



20 August 2003

Your Ref:
Our Ref. GI:AS

Mr Alistair Sands
Secretary-Australian Senate
Finance and Public Administration
References Committee
Parliament House
CANBERRA ACT 2600

Dear Sir,

Inquiry to Administrative Review of Veteran and Military Compensation and Income Support.

We confirm that we are the legal representatives for the Armed Forces Federation and, on their behalf have participated with the Ex-Service Organisation - Working Group (ESOWG) with respect to the Draft Military Rehabilitation and Compensation Bill 2003.

Unfortunately, at this point we are unable to provide a comprehensive response to the terms of reference with the exceptions of paragraph (c) and (e) (enclosed) due to Greg Isolani being on annual leave until the 31st August 2003.

We request an extension of time to respond to the Review that we believe is important and significant as it raises questions that we respectfully submit the Military Rehabilitation and Compensation Bill 2003 has failed to address.

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

Yours faithfully



Greg Isolani
KCI LAWYERS

ENC: Armed Forces Federation - Review and Appeal
Provision of Legal Aid Funding for War Veterans.

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Ex-Service Organisations Working Group
New Military Compensation Scheme
26 July 2002

AGENDA ITEM 3.5

ARMED FORCES FEDERATION – REVIEW AND APPEAL

Status:

Following discussions at the ESO - WG meeting on the 27th June 2002 and in response to Agenda Item 3.2, " Appeals and Reviews under the new Act " the following is ArFFA's overview of Option 2.

Discussion:

Design Principles

There is broad consensus for the VRB, with modifications to be incorporated into the new MCS without adding another tier of Review thereby causing delays, that is maintaining the current two tier review of the MCRS Scheme.

There is also the assumption that the right of review following any adverse VRB decision to the Federal Administrative Appeals Tribunal remains de novo.

A new VRB would be guided by it's own practice directions and procedures to give effect to lodgement of material, conduct of conciliations and hearings

Internal Review of Determination - Section 31 VEA / Section 62 SRCA

Currently an Applicant can request an internal review of any adverse decision under both the VEA and SRCA.

The discussion by some ESO's at the last meeting would indicate that the Section 31 VEA review undertaken by the Department ~~varies from state to state~~. Ideally, a Section 31 review is a reconsideration of the assessment, decision or determination under review.

This process involves the ESO and the Applicant with a view of resolving the issues in dispute or refining them to enable efficient case preparation. Generally disbursements are paid for or reimbursed by the Department at this stage of the review where a report has been asked for by the Department or a report provided by the applicant is persuasive in achieving a decision to accept the original claim.

A s62 SRCA reconsideration by an independent review officer from MCRS considers reasons and any additional material provided by the Applicant in order to consider whether a decision should be varied, revoked or affirmed. Generally the review does not seek any information or material beyond what is provided by the Applicant.

There are no disbursements payable by MCRS for medical reports provided in support of a request for reconsideration. There is no legal obligation for them to be paid in the event that an Applicant overturns the decision at the internal review stage.

Modified VRB for new MCRS model

Previous discussions have suggested the following approach. Once a claim is lodged, the new Commission will determine it and if the claimant is dissatisfied, an application can be made to the VRB in warlike and non-warlike cases. A Conciliation conference, instead of the VRB, as part of the AAT power of review would continue for peacetime cases.

The variant on this approach is to allow the VRB to undertake both roles before the AAT hearing. This option should be explored further.

An Applicant would be advised in writing to contact ESO's, community legal centres or similar organisations for assistance with respect to the VRB or AAT appeal.

Section 31 - VEA / Section 62 SRCA Internal Reconsideration

Following an Application is made to the VRB, the Commission must undertake a reconsideration / Section 31 review.

Once an Application is received an independent review officer or a "Case Officer" would be appointed to advise the Applicant of what further information is required or points that would need to be identified before it could proceed to the VRB conciliation. This would an inquisitorial role to ensure what further information, evidence or material could be obtained from either the new Commission or the Applicant to assist the parties.

This may attempt to effectively "case manage" and assist the Applicant as to what further information may be required in order for the Delegate to vary or revoke the decision before proceeding to the new VRB conciliation.

To reduce any delays a delegate of the new Commission would have to produce a certificate within 30 days of the Application being lodged a "Statement of Issues" that clearly outlines the issues in dispute, further material that Applicant requires and what the new Commission's position is regarding points of medical, factual and legal issues in dispute to enable the decision to be varied, revoked or for it to have a reasonable chance of success before a new VRB Conciliation.

The Application could then be referred to Conciliation no later than 45 days thereafter to enable the Applicant time to obtain additional medical, factual or other evidence.

Application for Legal Aid, Representation and Assistance

Prior to or following the Case officer receiving a Statement of Issues, an Applicant may, through the ESO or independently seek legal advice and assistance to proceed through to a Conciliation and if necessary a VRB hearing.

The ESO may engage an approved law firm or lawyer (i.e. A panel of lawyers who have been vetted by DVA with respect to their relevant legal knowledge, skill and experience regarding

military compensation) to prepare the Application before it proceeds to the new VRB conciliation.

The new Commission would allow for the cost of reasonable disbursements upon request by the applicant, to be paid if for example further medical evidence was required. It may use the current system of disbursements payable under the VRB (approximately \$460 per report per condition under dispute).

If legal assistance were obtained by the ESO on behalf of the Applicant then it would be reasonable for aid to be paid to the lawyer for the legal service. This fee may range between \$500-\$1,200 depending on when the lawyer is engaged and if the Application resolves prior to or following a Conciliation or if the matter proceeds to the new VRB for the Hearing.

The new VRB Conciliation

At this point, legal and ESO representation would be allowed to orally outline the written response to the Statement of Issues together with presenting medical and other evidence to be considered.

The new Commission could attend to assist the VRB and have the power to vary, revoke or affirm the decision under review. The evidence would be presented " on the papers " without any witnesses being called to give " viva voce " evidence. This would ensure that the conference remains largely informal with both sides having an opportunity to present the arguments orally.

The system of review would remain administrative with respect to being fair, economical, quick, just and informal. The Applicant would be accorded with procedural fairness and natural justice. The new VRB should not be bound by rules of evidence and can inform itself as it thinks fit.

Furthermore the new Commissions' decision would have to be in accordance with the current SRCA principles of equity, good conscience and the substantial merits of the claim.

The current AAT Conciliation Conference model could be adopted whereby an officer of the VRB is engaged to mediate the conciliation but not be involved in any future Hearings to ensure the discussions remain " without prejudice ".

The new VRB Hearing

In the event the Conciliation is unsuccessful, the new VRB would conduct a Hearing on the papers similar to the current VRB system with a representative from the new Commission, the Applicant together with the ESO and the lawyer.

There may also be a requirement following the Conciliation and contained in the practice direction for the parties to lodge a statement of the factual medical and legal contentions in dispute.

In order to reduce delays there may be no right for either party to obtain additional medical evidence following the Conciliation without leave of the new VRB. This would ensure that all parties prepare for the Conciliation with a genuine view of resolving the matter with all

relevant material at that point in time and not rely on having another go at getting further material.

To further reduce delays and disbursement costs there would be no witnesses called i.e. medico-legal witnesses or barristers to appear at the new VRB. The new VRB would then produce a written statement of their reasons following the hearing and give parties a further right of review to the AAT.

Time limit to lodge Applications to the new VRB

A substantial consideration of incorporating the new VRB into a new Military compensation scheme is to reduce the delay regarding the review process.

An application to the VRB must be made within 30 days similar to the request for reconsideration under the SRCA. This could be extended for example to a 3 month period with reasons in support of why it should be extended up to a maximum of 12 months as contained in the VEA. A beneficial approach should be allowed for the extension of time to the 3-month time limit with a consideration as to the reasons for any delay and the merits of extending the time limit to the 12-month limit.

A further consideration to reduce delays from the date of lodging claims to a review of the adverse decisions is for time limits for decisions to be set or deemed rejected after the expiration of a time limit of when a particular claim is made.

With respect to those with qualifying service any decision that is overturned that denied a right to income support should be back paid for a three-month period from the date of lodgement of the original claim.

AAT Hearing (de novo)

Following the outcome of the VRB Hearing and assuming it was unsuccessful, the Applicant could then seek de novo Hearing before the AAT. The new Commission would file what is currently the section 137 Statement.

The AAT Hearing would logically be de novo as there would be the opportunity to call the medico-legal or other witnesses who have not had their evidence tested together with Counsel to appear if the matter proceeded to hearing.

With respect to legal assistance payable then eligibility would only be available to Applicants with qualifying service.

The current AAT Practice Direction would remain in place with the exception that the Conciliation conference be removed unless both parties agree that there is a reasonable prospect of success.

With respect to legal costs the current SRCA provision should remain whereby the new Commission would be liable to pay for reasonable costs and disbursements if the determination under review is varied or revoked in the applicant's favour.

Review to be in the Veterans' Division of the AAT

The ideal of having the new Military compensation scheme within the Veteran Division is preferred given the unique 'reasonable hypothesis' that is to be maintained as the standard of proof.

Legal Aid, Administration and Financial Assistance

The current system of Legal Aid for those with qualifying service before the AAT is manifestly inadequate as the amounts payable (\$1,200 for all legal costs and disbursements in Victoria) are not in accordance with the scale (75% of the Federal Court scale)

This level of aid severely restricts the ability of Applicants to obtain legal representation and sufficient disbursements to pay for doctors to attend court and give evidence together with Counsel to appear on their behalf.

The proposed system to review adverse decisions at the new VRB and to the AAT should provide for adequate legal costs and disbursements to be paid to Applicants challenging adverse decisions.

As noted in previous submissions it is inequitable to allow for the current practice of MCRS using private solicitors to appear at the AAT (and in some cases to in effect conduct the internal review pursuant to s62 of the SRCA) without the same opportunity for Applicants to have the same assistance.

Therefore the legal costs and disbursements payable to Applicants at the new VRB level will ideally result in better decisions being made at a primary review level (VRB) by reducing the need for costly litigation before the AAT.

The current cost of administering Commonwealth funds to a State Legal Aid Office for veterans with qualifying service and for members of the ADF irrespective if they are injured in peace time service or not must be established to determine how much the Commonwealth spends to say "No" to a request for a grant of aid.

It is also reasonable to determine the level of expenditure by the Commonwealth to private law firms for representations before the AAT. This will be useful to establish the average cost of defending AAT applications versus how much legal aid is granted to for those with non-qualifying service disputing SRCA decisions.

Thereafter it may be appropriate to consider whether the amount of Aid, the cost of administering it and amounts spent should not be allocated to the new VRB to distribute. This may firstly result in more aid being available to those who are adversely affected by decisions and secondly reduce the cost administering the legal aid funds by removing the Attorney General's department and possibly the State Legal aid centres from administering these funds.

It is not proposed that the existing Veteran's advocacy centres in the state Legal Aid offices be abolished as this would affect those with current and future qualifying service that are disputing claims under the VEA. or to reduce legal aid.

Federal Court Appeals

Both parties would have the right to lodge applications to the Federal Court following the AAT decision in accordance with section 39B(1A) of the Judiciary Act.

Input from Defence, other agencies and ESOs:

Action required:



20 August 2003

Mr Ian McKeown
Regular Defence Force Welfare Association
BY FACSIMILE 9282 7854

Dear Mr McKeown,

Provision of Legal Aid Funding for War Veterans

We refer to the above and to the letter from Mr William Maxwell, Division Head, dated 20th September 2002 to CDRE Adams inviting a response with respect to the provision of Legal Aid funding.

1. Victorian Legal Aid Guidelines - Paragraph 5 War Veterans' Matters. (Encl)

Victorian Legal Aid (VLA) through an arrangement with the Commonwealth Attorney Generals Department distributes Commonwealth Legal Aid for Veterans as defined under Part 2 of the *Veterans' Entitlement Act* (VEA) to acknowledge the,

"special contribution made by war veterans to protecting Australian society in the time of war..."

This grant of legal assistance is with respect to Applications to the Federal Administrative Appeals Tribunal (AAT) following unsuccessful applications to the Veterans' Review Board (VRB).

A grant for legal assistance is neither subject to a means test nor any contribution from the Veteran except for the costs recovered in the matter by the Veteran.

There has been significant difficulty for Ex-Service Organisations to find legal practitioners to act on behalf of Veterans in the Federal AAT in not only Tasmania and Queensland, but in Victoria as a result of a number of factors including but not limited to:

1) The hourly rate set for payment for a Veteran (Currently \$127 based on 64% of the Federal Court Scale and,

2) The criteria to distinguish between "**non complex and complex matters**" as out lined in not only Victoria but also all state and territory Legal Aid offices that are governed by the "Commonwealth Legal Aid Guidelines"

2. STAGE 1 and STAGE 2 - NON-COMPLEX FUNDING

2.1 Non Complex Funding- Stage 1

Currently, a Non Complex matter is divided into 2 stages (1 and 2) of litigation and funding by VLA is for a maximum of 10 and 12 hours work for each stage respectively, plus 2 medical reports and witness fees.

The difficulty is that funding up to Stage 1 for 10 hours work once an Application is made from the VRB to the AAT may require in excess of more than 10 hours work to consider the issues in dispute, arrange medico legal examinations, attend any AAT preliminary conferences and to ultimately advise the Veteran as to the Prospects of success.

Irrespective of the amount of work undertaken if the Veterans' claim is unable to be resolved and unlikely to have any chance of success within the Stage 1 criteria, the maximum a practitioner is \$1,270.00.

There is a clear disincentive and difficulty for practitioners to undertake all of the above investigation appearances, arrange for any medico legal examinations, attendances with the Veteran and to advise of the scope to continue proceeding subject to the medical and / or other evidence for an amount of \$1,270.00.

2.2. Non-Complex Funding Stage 2

Assuming that following the Stage 1 funding for 10 hours work and that the medico legal and other reports support an application to proceed to hearing before the Federal AAT, the total amount for costs and disbursements is for an additional 12 hours work (i.e. a total of \$1524.00.this amount is INCLUSIVE OF COUNSEL FEES THAT MAY TOTAL UP TO \$1500. Therefore as a practitioner you have to in effect pay out of the 12 hours work payable to yourself for the time to prepare a case for a hearing to pay Counsel's fees to proceed to a hearing

Please note this means that a Veterans' solicitor will have to decide to either appear on behalf of the Veteran instead of engaging a Barrister whilst the Department can use in house Counsel or in some cases the services of a Queens Counsel retained by the Department to appear before the Federal AAT.

In effect a Veteran via his solicitor are unable to engage Counsel to appear as the total amount of costs after the Stage 1 level of funding will in effect have to be given to a barrister.

3. Complex Matters.

The Commonwealth and in turn the VLA have divided funding for what it deems "complex matters". (See Para 5 Qualifying for Legal Aid). These cases are those whereby there are;

- 1) Several conditions being claimed and
- 2) Reports required from 3 or more areas of medical expertise.
- 3) Complex link between Statement of Principles (SOP) and the conditions claimed and unresolved issues of law involved,

Thereafter a Grant of Aid is extended beyond the total amount of costs payable of \$2794. and the amounts payable are:

Stage 1 (i.e. Case preparation up to the second preliminary conference as per Non complex matters) up to \$2,780.

Stage 2 (i.e. hearing preparation, briefing Counsel to appear) up to \$1,270.

There are provisions made for solicitors to prepare and attend mediations that are not available for non-complex matters.

Issues for Regular Defence Force Welfare Association Members

It is noted that firstly, the National Legal Aid (NLA) Commission whose members include The Victorian Legal Aid Commission recently made a submission to the Commonwealth Attorney Generals Department (Family Law and Legal Assistance Division) to seek an amendment of the Legal Aid priorities and guidelines for war Veterans. We enclose the Attorney Generals response to the suggested changes for your information.

The NLA's proposals that are relevant to the RDFWA to ensure competent and adequate legal representations was to extend eligibility for those eligible for a grant of Aid and to remove the distinction between the complex and non complex levels of funding. Other considerations to improve the level of funding and to ensure adequate representation included:

- 1) Extend the Guideline to include funding for Veterans without War service but who had the right to claim under the VEA for allowances under Part 6 of the VEA i.e. Attendant carers allowance, recreational transport allowance, vehicle assistance scheme and temporary incapacity allowance if rejected at the VRB.

It is submitted that Regular Defence Force Welfare Association members together with a number of the Ex-Service Community are not comprised of only those who have "qualifying service" as defined under part 2 of the VEA includes the contribution by Veteran's rendering including Peacetime and Peacekeeping service which should entitle them to a grant of aid if they proceed from the VRB to the Federal AAT.

2) Abolish the Division between into Stage 1 and Stage 2 funding. In some cases the significant and majority of work undertaken to successfully resolve the matter can occur within the designated "stage 1" aspect of an application before review. (See further paragraph #5 and 6)

3) To allow for a grant of funding that is separate for Counsels fees as these should be payable as a separate expense and no different to any other disbursement (ie a medico legal report and the cost of his/her attendance) and should not be included in the solicitor's fees for either Complex or Non complex matters.

4) The hourly rate should be comparable to Federal AAT scale for matters pursuant to the *Safety, Rehabilitation and Compensation Act (SRCA)*. Legal practitioners are entitled to receive legal costs calculated at 75% of the Federal Court Scale Using the current guidelines of funding at a Stage 1 level that legal costs and disbursements payable could be up to \$2,500.00 and up to \$3,500 for Stage 2 plus disbursements (i.e. for a reasonable number of medical reports AND Counsel fees).

The current amount of Aid payable for Veteran's matters would properly reflect the scale of fees for Civil claims in the Victorian Magistrates' court with the difference being that does matters do not have the same complexity of issues that are found in Veterans cases.

In particular, Veteran's cases involve issues with respect to the SoP'a that may or may not apply, medical conditions to be discerned and further opinions to be obtained, finding relevant witnesses, (in particular with respect to widows' claims), an analysis of the GARP, considering and / or obtaining relevant Historical and similar evidence, the relevant law that applies at a particular point in time does not make the Hourly rate or time allocated attractive or in some cases feasible for a practitioner to act on behalf of a Veteran.

The total amount of funding payable for Veterans' representatives should be at a minimum the same as that for those claims before the AAT that are made pursuant to the SRCA. This means that in the event the case proceeds to a one-day hearing and is successful, the legal cost payable to the solicitor would be approximately \$4,500.00 - \$5,500.00 plus disbursements. (I.e. medical reports cost of witnesses to attend and Counsel fees).

The Hours designated at 10 hours and 12 hours respectively in Stages 1 and 2 for Non complex matters is unrealistic as the time taken can range up to 20 to 30 hours by the time an Application proceeds to the second AAT conference.

5) The Guidelines and funding for 22 hours do not allow for a Mediation before the AAT as part of either Stage 1 or Stage 2 funding. There is a clear disincentive on behalf of the veteran's solicitors to even attempt to spend more time and effort other than the maximum of 22 hours allocated to then participate in any mediation that could resolve all issue in dispute and reduce the need for hearing.

We highlight to the Regular Defence Force Welfare Association that mediation at the AAT has proved considerably successful for Military Compensation (SRCA) matters p and should be part of the increase in any funding for Veterans' solicitors taking into account the time taken to prepare and attend a Mediation.

6) The guideline that distinguishes between complex and non-complex matters to be abolished. The definition of "non complex and complex " matters is confusing as all matters have their own complexities to deal with the Application and interpretation of any relevant Statement of Principals, medical evidence to be obtained, historical reports to be considered. There is also the substantial case preparation with respect to all the medical and other evidence and attending AAT conferences either by telephone or in person, consulting with the Veteran, arranging and obtaining any medico legal reports that renders such definitions of a matter being complex or not as redundant.

Any attempt by the Commonwealth to reduce and/or restrict the level of aid by categorising supposed legal "complex and non complex matters" and fixing the total amount of costs and counsel's fees which must be categorised as a disbursement at \$2,500.00 does not sit within the purpose of the Commonwealth's provision of Legal Aid that in any way acknowledged the "special contribution made by war veterans to protecting Australian society".

Furthermore, there is an increasing frequency for DVA to use in house Counsel who are former members of the VRB (in Victoria) or legally qualified practitioners to appear on their behalf before the Federal AAT and in some cases a Queens Counsel who has been retained by the Department and appears in the "complex cases".

7) An hourly rate of \$150 that reflects the applicable scale payable for Military Compensation claims i.e. (75% of Federal Court Scale) Legal practitioners should be able to justify the amount of time undertaken via Time sheets to obtain instructions, consider all relevant material and to properly prepare and present matters following unsuccessful VRB applications to mediation and thereafter hearings before the Federal AAT in order to justify the amount claimed from Legal Aid.

8) The level of funding does not allow for disbursements for a legal practitioner to attend Veteran's and RDFWA members in rural areas and the additional time taken in travelling time, the cost of travelling and time spent out of the office.

If you require any clarification or expansion on the issues raised herein please do not hesitate to contact Greg Isolani on (m) 0405 138 711.

Yours faithfully,

Greg Isolani

KCI LAWYERS

Encl : VLA Guidelines

Attorney General Response to NLA Recommendations