the mind earlier. As I interpret what our veterans are saying through the submission—and Jodie might correct me—it is really like a criminal matter where, if you are going to get a costs order in a criminal matter, you have really got to show that, had the full information been known earlier on, the prosecution would not have run. In other words, if the matter had been properly dealt with earlier on in the piece, as the documents would show, there may be an entitlement for a costs order in favour of the applicant because the matter was not appropriately dealt with.

CHAIR—I noticed that too. At page 4 of your submission you state:

Given the AAT set aside rate of 33% to 39% ... the Repatriation Commission would potentially have cost orders in at least one third of matters before the AAT.

I understood it was a one-way costs order, but 30 per cent—

Mr Grant—I do not think that is a realistic figure; I think it is a global figure. That is the potential pool of cases, but I suspect any costs order on appropriate principals would be less than that. We are not necessarily suggesting that costs follow the event.

Senator MARK BISHOP—Are you really arguing for frivolous and vexatious—

Mr Grant—No, we would not put it that high. That is the concept, but we would not put it that high. I would equate it more with what I said before about the standard in criminal matters—that is, basically, if you had applied the correct law and the correct decision making to the facts before you, you could really have only found this much earlier in the piece. But we are not advocating that very highly because, if adopted, our submission of moving everything forward would obviate the need for that.

Senator MARK BISHOP—Pursuing the chair's comment: if costs were given against the commission, do you think that would have any effect on getting decisions right the first time, or would it simply not result in more concessions being made upfront?

Mr Grant—Again, it would just be one thing at the end of the line, where the tribunal would actually say, 'This matter should have been dealt with earlier on what we have seen before us.' But, if you have better decision making and earlier assistance being provided to applicants, you are going to take a lot of matters out of the AAT's reign, I think. That is the thrust of what we are trying to say—but, ultimately, you have some sanction available to the AAT in appropriate matters to focus the mind on earlier decision making. I will illustrate that very briefly by going back to the criminal jurisdiction. I know from having worked in the Attorney-General's Department at state level that, when a costs order is made against either the DPP, the prosecuting authority or the police, it does focus their mind—what went wrong with the procedures; what went wrong with the processes?—and there are internal inquiries as to what happened in that particular matter.

Senator MARK BISHOP—So you would see it as a relatively rare event?

Mr Grant—Yes.

Senator MARK BISHOP—In that context, as an aid to efficiency at earlier levels of the process?

Mr Grant—That is entirely the aim of it.

Senator MARK BISHOP—I understand that.

CHAIR—Do they exercise a power to remit a matter back?

Mr Grant—No.

CHAIR—That would be a more powerful or equally powerful sanction, would it not?

Mr Grant—There certainly are jurisdictions where they do in fact remit a matter for it to be considered again.

CHAIR—But do they do that in this case?

Mr Grant—Do you mean in the criminal area?

CHAIR—No, in the AAT.

Ms Buchanan—No. They may decide an entitlement matter and then remit the matter for the assessment, if you like.

CHAIR—The quantum?

Ms Buchanan—Yes, the total amount of pension to be paid.

Senator MARK BISHOP—That leads me to one final issue. A couple of the submissions made the comment that the jurisdiction in this area be extended to cover matters of income support—that is, within the veterans jurisdiction. Ignoring the issue of eligibility, do you have any estimate of the increase in workload that that would cause? Secondly, in your view, are the tribunals, as currently constituted, sufficiently expert to handle that added complexity? Do you have any views on that, Ms Buchanan?

Ms Buchanan—That is a difficult one. I do not have any statistics on the number of matters brought before the AAT. I do not have any statistics on the number of matters to do with income support.

Senator MARK BISHOP—There is none at the moment. The suggestion is that the jurisdiction be extended. I am asking you, firstly, whether you have any view on the likely levels of demand and, secondly, whether the tribunals as they are currently constituted would have the necessary levels of expertise to handle that work. Do you have a view on that?

Ms Buchanan—I do not, but I would have thought that training could be provided if necessary.

Mr Grant—To the tribunal members. It is not a matter that we are involved in.

Senator MARK BISHOP—That is fine. In paragraph (b)3, on page 3 of your submission, you say:

... appeals lodged to the VRB can take up to 2 years to be heard. This is a lengthy period of time, particularly for an aging veteran population.

If it were two years, I would agree with you, but my observation of the stats from the DVA annual reports and from the advice I have received from all of the ex-service organisations is that, in more recent times—in the last 18 months to two years—the overwhelming number of

matters are settled within three or four months. So where does this figure of two years come from? How common is it, what causes it and what evidence is there of that? It is quite contrary to everything else I have been told.

Ms Buchanan—Essentially, matters before the Veterans Review Board do have up to two years, but they can bring their matter before the Veterans Review Board well and truly before that. The point is that matters can get stuck, if you like, at the Veterans Review Board.

Senator MARK BISHOP—No. I am saying to you that the overwhelming number of matters are now settled most expeditiously. The advice I have received from the ESOs is that the time frames have improved very significantly in recent times and it is just not an issue any longer. It takes three, four, five or six months from beginning to end. So where is the evidence that it takes two years? It is different from what everyone else is saying to me.

Ms Buchanan—Two years is not a benchmark. We are just saying that it can take up to two years, and at that point the veteran will be asked whether they need an extension of time to bring the matter before the Veterans Review Board. I do see some veterans who, for whatever reason, have been represented and no longer have representation. They were not clear on what the process was to bring their matter before the Veterans Review Board, for whatever reason. They may be in the minority.

Mr Grant—Perhaps a better way for us to answer that is to take it on notice. We will provide you with any information, rather than just anecdotal, that veterans as a group can give us to substantiate that claim. I take the thrust of your comment, Senator, that certainly in recent times the time frames have improved substantially. We will take that on notice, if that is okay, and we will come back to you.

Senator MARK BISHOP—That is fine. In that context, I refer you to the annual reports of the VEA, the submission of the principal registry of the Veterans Review Board and the submissions from the various legal firms which all make that point. I take your point that it can take up to two years. Really, I am asking you to provide levels of incidence.

Mr Grant—Of where matters have dragged on for that length of time.

Senator MARK BISHOP—Yes. That is what I am asking you. In paragraph (e)2, on page 4 of your submission, you say:

> Enhance the capacity of the Commission to address access and equity issues to service target groups living in regional and remote areas, Aboriginal and women clients and clients from a culturally and linguistically diverse background.

I appreciate where that is coming from, but within this jurisdiction my observation is that the World War II veterans and their widows, the Korean War veterans and their widows, the Vietnam War veterans and their widows, and veterans right up until the first Gulf War were by and large a pretty homogeneous group of people. They reflect the composition of our population in those times. They are basically white Anglo-Saxon males, from World War II through to Vietnam, and their widows are the female equivalent. So where does the argument for a culturally and linguistically diverse background come from in this jurisdiction?

Ms Buchanan—Legal Aid assists allied veterans, and a number of those are Vietnamese allied veterans who served in the South Vietnamese forces.

Senator MARK BISHOP—Do they have access to the VEA?

Ms Buchanan—They are entitled to apply for a service pension on the grounds of age or invalidity.

Senator MARK BISHOP—That would be an issue in New South Wales—

Ms Buchanan—They are entitled not to a disability pension but rather to a service pension. That is their only—

Senator MARK BISHOP—Which is equivalent to the age pension.

Ms Buchanan—Exactly: as an American or a Canadian or a Vietnamese—all allied veterans.

Senator MARK BISHOP—Are there large numbers of people seeking assistance that come from those backgrounds?

Ms Buchanan—That has been a growing area for the Legal Aid Commission. Through our work with the Vietnam Veterans Association we have found that there have been a number of Vietnamese allied veterans seeking invalidity service pensions due to their incapacity to work.

Senator MARK BISHOP—Right.

Ms Buchanan—There is a means test for those matters, unlike for the part 2 veterans.

Senator MARK BISHOP—Okay. So that descriptor is mainly directed at people who served in the armed forces of the former Republic of South Vietnam. Is that a fair comment?

Ms Buchanan—Yes, but we have also had veterans who may well have other origins—Greek, for example. But by and large the veterans whom we represent are Anglo-Saxon Australians.

Senator MARK BISHOP—That is self-evident in this jurisdiction. I am trying to find out how significant this level of demand is because it is not something that has come across my horizon; in fact, this is the first time it has been raised. That is why I am trying to find out.

Ms Buchanan—It is a small number. In the last financial year there were probably around 15 to 20 applicants who would have used the Administrative Appeals Tribunal or sought assistance at an earlier stage in making a claim.

Mr Grant—As we point out, we are also doing a fair bit of work with the Indigenous communities. That was wrapped up in that same paragraph.

Senator MARK BISHOP—All right.

CHAIR—Just on that, can you identify some areas where there is a lack of capacity of the commission to address those access and equity issues?

Mr Grant—It is a matter of how we get out and about. We greatly increased our outreach services last year. We had 25 outreach services, with a substantial number of those to country New South Wales. We see more need for better community education about rights and entitlements and how to go about claiming those entitlements. That is what we do a fair bit of but we would like to do a little bit more of it.

We work quite well with the veterans groups organising it et cetera. The roll-up is always good and our staff enjoy those visits so we would like to do more of that. We would like to do more advice sessions for those people as well but we are a little bit limited in our capacity to do that—to go out and provide out reach services. Our veterans advocacy service is situated in head office and we do not provide those services. We have 20 regional offices through New South Wales but we do not really provide a veterans service there because we cannot.

CHAIR—So it is not so much in the personnel area, it is in the availability area, if you like?

Mr Grant—Yes.

Ms Buchanan—It is part of the early intervention that we have been suggesting—making veterans aware of their entitlements as early as possible, making sure they are given assistance in regional areas and improving veterans' access to services in regional areas.

Senator MARK BISHOP—That is a perfectly worthwhile objective. I am not arguing with any of that. I was just picking up on the culturally and linguistically diverse background part, and you have explained that: it is former allies and people who fought in the Republic of South Vietnam.

Ms Buchanan—Tim McCombe of the Vietnam Veterans Association could make some further comments on that issue also.

Senator MARK BISHOP—He is coming later. Thank you.

Senator MOORE—I have some questions about whether the process that you have described here operates in other states in a similar way. You are particularly representing the NSW Legal Aid Commission. Are there similar set-ups in the other states?

Mr Grant—We are a little different in that we have a substantial in-house practice, as we call it, which is a collection of lay advocates. I do not know whether that model is pursued in other jurisdictions. If it is, it is on a much smaller scale than in New South Wales. Mind you, we also provide funding to the private profession as well. Legal aid is granted to the private profession to pursue claims in this area. We have up to nine advocates who are able and ready to accept instructions in veterans matters.

Senator MOORE—I am interested in whether there is a national approach to these issues, seeing that the legislation is federal and the veterans are struggling for these things, no matter which state they live in. This is how it is operating in New South Wales.

Mr Grant—I think we are different because we have that substantial in-house practice.

Senator MOORE—And that was the choice you made.

Mr Grant—I do not think that model has really been picked up elsewhere, which means they rely on the private profession and, of course, it is getting more and more difficult to get assistance from the private profession in things like veterans matters.

Senator MOORE—Your submission quantifies the difference between the amounts of money paid, and the difference is quite significant in terms of what a strong market rate for this business would be as opposed to what is currently available.

Mr Grant—That is true in veterans matters and it is true right across the legal aid spectrum. We pay considerably less than the market rate.

Senator MOORE—And there are costs in getting medical reports and so on.

Mr Grant—I think that in most areas we are not too bad in paying for disbursements and reports as we get them. Another area for us, though, is the problem of getting the solicitors to do the work. That is true right across the country—there is a shrinking population of people who are prepared to do legal aid work at legal aid rates. It is going to get worse, not better, as the baby boomer solicitors leave the workplace, particularly in country locations—it is difficult to get some of the kids to go out to the country. That is true not just in law but also in medicine, counselling and all sorts of things. It is a substantial problem. So right across the country, legal aid commissioners are looking at how you can keep private practitioners doing this and other forms of legal aid work at the rates we can afford to pay.

Senator MOORE—And maintain expertise in this particular stream of law.

Mr Grant—It is an expert area.

Senator MOORE—In your submission you recommend that that legal aid involvement be increased on the expectation that injecting savings at the front end, quite rightly, should make savings in terms of the AAT process and further in terms of the Federal Court. Do you have any idea of the ballpark figures you are talking about there?

Mr Grant—No, it is very difficult to quantify, because not only have we said, 'Get in earlier,' but we have said, 'We would like to get into a much broader range of matters under parts 3 and 6 of the legislation.' There is a broader range of matters which we think getting involved in would assist everyone in getting an earlier resolution. Under the Commonwealth guidelines we are restricted to part 2, apart from advice and minor assistance, of which we do a considerable amount across the whole spectrum of matters.

Senator MOORE—Advice and minor assistance would be largely uncosted too, I would imagine.

Mr Grant—Yes, I think so. We can do more of that, perhaps, than some other jurisdictions, because we have our in-house expertise. It is very difficult to get private practitioners to give that advice and minor assistance.

Senator MOORE—I have one other point and it is about the question I asked the previous witness about the culture of appeal within this particular group of citizens. The submissions have indicated that there is a strong attachment to the right of appeal and that there is an awareness of people's rights. I would like some comment from you two, who work with these people, about how that operates. Also, my experience has been that one of the jobs of an advocate is to tell someone when they have no hope—to stop the process and say, 'You aren't going to win,' and so on. I wonder how often that occurs in this field.

Mr Grant—I will make some general comments and let Jodie answer from the practitioner's perspective. Certainly, we are obliged to apply a merit test. So we tell people up front if they have a hopeless case.

Senator MOORE—And that is for the access to legal aid?

Mr Grant—And we are obliged to do that under our guidelines. At least if we can get in there we can make that apparent, tell people why and maybe even tell them what they can do later on to bolster that case. So we have to apply a merit test, and we do. Having said that, we have a small refusal rate. That refusal rate right across the country, as I understand it from the national legal aid submission, is small. In terms of appeal rights, we may have some small disagreement over the ultimate figure before the AAT, but a substantial proportion of cases have success or partial success. It seems that the system lends itself to appeal or going to the next stage. Those are the general comments I would make. Jodie may have some specific comments to make.

Ms Buchanan—Certainly under the VEA, veterans come with a range of knowledge about the system. A number are quite reticent to continue an appeal simply because of the stress, given that a great number of the veterans we represent have psychiatric disorders related to their war service, particularly if they are in regional areas and are isolated. So I would not say that there is necessarily an attachment to the appeal right; it can actually be quite the reverse.

Senator MOORE—In terms of the merit test and access to legal aid, when you say to someone, 'You will not be able to access legal aid for this process,' are you aware of people who then continue with their appeal process but do not access legal aid?

Mr Grant—I do not know if Jodie has any anecdotal material, but once we refuse them legal aid—

Senator MOORE—That is the end of your involvement?

Mr Grant—Yes, that is basically the end of our role. Our refusal rate is very small.

Senator MOORE—Is that because of the quality of decisions?

Mr Grant—I am not sure. It is complicated for us because we can get involved early in advice and what we call minor assistance. So we can help people earlier on. By the time they

apply for legal aid, we have probably already seen them in one form or another anyway—or a proportion of those.

Senator MOORE—You are already engaging in the case?

Mr Grant—Yes, early on through the advice and minor assistance.

Senator MARK BISHOP—I would like to refer you to page 3 of your submission. Under the heading 'Veterans Review Board' at paragraph 7 you say:

Beneficial legislation is sometimes incorrectly applied. There would appear to be a lack of consistency in the application of Federal Court decisions in the VRB.

You do not appear at VRB level, do you?

Mr Grant—No.

Senator MARK BISHOP—Could you just develop that point? How significant is it? How did it get drawn to your attention?

Ms Buchanan—Although we do not currently appear at the Veterans Review Board, and we have not since mid-1997 because of changes to the Commonwealth guidelines, we do read Veterans Review Board decisions daily because we are appealing decisions to the Administrative Appeals Tribunal. It is apparent that members have made some different interpretations of recent case law.

Senator MARK BISHOP—What points do they differ on? Is it the medical evidence?

Ms Buchanan—I can give you an example: the case of Kattenberg, which is a Federal Court decision. I have seen some different interpretations of that between Queensland and New South Wales. For example, you may have a visiting member sitting in New South Wales. This is just one example. I raise that as an issue.

Senator MARK BISHOP—How do you get that remedied? Do you argue again at AAT level or what?

Ms Buchanan—Yes.

Mr Grant—That is the sanction, but there has to be a process of ongoing judicial education, which is a challenge for all tribunals across the country, to make sure that their members have a solid understanding of superior tribunal or superior court decisions. I do not know how the board go through the process of educating their members, but I am sure they have some process. Obviously that has to be given some attention.

Senator MARK BISHOP—Do you regard it as a significant problem, Ms Buchanan, or just an incidental problem?

Ms Buchanan—I would say it is an incidental problem. The interpretation of recent case law—or being unaware of recent case law, perhaps—can also be a problem at the primary level.

CHAIR—Thank you, Ms Buchanan and Mr Grant, for your attendance this morning. You have taken one or two matters on notice. If you could respond to the secretariat with that information, that would be appreciated.

Proceedings suspended from 10.55 a.m. to 11.16 a.m.

BROWN, Mr Raymond David, National President, Injured Service Persons Association Inc.

CHAIR—Welcome. Thank you very much for agreeing to appear today and also for providing us with a written submission. I would just point out to you that this is a public hearing of the Senate Finance and Public Administration References Committee. We prefer evidence to be given in public but, if there is any matter that you wish to raise with the committee in camera, you can make a request at any time and we will consider that at such time. Also, I hope the rights and responsibilities regarding appearing before Senate committees have been provided to you and that you are aware of those. I now invite you to make some opening comments and then we will proceed to questions from members of the committee. Thank you very much.

Mr Brown—I became involved with military compensation in 1994 after my accident, which left me a quadriplegic. Since that time I have done pension officer and welfare officer courses through TIP, the Training and Information Program, and have handled many initial claims and also reconsiderations and appeals, mainly through MCRS. Our association deals with peacetime injuries. At the time of my accident, there was hardly anybody who knew the SRC Act, so I became involved with that. Over the years I have experienced the initial claim process, the appeals process and the administrative appeals process.

Basically we are not happy with that type of review process because we think it is an unfair system, especially when it comes to the internal reconsiderations. We class it as biased and we do not think it is an independent system, especially since we found out that some internal reconsiderations are outsourced to legal firms. We think that that is totally unfair.

CHAIR—Thank you, Mr Brown.

Senator MARK BISHOP—Welcome, Mr Brown. I want to lead off with the points that you made at the end of your opening submission. I refer you to the bottom of page 1 of your submission, which says:

> The ISPA has also learnt that in certain circumstances reconsiderations at the internal level have in fact been outsourced to legal firms. This has been the case in Brisbane and we wouldn't be surprised if this has occurred in the Canberra review section as well.

That is the point you made. Is there any evidence for this or is it just suspicion or hearsay that you have picked up?

Mr Brown—At the start of 2002, we had a meeting at DVA in Sydney with the association public officer; Guy Griffiths, the chairman of AVDS; Peter Alexander, the secretary at the time; John Tattersall, manager of MCRS; and Mr Gary Collins, the Deputy Commissioner of DVA. At that meeting we posed those questions and they confirmed that, in Brisbane, certain cases were outsourced. Their reason was that, due to the change of the internal review process being done in Brisbane, they had a backlog. That is the reason that they outsourced those cases.

Senator MARK BISHOP—Were these MCRS matters or VEA matters?

Mr Brown—These were MCRS cases that we raised.

Senator MARK BISHOP—MCRS cases that you raised?

Mr Brown—Yes.

Senator MARK BISHOP—And they said at the beginning of 2002 that matters had been outsourced to legal firms in Brisbane to clear up the backlog of work?

Mr Brown—Yes—so they could get through it all.

Senator MARK BISHOP—Have you pursued that matter with them since then?

Mr Brown—No.

Senator MARK BISHOP—So you do not know whether that is still occurring?

Mr Brown—No, we do not. But when it comes up once, you are always suspicious.

Senator MARK BISHOP—Did they give you any idea of how many matters had been outsourced?

Mr Brown—No; no idea whatsoever.

Senator MARK BISHOP—When they say 'outsourced', is it perhaps just the case officer writing off and seeking legal advice, or is the law firm effectively making a recommendation as to a decision to be made by the case officer?

Mr Brown—We interpreted that the whole case file was given to a specific law firm and they have gone through it and either affirmed the original decision or overturned the original decision.

Senator MARK BISHOP—You know that has occurred in Brisbane and you suspect it is occurring elsewhere?

Mr Brown—If it has happened in Brisbane, and considering that all the other states have also combined to have their internal reconsiderations done in Canberra, we would assume that they have also had a backlog and therefore would have adopted the same system.

Senator MARK BISHOP—Are you saying that the internal decisions of all the states are now centralised in Canberra?

Mr Brown—As far as I am aware, Queensland and New South Wales are done in Brisbane, with the other states going to Canberra. That is my knowledge.

Senator MARK BISHOP—What makes you say that? Why do you think that?

Mr Brown—In my dealings with the reconsideration process and finding out why it has taken so long, we have received replies to say that these are now centrally located in Brisbane and Canberra—as well as our clients, the members that we help.

Senator MARK BISHOP—So if I am in my home state and I have an application for some form of benefit or payment, the work on that after the decision at first instance will be sent to Canberra for review?

Mr Brown—Only if you do not like the decision and you want to appeal it. Then it is sent interstate. At the moment we have a member who is in South Australia whose claim went to Victoria and now it is in Canberra, and she is at the AAT stage.

Senator MARK BISHOP—You suspect, but do not know, that the decision making process in Canberra is outsourced to legal firms?

Mr Brown—Yes, I believe that may happen.

Senator MARK BISHOP—All right. We will chase that down with DVA tomorrow to see whether it is true or not and what the rationale for it is. Do you object to that?

Mr Brown—I do not believe that it should be outsourced.

Senator MARK BISHOP—Why?

Mr Brown—Because it sort of leaves the bias to the department; it does not give a level playing field where a solicitor, a law firm, comes in at the AAT. Under Section 31 of the VEA, that is not, as far as we know, done by a legal firm; it is done internally and that is the way it should stay.

Senator MARK BISHOP—Are you saying that you are not getting a fair go?

Mr Brown—That is correct, yes.

Senator MARK BISHOP—In outsourcing these decisions to solicitors, is the DVA bringing more expertise to bear on the case than you can provide to the person you are advocating on behalf of?

Mr Brown—I think it has taken the responsibility to make that decision away from the delegate. If you cannot make a decision at that level, why are you a delegate?

Senator MARK BISHOP—Fair enough. What experience does your organisation have with VEA claims?

Mr Brown—Not a great deal. I work in conjunction with the local RSL and the VVAA. When it comes to the DVA side of things, they usually handle that or I put them onto it. When it comes to MCRS, they contact me to handle most cases.

Senator MARK BISHOP—Is the overwhelming bulk of your work MCRS?

Mr Brown—Yes.

Senator MARK BISHOP—Given that a lot of organisations are being pretty critical of the MCRS and the processes involved—they allege it is too tough for claimants—what changes should be made, if any?

Mr Brown—I think that something needs to be done with the internal review process because, as I have stated in our submission, I find that it would be hard for one delegate to override another delegate's decision. As I said in the submission, if it continually happened it would give the impression of incompetence by the original delegate. The other reason is that the responsibility for making that decision is therefore taken away from the reviewing officer. That could be an easy way of saying, 'This is getting too hard; I will confirm the original decision and let it go to the AAT.'

Senator MARK BISHOP—You have been participating in the MCRS working party?

Mr Brown—Yes.

Senator MARK BISHOP—And that has given some consideration to this issue?

Mr Brown—Yes.

Senator MARK BISHOP—What reason does the government give for persisting with the dual review scheme?

Mr Brown—My impression is that they seem to want to maintain a separate stream for those with qualifying service or war service, to give them recognition or something different that stands out. In the case of the review process, I think it is inappropriate, considering that we are going for a single stream compensation scheme that has in it areas that recognise war service. Therefore, when it comes to the review process, I believe we should have one single stream that applies across the board, because during that process—if the statements of principles are adopted—the beneficial standard of proof applies to 'war like'. I mean there is the differentiation there.

Senator MARK BISHOP—Okay. So you think the government wanted to maintain the beneficial things that flow from QS. We all understand that argument. What was the attitude of the Department of Defence and the other ESOs? Were they supportive of maintaining that dual stream?

Mr Brown—I think the complications that surround it—to continue with those different streams—were a concern for everyone. The only issue that was hard was deciding, 'Okay, what is a better way of doing it?' Generally people believe that one review stream is needed to get rid of all these different choices on the flow chart—even to the stage where other ESOs believe that legal aid should be extended to all servicemen, not just those with war service.

Senator MARK BISHOP—So did the resistance then come mainly from DVA and the Department of Defence?

Mr Brown—I do not think it is so much resistance; it is them trying to find a system that everyone is happy with. You can continually throw up different scenarios. It is a matter of finding the one that everyone is happy with.

Senator MARK BISHOP—That is always a difficult job. What would the ISPA's reaction be if the VRB and the AAT were combined for all cases, regardless of differing entitlements?

Mr Brown—As in the VRB and the AAT becoming one review?

Senator MARK BISHOP—Yes.

Mr Brown—We would oppose that. We prefer to have the initial determination, then an independent review and then the AAT. We do not want the—

Senator MARK BISHOP—Right. So are you really advocating that the current VEA system be extended to ADF people in the MCRS system?

Mr Brown—Yes.

Senator MARK BISHOP—So essentially you want to have a VRB tier in the MCRS system?

Mr Brown—And then the AAT.

Senator MARK BISHOP—Okay. Thank you Mr Brown.

Senator MOORE—What is the worst thing about the system at the moment?

Mr Brown—As I said, it is the internal review—and also the AAT. We believe that it is unfair that a claimant is restricted in costs to appeal. The department is able to spend $8,000 on solicitors, when our members—or the claimant—are restricted to an advocate and $1,500 to $1,800 for their troubles. This makes it hard for a claimant to get good legal representation. A solicitor or advocate who may be fresh out of school and is going to get $1,500 is up against a barrister or QC who is going to get $8,000.

Senator MOORE—How do you know that the DVA have got $8,000 to spend? Did they tell you that?

Mr Brown—No. I have read in the *Hansard* from the federal parliament—

Senator MOORE—Are you referring to Senator Bishop's questions?

Mr Brown—Yes.

Senator MOORE—Senator Bishop's questions are very popular reading.

Mr Brown—Yes. When you see the annual figures and how many times they are represented and you divide the figures—

Senator MOORE—And you extrapolate those figures from the—

Mr Brown—Yes.

Senator MOORE—I am interested in the meeting you had with the people in 2002: did you feel in that interaction that the department was going to share information with you about outsourcing—and I use that term quite openly—the case files to private lawyers, or did you have to extract that?

Mr Brown—Surprisingly, it came very easily. We put forward the question and they did not hesitate to answer.

Senator MOORE—What made you question them? Had you had suspicion that this was happening?

Mr Brown—Yes, we had suspicions, and we thought, 'Let's put it to them.'

Senator MOORE—And they responded immediately?

Mr Brown—And they responded immediately, which shocked us. We then had a meeting with the Minister for Veterans' Affairs, Mrs Danna Vale, and we brought that issue up with her as well, just to let her know that this is what we found out. She found it interesting but obviously did not really chase it up much more than sitting there and talking with us.

Senator MOORE—Did she understand your concern at the issue? You have obviously—in your submission and today—indicated that that is particularly worrying to you as an organisation.

Mr Brown—We had a lot of issues that we presented that day, so I suppose her interest was just as much in everything else—

Senator MOORE—All the other things you were talking about. Is the association of which you are a member a very large association in terms of the people who have got training to provide advocacy for other people who are caught up in the system?

Mr Brown—No, we do not have a large number of pension officers or advocates, mainly due to the fact that, because we are a peace time association, a lot of our members work. So basically they are medically discharged and we help them out, they do their rehab and then they go on to do whatever work that they can, at a reduced rate obviously. So when it comes to having people who are available all the time we are very restricted. So our advocates and pension officers numbers are limited. However, we have had an increase in membership so we are trying now to get some more people on board. We do have people who are members of other associations as well and who are TIP trained, so they help out where they can, when they can.

Senator MOORE—And they share the knowledge?

Mr Brown—Yes.

Senator MOORE—Right.

Mr Brown—Trying to get people to help is probably the same as in other ESOs. Getting them motivated sometimes can be a bit of a problem.

Senator MOORE—And the ESO community shares, in terms of the different organisations, their knowledge and expertise?

Mr Brown—Yes, generally. I have been able to contact my local VVAA, RSL, TIP and all of those, and any information that is required they are all happy to give. It is the same with our association. If we have information that people need then we will pass it on without a problem.

Senator MOORE—In terms of personnel who are caught up in an injury at work during peacetime—your work during peacetime—they know that you exist and know that they can turn to your organisation?

Mr Brown—We try to promote ourselves, like everyone else. These days, trying to get membership is a daunting process—it does not matter who you are. We advertise in the Defence Force newspapers now and we get a good response from there. If you go to the heart of where the problems arise, that helps. But, as I said, the problem is the injuries are not incapacitating in a lot of cases, so they will join and then they will go off to work in other areas.

Senator MOORE—They get the support they need and then move on.

Mr Brown—Yes. I always encourage a return to work because financially you are better off: 'Get whatever work you can because you are going to be better off.'

Senator MOORE—From your perspective as someone who is working in the system a lot and working with different people, is the system complex?

Mr Brown—Yes, it is. We find that we get some guys—or women—from the fifties or the sixties who have said, 'Look, I was a nasho. I have only just found out that I can make a claim.' Once you start getting into their details, you are looking at the 1903 act, the 1930 act, the 1972 act, the 1980 act and so on. You have all these different acts so it does become complicated when you are dealing with a claim. If you are dealing with a claim from the fifties or the sixties, there is the clause that claims must be made within six months. So when you submit a claim it comes back saying, 'No, you have not submitted it under the 1930 act.'

Senator MOORE—Rejected.

Mr Brown—So then you have to put in for a redetermination. I have contacted John Tattersall at the MCRS Sydney, and he is quite happy to process those claims, providing there is enough evidence to support them. So we have a good working rapport with John in that area with regard to the act.

Senator MOORE—You had to re-establish the same rapport with the section heads in Brisbane and Canberra.

Mr Brown—Yes, well that is what we try to do with the guys in Queensland. At the moment, the Queensland branch have a good working relationship with a couple of the delegates and the heads there. I suppose it is a matter of getting the right person.

Senator MOORE—I think that is the same with all systems—you need to find the one you can talk to. Thank you.

CHAIR—As Senator Moore is from Queensland, I am sure she took all that on board.

Senator MOORE—Absolutely.

Senator MARK BISHOP—I want to pursue one issue. Mr Brown, in your submission you say:

Legal aid should be accessible to all ex service personnel. If it is good enough to allow legal aid for the illegal immigrants to lodge appeal after appeal, then those who have served in the Australian Defence Force should have access.

Does that request for legal aid for ex-service personnel only apply to VEA and MCRS matters, or do you mean it should apply generally with assistance in matrimonial or criminal law?

Mr Brown—Just the MCRS and the VEA. When we are dealing with claims for service related injuries, we believe that we should have access.

Senator MARK BISHOP—Okay. So we are just limiting it to the current system. Legal aid is already available on a means tested basis, is it not?

Mr Brown—My understanding is that it applies only to those with qualifying service.

Senator MARK BISHOP—I see.

Mr Brown—Peacetime injury claimants do not qualify for legal aid, unless they are in poverty, obviously. But that would not be through the same avenues as the VEA.

Senator MARK BISHOP—So if you have peacetime injured defence personnel without QS, should there be some sort of limitation or means testing? Would you advocate that it be applied to senior NCOs or officers?

Mr Brown—Could you say that again.

Senator MARK BISHOP—If legal aid was to be provided to serving personnel who do not have qualifying service, do you advocate that that provision of legal aid be open ended or effectively means tested?

Mr Brown—I think it should be in line with the current system under the VEA, for those with qualifying service. If it is increased for the better, then obviously it should flow on to the peacetime claimant. As a minimum starting point, it should be in line with the VEA.

Senator MARK BISHOP—Thank you.

CHAIR—Mr Brown, thank you for your appearance this morning and for taking the time to make a submission to the inquiry.

Mr Brown—Thank you for the invite.

[11.44 a.m.]

McCOMBE, Mr Timothy Hocart, President, Vietnam Veterans Federation of Australia

CHAIR—Welcome to this morning's hearing of the Senate Finance and Public Administration Committee inquiry into the administrative review of veteran and military compensation. We have received your written submission, which has been accepted for publication by the committee. You have been provided with details regarding the rights and responsibilities of witnesses appearing before Senate committees.

Mr McCombe—Yes.

CHAIR—We do appreciate evidence being taken in public but if there is any matter you wish to raise in camera at any time, just make that request and we will consider it. This morning you also provided the committee with a copy of a letter from the Minister for Veterans' Affairs, Mrs Danna Vale, dated 10 September 2003. Attached to that is a submission by the Vietnam Veterans Federation relating to the provision of Commonwealth legal aid in veterans matters. I take it you wish us to accept that as additional material to your written submission?

Mr McCombe—I think the committee should be aware that there is other action relating to legal aid that has been ongoing for a number of years now. The ex-services community has been lobbying the government fairly heavily to get an increase in legal aid. It goes back to before the last election, in fact, when the Attorney-General's department conducted an inquiry into it. Our submission also went into that, but after the elections the report never surfaced.

CHAIR—We will accept that as an addition to your written submission. I now invite you to make some opening comments and then we will proceed to questions.

Mr McCombe—I would like to make a comment to start off with. There is an attachment to my submission that I do not think is incorporated in your submissions, which is Justice Stone's decision relating to the Specialist Medical Review Council. Have you got it?

Senator MOORE—No.

Mr McCombe—It isn't there? Unfortunately I did not bring a copy with me. I will talk to that later, but firstly I will lay down my credentials to the committee. I have been involved in the ex-services community since 1981. In the early eighties we were primarily involved in the Agent Orange issue and getting the counselling services established because we recognised those problems in the veteran community. During that period I have acted as an advocate at the Veterans Review Board of many hundreds of cases. I also do Administrative Appeals Tribunal work; people who do not get legal aid usually come to us and we represent them free of charge. That is my background.

Presently our association is starting to do a bit of military compensation work. We have an open door policy: we do not reject any person who walks through the door as long as they are a veteran or have served in the military forces—as long as they have got some sort of entitlement.

In fact, one of our people goes over to the Moorebank area sergeants mess every Friday morning and does claims over there. We are picking up a lot of the peacekeeping forces; Timor, Somalia, Rwanda and the gulf people are coming through our office now. A lot of them have got dual entitlements and a lot of them go for them under the Veterans' Entitlements Act, but you get other people who like to claim under the military compensation scheme. That is a bit of background on it.

I work out of the New South Wales office. Basically my submission is based around the work that they do because that is the work I am most familiar with. I am also the senior vice-president of the New South Wales branch; I still have operations in that area as well. The New South Wales office does about 1,200 initial claims a year. If you include our sub-branches state wide it would be up to the 2,000 mark. That is only an estimate; we have not got the actual figures to verify that. At present we have got between 400 and 500 Veterans Review Board appeals in the system and about 30 AAT cases under appeal. We have got about 15 actual military compensation claims active at present and there are about two claims we have got under appeal at the AAT. Our principal is that we try to get the claims settled and determined at the earliest possible stage and we encourage the veterans to get as much medical or factual supporting evidence as possible to us so that we can get a good decision for them at a delegate level.

We believe that the scheme is working a lot better presently than it has in the past. There is room for improvement. Section 31 has always operated, but before they formalised it in the legislation it was an informal arrangement. We used to ring the senior delegate in the department and ask him to do us a favour and look at the case, and the odd one would be overturned. But now it is formal, resources have been put into it and we are finding more and more that the decisions that are under appeal are being finalised under section 31. Last year, over half our appeals were finalised under section 31. The cost saving to the government must be enormous in that area alone.

There are a number of areas that we think need improvement. One is what they call a non-SoP claim, where a statement of principle does not exist for a medical condition. If it does not exist then—

Senator MARK BISHOP—Mr McCombe, could you explain to the rest of the committee what statements of principle are? They may not know.

Mr McCombe—Statements of principle are documents produced by the Repatriation Medical Authority. The legislation was changed in 1994, I think. Now the conditions can be determined by the Repatriation Medical Authority, and they produce statements of principle, which are basically templates. Say it is a statement of principle for prostate cancer. One of the factors under that is that for 30 days or more service in Vietnam you would be able to get prostate cancer accepted. For Vietnam veterans who are suffering from prostate cancer, that is a very good thing. It really knocks out the appeal and a decision is made straight away. But if a statement of principle does not exist for a medical condition—and it is usually a more uncommon sort of condition—then the old reasonable hypothesis laid down by the Federal Court, and by the High Court in the Bushell determination, applies. That is a reverse onus of proof sort of condition. We are finding that if we make an application regarding one of these conditions it is usually dismissed out of hand and goes straight into the appeals system. In other words, we are saying that the department does not investigate it at all. Even when we supply information in support of

the claim, it is rejected. I cannot recall a case in the last couple of years where it has not been rejected. Basically, it is reversing the onus of proof, requiring the veteran to prove his case, whereas, under the legislation, the department has to investigate the claim thoroughly. That is one of the issues.

Another issue is the BEST funding, which is where the government funds ex-service organisations to employ advocates. The idea of the BEST funding is to encourage ex-service organisations to really put effort into determining the claim as soon as possible. It is not just for the appeals system; it is for the decision on the original application and things like that. We are saying that that works very well and should be extended.

An issue that has given us problems over the last seven years is the appeal process relating to statements of principle—that is, appeal rights under the legislation when the RMA puts out a statement of principle. So if you have some problems with one of the factors put into the legislation or if the RMA refuses to produce a statement of principle, following a request from an ex-service organisation or a veteran or a doctor, then there is a right of appeal to the Specialist Medical Review Council. We have been in and out of the courts since 1995 with a specific case relating to prostate cancer and smoking. We reckon there is strong evidence to link prostate cancer and smoking. That has been going on for seven years. Justice Stone's decision, in the full bench of the Federal Court, laid out the number of steps that have been taken. I think it is 13 steps. The initial one, if I can do this off the top of my head—I might miss a step here—

Senator MARK BISHOP—Mr McCombe, this issue does not really come within the terms of reference.

Mr McCombe—Doesn't it?

Senator MARK BISHOP—No.

Mr McCombe—Are you sure?

Senator MARK BISHOP—Yes, I am.

Mr McCombe—Is it an administrative decision?

Senator MARK BISHOP—Yes.

Mr McCombe—'Veteran and military compensation': it does.

Senator MARK BISHOP—You are talking about reviewing SoP decisions at first instance.

Mr McCombe—But that is an administrative decision.

Senator MARK BISHOP—That is a policy matter. It is a policy decision to have a review. There is no review.

Mr McCombe—Yes, there is. I beg your pardon, but there is. Please explain to me while I have been in and out of the Federal Court if there is no review.

Senator MARK BISHOP—That is a legal matter. It is a policy decision whether you have the review or not. You are complaining about the application of the system. If you want to go on with it, you can, but it is not intended to be part of this inquiry.

Mr McCombe—Okay, I will not go any further with it but I would like to state that I do not think you are right.

Senator MARK BISHOP—I wrote the terms of reference.

CHAIR—In any event, you have provided us with Justice Stone's decision and we can access that. I do not want to curtail your opening comments except to say that we do want to get to some questions. We are able to access Justice Stone's decision.

Mr McCombe—Can I take that a step further for Senator Bishop? All claims that go into the system now are determined under SoPs. Under the new system, the military compensation system, the SoPs will be incorporated there. I do not know how you can say that it is not part of this inquiry, because the basis of the repatriation system is there and, if the inquiry ignores that, I think you might as well forget about it. It is a basic part of the determining system now. That is all I have to say.

CHAIR—Thank you. There has been some interchange and that is certainly welcome in and healthy for the discussion of these issues. We will now go to questions.

Senator MARK BISHOP—I do have some questions arising out of your submission. You made the point about BEST funding that uncertainty was caused by annual grants. Is the funding too widely dispersed to too many small groups? Should the funding be given in larger amounts to fewer numbers of groups so that more expertise is developed in particular areas?

Mr McCombe—I would say yes to both questions. There are a lot of ex-service organisations that receive funding. There is usually a small RSL sub-branch that gets a computer or some admin assistance from it. One of the things about the grant is that it goes from one year to the next and you have to apply every 12 months. We just cannot guarantee our advocates continuing employment. That is one of the problems that we have with it. When we are training up a person, we would like to say, 'We'd like to keep you for three or four years.' Under this system, we do not know what we are going to get from year to year so we just cannot guarantee that.

Senator MARK BISHOP—In regard to the distribution of funds to organisations, do you have a view that it is done independently and impartially? Do you have a criticism of the way funds are distributed under the BEST program?

Mr McCombe—Only the criticism that it seems to be that small groups do not have that greater input into the determining system. My understanding is that you put the grant into the state DVA, they review that grant, approve it and send it up to head office where they do certain things with it—and I am not quite sure what they to do it—then it goes to the minister, who has final say. So, if you are offside with the minister, you just might not get the grant. It is a bit of a mystery how they do end up with it.

Senator MARK BISHOP—But your basic criticism is that too many small groups are getting too small amounts of money?

Mr McCombe—Yes. We are looking at an increase in funding for the major ex-service organisations and on a biannual basis at least.

Senator MARK BISHOP—If extra funding was granted to your organisation or it was given over a longer period of time, guaranteed over a two-or three-ear period, how would you use it?

Mr McCombe—We would train up some more front-line people—who we call social workers, who actually do the claim work—to a higher degree so we actually present a better claim to the DVA. We do a lot of what we call 'outreaching' and we would like to extend that. We bought a van—not under BEST; we bought it out of our own funds—and we send people out to certain country areas. We do about eight trips like that a year, but we are only scraping the surface because a lot of the sub-branches of the RSL in country towns are very small or are folding and there is no assistance out in these country areas for veterans.

Senator MARK BISHOP—The Legal Aid Commission of New South Wales and a number of solicitors in submissions to this inquiry have suggested doing away with the VRB and improving the existing internal review process. What does the VVFA think of that suggestion?

Mr McCombe—We have the opposite view. I think the last Auditor-General report that I read on this said the cost per hearing at the VRB is about $800. These figures are a bit dated. I worked out the average for the AAT and I think that was about $13,000. The VRB, which is informal, non-legalistic and high-volume, can do three hearings a day. The AAT would never do three hearings a day; they would be flat out doing one or two hearings a week. You find out that people who are represented by experienced advocates, usually through the ex-service organisations, have a higher success rate than the figures in this submission from the department show, in the sense that a lot of people represent themselves and a lot go unrepresented. If you did the figures on who is represented and who is not represented, you would find that the people who are represented would have a very high success rate.

Senator MARK BISHOP—So you want to keep the VRB?

Mr McCombe—Yes.

Senator MARK BISHOP—All right. Would a new organisation combining the VRB and the AAT, with compulsory mediation at stage 1, like the VRB now, plus a full right to a hearing AAT style with full legal aid throughout, be worthwhile considering?

Mr McCombe—I think that is very similar to something that was under the ART legislation, which got rolled in the Senate. We vigorously opposed that.

Senator MARK BISHOP—Did you?

Mr McCombe—Yes.

Senator MARK BISHOP—So you would be opposed to that suggestion?

Mr McCombe—Yes.

Senator MARK BISHOP—Why?

Mr McCombe—And I think the Labor Party was opposed to it too.

Senator MARK BISHOP—I think we were, weren't we?

CHAIR—If it got rolled in the Senate, yes.

Mr McCombe—It was put up by the Liberals and then it was rolled in the Senate. Labor and the Democrats opposed it.

Senator MOORE—That is right.

CHAIR—There were a range of reasons.

Senator MARK BISHOP—If the VRB and the AAT were combined with compulsory mediation at stage 1, would you object to that?

Mr McCombe—Yes. Section 31 is working very well at present. This is a one-to-one person system. When you start getting into the administrative area of the appeal system, that is where your costs start to mount up, so you are better off just dealing with somebody in the department who has been given that role. It would be cheaper and quicker. We are quite happy with the way it is going.

Senator MARK BISHOP—At departmental level?

Mr McCombe—Yes. It affects section 31, so we are saying: just keep the system that is working quite well.

Senator MARK BISHOP—Okay. Once you leave the departmental level, the first step in the appeal process is to the VRB?

Mr McCombe—Yes.

Senator MARK BISHOP—I am talking about that process. Do you see any merit in combining the VRB and the ART at that level with compulsory mediation?

Mr McCombe—No. I have not seen the last figures of the VRB, but it got some 5,000 appeals. You would be putting in a more formal appeal system, and I suggest that would take longer to determine cases than the way in which the VRB does it now, with 5,000 cases.

Senator MARK BISHOP—That is right. That is a legitimate criticism. The complaint that a lot of people make is that, if a lot of the evidence that comes forward at VRB level or latterly at AAT level had come forward earlier in the system, the claims might have been settled a lot

earlier, so the compulsory mediation at VRB level would be designed to force both sides to put on the table all of the evidence going to the merit of the claim.

Mr McCombe—One of the biggest problems you can have in the appeals system is that the hypothesis you are arguing in a case can change. At the Veterans Review Board, you could argue that spondylosis is due to malalignment and then you could get legal aid and go to the AAT and an expert will come up with another hypothesis altogether. Do you see what I mean? I think what you are suggesting would be unfair to the veteran, as the hypothesis can change and your factual evidence can change too.

Senator MOORE—The new body would have legal aid access, would it not?

Senator MARK BISHOP—Yes, it would.

Mr McCombe—That is going to be extremely expensive. The beauty of the VRB is that it is a low-cost, informal non-legalistic body. Veterans with psychological conditions who have to go into the witness box at the AAT go through hell—and they go through hell right through the hearing. It is not a pleasant experience. They are cross-examined by experienced advocates or, in some cases, by barristers, and it is not pleasant.

Senator MARK BISHOP—No, it is not pleasant.

Mr McCombe—It is unpleasant and can affect the veteran's health. Our view is that we should get it cleaned up as soon as possible with the least fuss and the least pressure on the veteran. At that level, the VRB is less stressful than the AAT. Forcing all veterans into a situation where they could end up in a witness box would be terrifying for some for them.

Senator MARK BISHOP—I was not putting that proposition; I was really arguing—

Mr McCombe—No, but we have practical experience and we see what happens. You also have to remember that there is a lot of culling done by the 31s now and there are fewer appeals at the VRB. The appeal level is falling at the VRB. I understand that the number of claims going in per year has levelled out but it is not falling. The VRB numbers are dropping. I think it has been quite effective.

Senator MARK BISHOP—The Legal Aid Commission of New South Wales also made a suggestion regarding awarding costs at the AAT—and you would have heard that discussion earlier on. What is your organisation's view on that suggestion?

Mr McCombe—I think it was about costs against the department.

Senator MARK BISHOP—Yes; one way.

Mr McCombe—We have no problem with that.

Senator MARK BISHOP—What happens if it is two ways?

Mr McCombe—There would be big problems. You would find a lot of veterans would not go on. You could have veterans who are out of work and fighting the system for a TPI and all of a sudden there is a chance that they could get a—

CHAIR—Do you think it would work in the way that the Legal Aid Commission suggested—that it would actually put pressure on them to think more seriously beforehand?

Mr McCombe—Yes. I would like to make a further comment. Not all decisions that end up in the appeals system are bad decisions by the delegate; they can be policy decisions by the department. An example of this is prostate and fatty food, where they just refused to accept it, regardless of many, many AAT decisions supporting that hypothesis. Another example—I know it is a bit dated—was the agent orange issue, and they refused to accept that. I think the latest really topical one is the stressor in PTSD. The department have their interpretation of it. There have been Federal Court decisions in Stoddart and Woodward. The defining order stresses that the department are not accepting the definition. So appeals do not just come about because not enough information has been put forward or things like that.

Senator MARK BISHOP—Your basic criticism there is that the current statement of principles does not extend to some of the medical conditions that you allege your members are now raising with you.

Mr McCombe—Yes. Our criticisms are of the appeals system, which you said is not in the terms of reference.

Senator MARK BISHOP—That is where I am going; we have agreed it is not within the terms of reference. But that is the point you are making.

Mr McCombe—Yes.

Senator MARK BISHOP—I understand.

CHAIR—I am not surprised about your comment a moment ago. I read the other day that someone said that saturated fats are not a problem now, which means I have been paying my doctor a lot of money for a long time to get different advice.

Mr McCombe—Next week it will be somebody saying something different. The RMA base their SoPs on the amount of medical and scientific evidence that is available.

Senator MOORE—I just have a couple of questions. Mr McCombe, your preference for the internal review process operating effectively is one I share, but it is also one that other submissions have raised some deep concerns about: the quality of the internal reviews is patchy and, in the opinion of other people who have given evidence, the internal review is almost a step towards the other levels without being seen as a genuine effort to reach a mediation or result. Has that been your experience?

Mr McCombe—No. In fact, if you present the evidence you usually get the claim up. But also you are still dealing with the human factor. Some delegates look at things differently to

others. As it is now, there could be room for improvement but we are quite satisfied with the way it is going.

Senator MARK BISHOP—With the internal review process as well as the VRB process?

Mr McCombe—Yes. If there were more funding put into the section 31 review, the appeals would drop further, because, under the system now, they have a workload which they have to abide by.

Senator MARK BISHOP—But your experience, of course, comes from being an experienced advocate who puts the cases together and assists veterans in putting their matters before the department at first instance, doesn't it? You essentially take forward well-prepared cases to either internal review or VRB and when they are well prepared you get the proper result. The real complaint comes from those matters that are not properly prepared or not prepared at all. They bring forward evidence very late in the process which, if it had been brought forward at internal review stage, might have dispensed with the claim then. That is my understanding of the criticism.

Mr McCombe—But, if you put in some sort of stop or force people to put the evidence at the first level, you are not allowed to reintroduce any further evidence—any hypothesis that is raised or you find out about later or a new study that comes out that supports your hypothesis. A new SoP—statement of principle—amending the previous one might come out that might get the claim up again. So you have to have the open end.

Senator MARK BISHOP—Okay. Let me come at it a different way. Should there be some sort of incentive in the system whereby at the internal review stage all then available material is brought forward for consideration?

Mr McCombe—Yes.

Senator MARK BISHOP—That is the problem, isn't it?

Mr McCombe—Yes.

Senator MARK BISHOP—Would you agree with that?

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

Senator Mark Bishop—The problem is not with the ESO; the problem is with those who are not—

Mr McCombe—What percentage are you talking about?

Senator MARK BISHOP—That is what we are going to find out tomorrow.

Senator MOORE—Do you think the system is complex?

Mr McCombe—Yes. When I first got involved in the ex-services, the Veterans' Entitlements Act was one volume—about half the size of the first volume now. Now you have two volumes which are huge. It is just getting more complicated.

Senator MOORE—Do you have any trouble getting volunteers to get trained to take on the role that you have?

Mr McCombe—We can get the volunteers but we have a high turnover. Most of the volunteers are usually TPI who have their own health problems. They find taking veterans down to represent them quite stressful. We are finding that we are constantly retraining the volunteers. We are losing them and replacing them. That is one of the reasons why DEST was brought in: to help the ex-service community get some sort of stable system in place.

Senator MOORE—Your point was well taken earlier about how stressful the actual process can be for someone who is putting in an appeal—that, while the end result could be something that is sought after, you have to be prepared, particularly at the AAT level, to advocate your own case. So whether you have got someone with you or not, you have to give evidence and process.

Mr McCombe—We have veterans who just refuse to go into the appeal system. If you tell them that they can appeal a decision, they say, 'No, I don't want to. It is too stressful.'

Senator MOORE—Do people understand their rights in terms of their appeal options?

Mr McCombe—Yes; if they come to us they do, anyway.

Senator MOORE—And people know about your organisation—it is well-publicised and so on?

Mr McCombe—Yes. About one-third of our claims are from servicemen who served in other wars, and that is growing.

CHAIR—What is the membership of your federation?

Mr McCombe—The federation has about 8,200 members Australia wide.

CHAIR—That would be sizeable proportion of the total number of Vietnam veterans, wouldn't it?

Mr McCombe—The number of Vietnam veterans keeps going up; it is about 62,000 now.

Senator MOORE—Do you find much variation between the different states in terms of your membership and the kinds of decisions that come out? I know that members of your federation talk to each other quite a lot. Do you find in those discussions that decisions being made in Western Australia differ greatly to those being made in Victoria? Is there that kind of variation?

Mr McCombe—It does happen. You have the interpretation of the law by a board so there are variations, but they move the board members around a lot too so it would be very pretty hard to say one way or the other.

CHAIR—Thank you very much, Mr McCombe, for your appearance this morning and for your written submission—it is very much appreciated.

Mr McCombe—Thank you.

CHAIR—That completes our hearing for today and the committee now stands adjourned until our hearing in Canberra tomorrow.

Subcommittee adjourned at 12.17 p.m.