

**SENATE INQUIRY
INTO ADMINISTRATIVE REVIEW
OF VETERAN AND MILITARY COMPENSATION
AND INCOME SUPPORT**

Submission to
Finance and Public Administration
References Committee

by the

LEGAL AID COMMISSION OF NSW

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INTRODUCTION

The NSW Legal Aid Commission ("the Commission") is grateful for the opportunity to provide a submission to this Inquiry. Among the specialist services provided by the Commission is the Veterans Advocacy Service ("VAS"). Established in 1947, the VAS is the only specialist legal aid service of its kind in Australia. It is entirely Commonwealth funded and has 14 established positions, of which 9 are advocate positions. Advocates appeared at the Veterans' Review Board until 30 June 1997 and have appeared at the Administrative Appeals Tribunal since 1989.

The VAS provides free community legal education, legal advice, assistance and representation to veterans and their dependants about their rights and entitlements under the *Veterans' Entitlements Act 1986 (Cth)* ("VEA"). It provides assistance to:

- Veterans who served in any armed conflict involving Australia, including World War I, World War II, the Korean War, the Malaysian Emergency, the Vietnam War and the Gulf War
- Allied veterans who were involved in conflicts listed above
- Veterans who were Australian Merchant Mariners during World War II
- Members of Peace Keeping Forces
- Eligible members of the Defence Forces
- Dependants of the above groups.

In 2002/2003 the Commission made 349 grants of legal aid in veterans matters, and conducted 25 regional advice clinics across NSW. Groups targeted by the advice clinics were Aboriginal veterans and ex-service women that have been underrepresented in VAS statistics.

In those matters where aid was granted during 2002/2003, 83.3% of the VAS's clients were aged 55 and over, of which 53.3% were aged 75 and over. 100% of them have either physical or psychiatric disabilities or a combination of both.

In response to the specific matters raised in the Terms of Reference, the Legal Aid Commission provides the following information:

(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;*

Veterans' jurisdiction

The causes for extensive demand for administrative review of decisions on compensation claims in the veterans jurisdiction should be examined from the lodgement of claim and each stage of review as follows: -

- Lodgement of claim

There are a number of problems identified at this level including:

1. A lack of external agencies/persons available to give expert advice regarding the lodgement of claims.

2. The difficulties encountered by voluntary welfare and pension officers to be kept abreast of changes to case-law and legislative developments in advising veterans on claims, statements and questionnaires.
3. A lack of Commonwealth funding for the time required to lodge a claim. Applicants seek minor assistance to prepare statements, complete questionnaires including smoking, alcohol, lifestyle, and solar damage. Disbursements cannot be incurred to obtain expert medical and other evidence as may be required to support the applicant's claim.

- Primary decision

There are a number of problems identified at this level including:

1. Pursuant to Section 17 of the *Veterans' Entitlements Act (1986)* the Repatriation Commission has an obligation to enquire when a claim is lodged. Claims assessors have a restricted role in collecting information which can limit the extent of their investigations. This increases the likelihood of the need to appeal under S31 VEA. The extent of the provision of current case-law and information on legal developments to assessors is not known but could be a highly relevant factor in the need to appeal decisions.
2. Reasons given for the rejection of a claim at the primary level can be inadequate. The applicant can feel frustrated by the lack of reasons given and this is particularly so in all claims lodged for malignant neoplasm of the prostate causally related to the consumption of animal fat and the majority of claims for pension at the Special Rate (TPI).

- Veterans' Review Board (VRB)

There are a number of problems at the first tier of review including:

1. Under the current Commonwealth Legal Aid Guidelines, legal aid is not available for applications to the VRB. This was withdrawn by the Commonwealth under the 1997 *Agreement between the Commonwealth of Australia and New South Wales in relation to the Provision of Legal Assistance* and has continued under the current Agreement (1 July 2000 to 30 June 2004).
2. Legal practitioners are excluded from appearing at the VRB. Applicants are either self-represented or seek representation from an ex-service organisation. Matters can be heard in absentia due to lack of available free representation.
3. Lack of available free representation can result in veterans being charged by private practitioners or by them taking a percentage of pension arrears if the matter is successful for advice and preparation of their matter.
4. The Respondent does not appear at VRB hearings.
5. A maximum amount of \$467 for obtaining relevant documentary medical evidence for each condition claimed may be reimbursed. The fee for specialist medical practitioners to review documents and provide an expert

medico-legal report is generally in excess of the maximum sum allowed. (Any report obtained in this matter is not privileged.)

6. The VRB does not hear expert evidence but makes a decision on the papers only.
7. 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.
8. Section 152 of the VEA is not utilised as fully as it could be which necessitates more thorough investigation of the applicant's claim at the next tier of review, the Administrative Appeals Tribunal.

- Administrative Appeals Tribunal (AAT)

The Respondent extensively uses non-qualified 'experts' for opinion on matters before the AAT. This issue requires consideration as opinions given may not adequately address issues such as a veterans work capacity where there is no qualification in rehabilitation medicine for instance, but a more general vocational interest.

(b) *An assessment of the operation of the current dual model of internal review, Veterans' Review Board/ Administrative Appeals Tribunal, its advantages, costs and disadvantages;*

There are no evident advantages to Veterans of the dual model of internal review, Veterans' Review Board/ Administrative Appeals Tribunal.

1. The VRB represents an additional and costly tier of review to administer. Costs for finalising applications before the VRB increased from \$901 in 2000/2001 to \$996 in 2001/2002 (VRB Annual Report 2001/2002, page 41). The administration costs of the VRB could preferably be utilised in increasing resources within the Repatriation Commission to conduct internal reviews by senior review officers pursuant to S.31 of the VEA.
2. The VRB makes the administrative review process more complicated for veterans. This is particularly so given the limited choices to veterans in representation before the VRB. Veterans often report feeling frustrated and confused and wishing to withdraw their application for review.
3. It often takes longer for veterans to achieve a successful outcome in their appeal as 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.

(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 in the future, including compensation claim preparation, evidentiary requirements, facilitation of information provision and the onus of proof;*

1. An appropriate model for a system of administrative review for VEA and MCRS entitlements is proposed at Attachment 1.

2. The key features of the proposed model include:
 - Merging the VEA and MCRS compensation schemes whereby a primary claim is appealed directly to the AAT with optional internal review at any stage.
 - Introducing consistency in the appeal periods for VEA and MCRS appeals.
 - Making legal aid available from lodgement of primary claim for professional time and to enable disbursements to be incurred in accordance with evidentiary requirements and the facilitation of information provision. Non-means tested legal aid for applications under VEA. Means tested legal aid for applications under MCRS as per the current Commonwealth civil guidelines for other Commonwealth pensions and benefits.
 - Legally there is no onus of proof on the applicant or respondent. However, practically the onus of proof is on the applicant with legal aid to incur disbursements from lodgement of claim or if not, from receipt of the primary decision.

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

1. Abolish the VRB for reasons given in (a) and (b)
2. If the VRB is maintained, make it an optional rather than a compulsory tier of review as per the proposed VEA/ MCRS model.
3. Re-instate non-means tested legal aid for VEA applicants following rejection of a primary claim to provide early intervention in the resolution of disputes.
4. Introduce a disincentive for matters to proceed to the AAT by introducing cost orders one way to the Repatriation Commission for VEA matters as exists for MCRS/Comcare matters. Given the AAT set aside rate of 33% to 39% from 1999/2000 to 2002/2003, the Repatriation Commission would potentially have cost orders in at least one third of matters before the AAT.

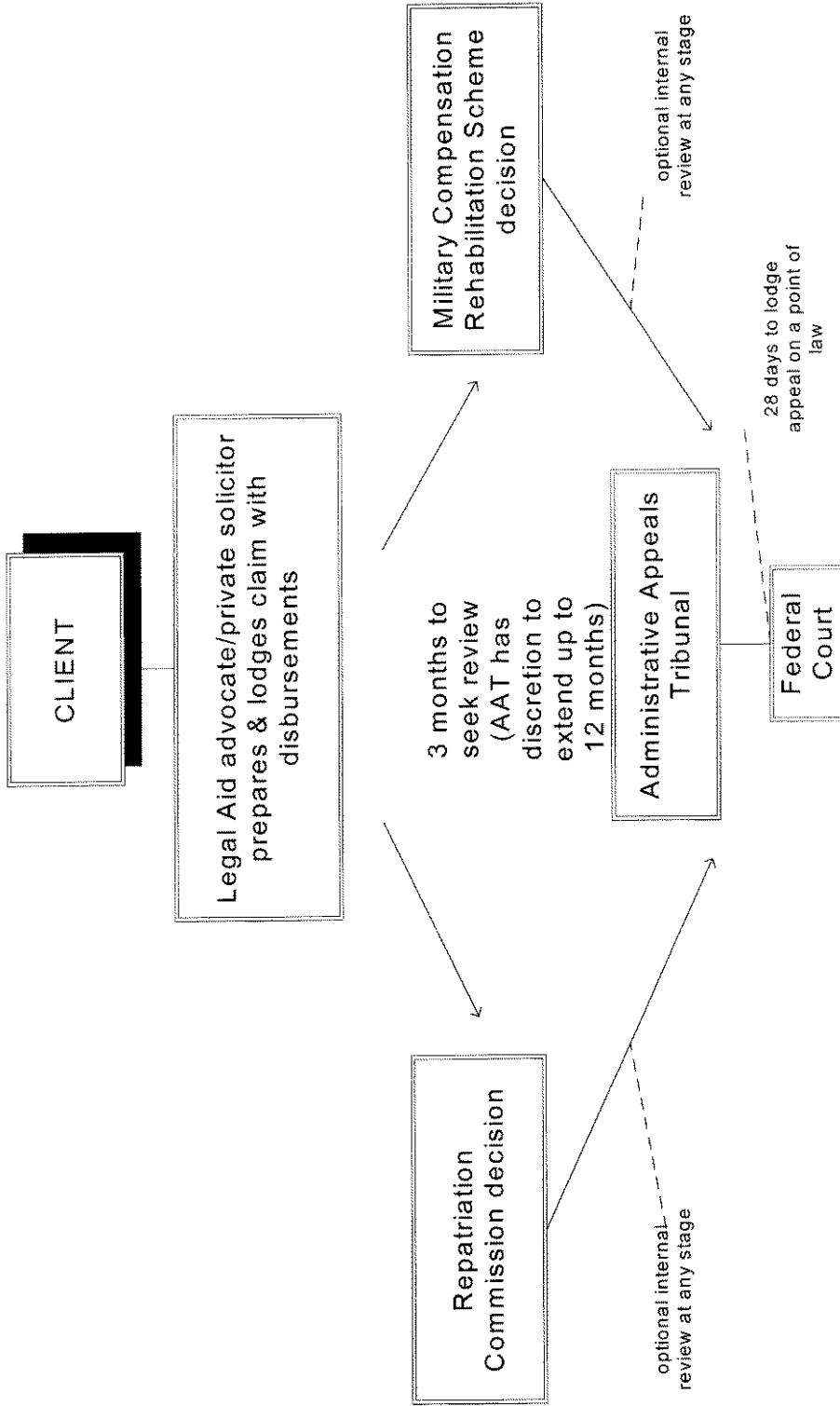
(e) An assessment of the adequacy of non-means tested legal aid for veterans, the appropriateness of the current merits test and its administration, the options for more effective assistance to the veteran and ex-service organisations and the legal industry.

1. Non-means tested legal aid is available to Part II veterans and their dependants under the VEA. It works well where legal aid is accessible.
2. 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.
3. Non-means tested legal aid should be expanded to include invalidity service pension matters (Part III, VEA), Allowances (Part VI) and 'Gold Card' matters relating to health care treatment.

4. The merit test is administered effectively by legal aid when eligibility for legal aid is being considered. Legal aid is refused only where there are no 'reasonable prospects of success'. The applicant has a right of review to the Legal Aid Review Committee if legal aid is refused on merit.
5. Legal Aid funding is necessary to challenge the Statement of Principles, legislative instruments for disability pensions, by obtaining medical reports and research to request reviews of relevant instruments to the Repatriation Medical Authority and Specialist Medical Review Council. The cost of a relevant expert to review medical research before the SMRC and provide opinion is beyond that of a self represented applicant or ex-service organisation.
6. The options for more cost effective assistance has been addressed above and in the proposed model of administrative review at Attachment 1.

MODEL OF ADMINISTRATIVE REVIEW

Attachment 1



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BOARD PAPER

SUBJECT: Family Law Duty Solicitor Scheme

DATE: 15 July 2003

ISSUE

To provide a report and evaluation of the Family Law Duty Solicitor Scheme at Parramatta at the conclusion of the 12 month pilot period and to inform the Board of the expansion of the pilot to the Newcastle Registry of the Family Court and Federal Magistrates Service.

PARRAMATTA PILOT

Stage One of the Family Law Duty Solicitor Scheme commenced operation at the Parramatta Registry of the Family Court and Federal Magistrates Court on 5 August 2002. The Scheme has two solicitors who are available to provide assistance for self represented litigants in both courts on Monday, Tuesday, Thursday and Friday of each week.

Overview of the Scheme - 5 August to 30 June, 2003

The Scheme and its services have settled into the day to day life of the Parramatta Registry. Generally, assistance is provided on each of the FMS Duty list days on Mondays and Fridays as well as the Family Court Deputy Registrar Lists on Tuesdays and Thursdays. Assistance is also provided for litigants in the Judicial Registrar's list and, on occasion, usually following a specific request, matters before Judges. On some days, up to 4 courts may be operational, covering 2 separate floors of the Court House. The Solicitors are available until the duty lists are complete and are generally occupied until at least the luncheon adjournment.

In addition, the two solicitors who service the Scheme have integrated into the Family Law Section of the Parramatta Office and are playing an important part in the expansion of in-house family law services for the Parramatta region. This includes participation in the new Family Law Advice Clinic at the Parramatta office on Mondays, Wednesdays and Fridays, undertaking Child Representation matters and, for the senior duty solicitor, providing assistance with the supervision of junior solicitors in the office. The Duty Solicitors will also frequently be responsible for agency matters for the Parramatta Office and other regional offices, reducing the need for other in-house Solicitors to travel to Court for procedural or less complex matters.

A table summarising the work of the Scheme during Stage 1 is annexed to this Paper.

The following observations can be made in relation to the Scheme:

Client base

- Assistance was provided to a total of 400 self-represented litigants. There has continued to be an almost even split of assistance to men and women. On average, the Scheme assists approximately 9 people per week.
- Since the commencement of the Scheme, there has been an increase in utilisation of the Service by 14%. This may be attributed to increased knowledge of the Scheme and its services by Judicial Officers and Court officers who refer the majority of work to the Scheme.
- There is a capacity for the Scheme to provide further assistance during relevant court times, and, with improved signage, the production of a Duty Solicitor Scheme brochure, continuing liaison with the Court and liaison with community organisations the Commission will continue to raise the profile and utilisation of the Scheme.

Referral Sources

- It continues to be the case that approximately 50% of identified matters originate from the Federal Magistrates Court with 30% from the Family Court. A small percentage of matters involve advice on matters that are not in any Court List on that day however on most occasions, those matters are referred to the Parramatta Office for advice through the Clinic which provides advice out of that office.
- Accordingly, it continues to be the case that Mondays and Fridays see the highest demand for the Scheme (when the FMS and Judicial Registrar are sitting), with Thursdays and Tuesdays (with DR Lists only) showing a lesser demand.
- A "proactive" attitude when undertaking Duty work is proving an advantage, and it is not uncommon for the Duty Solicitor to assist self represented parties to complete Trial Notices, Directions Sheets, Counselling Referrals and other procedural forms without a formal request for assistance being made.

Matter types

- Assistance in relation to parenting issues continues to be the major area with approximately 62% of matters pertaining to children. Property, contravention and recovery make up the other major areas. Anecdotally, it continues to be observed (although not adequately reflected in the available data) that advice in relation to contravention (predominately regarding poorly prepared applications or the definition of "reasonable excuse") is a high area of assistance. As this is an area in which Legal Aid is not commonly available, consideration may be given to the preparation of some type of summary assistance sheet for both applicants and respondents who will be appearing for themselves in these proceedings. An advantage of the duty scheme is the potential it offers to appropriately identify self represented litigants who would be able to use self help forms of assistance, for example, a contravention "kit".
- In matters where a self represented litigant received some type of representation, as distinct from advice, through the Duty Scheme, over

27% of matters were finalised and removed from the pending cases list. Interim agreements, usually by way of negotiated and drafted Terms of Settlement also make up an important part of the assistance provided.

- The Scheme has acted in 11 matters where an urgent order is sought in relation to a child.
- The Scheme has also now acted for 2 clients who were in custody at the time their matter came before the Court. In the first matter, the client was brought before the Court on a warrant for her arrest after having wrongly removed the children from their Father. The Federal Magistrates Service requested the Duty Solicitor's appearance for the Mother on the first return date when the issue of bail was to be argued.

Conflict

- Conflict was identified in 56 occasions, comprising only 14% of those parties seeking assistance. In many of these cases, minor assistance was provided to the conflicted party in the form of legal information, liaison with the court staff, a courtesy appearance before the court to advise of the conflict situation and/or active referral to a private solicitor for further assistance. In these situations private practitioners have been pleased to assist on a pro bono basis. It may be observed that generally, identification of conflict does not seem to have actively disadvantaged many clients who have approached the duty service.

Means of Clients

- It continues to be the case that on average, approximately 60% of clients approaching the Scheme are in receipt of a Centrelink pension or benefit. Accordingly, approximately 30% of clients receiving assistance from the Scheme are in receipt of a wage or other income that would have rendered them ineligible for legal aid. However, it may also be observed, that for many of the clients within this group, the incomes stated were towards the lower end of the wage scale, which would have made full payment of private legal services a relatively high economic burden, providing one possible explanation for their self represented status on the particular day at court.

Observations

At the conclusion of the first stage of the Duty Solicitor Scheme it appears clear that it has contributed towards fulfilling a much needed service within the Parramatta Registry of the Family Court and Federal Magistrates Court. In addition, the two solicitors allocated to the Scheme are now also contributing to the expansion of the Parramatta office and the further provision of in-house services for the Sydney western region.

NEWCASTLE PILOT

Following consultation by the Director Family & Civil Law, Mr Matt Cogan, SIC and Ms Kim O'Rourke, Snr Solicitor Family Law Newcastle with Justice Graham Mullane, Family Ct. Judge and Mr Warren Donald, Federal Magistrate, it has been agreed a pilot duty solicitor scheme be introduced at Newcastle for a 12 month period.

At Newcastle the greatest demand for a Duty Solicitors service is also in the Federal Magistrates Duty List, which occurs each Wednesday. In the Newcastle Registry however applicants have also the option of applying for summary and interim orders in the Judicial Registrars list in the Family Court, which occurs once per month, although in 2004 the list is scheduled to occur once every 10 weeks. It is also considered by Newcastle Family Court staff and Family Law Solicitors in the Newcastle Regional Office that assistance could be given to self represented persons in the Deputy Registrars Duty List, which occurs each Monday.

It is also to be noted that there has been a second Federal Magistrate appointed in Newcastle and is due to start sittings in September this year. The incumbent Family Court Magistrate Mr Warren Donald has indicated it is proposed that the second Magistrate will sit on a list day to receive transfers of urgent matters including Recovery Order applications and applications for interim hearings. The service would encompass the following:

1. Appearances as required each Monday in the Deputy Registrar's list of the Newcastle Family Court.
2. Appearances each Wednesday before either/or of the two Federal Magistrates.
3. Appearances on duty days between Monday and Wednesday in the Judicial Registrars list of the Family Court sitting each fourth week in 2003 and each 10th week in 2004.

Location

Service of the Newcastle Family Court and Newcastle Federal Magistrates Court encompasses a large geographical area from Sydney in the south, to Dubbo in the west, to Coffs Harbour and Lismore in the north and with circuits to Armidale and Tamworth.

This area is represented by large numbers of socio economically disadvantaged persons who come within the client group of the Legal Aid Commission of NSW.

Justice Graham Mullane and Mr Warren Donald are particularly enthusiastic about the prospect of a Duty Solicitor scheme being introduced in accordance with the guidelines established at Parramatta.

It is anticipated the Duty Solicitor will appear on average three days per week in various lists of the two courts and will then assist with outreach to Taree one further day per week. This will enable a resource to be utilized to assist in this area which is identified as an area of unmet family law need.

RECOMMENDATION

That the Board note these initiatives.

Kim Cull
Director Family & Civil Law