



Law Council
OF AUSTRALIA

Veterans' Advocacy and Support Services Scoping Study

Department of Veterans' Affairs

5 September 2018

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

| | |
|------------------------------------------------|-----------|
| About the Law Council of Australia..... | 3 |
| Acknowledgement | 4 |
| Introduction..... | 5 |
| Dislocating Causes..... | 5 |
| Alternative Self-Remediation | 6 |
| Unfitness | 7 |
| Advocacy..... | 8 |
| Ethical standards..... | 9 |
| Intermediaries | 9 |
| Contact | 10 |

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council acknowledges the assistance of the Military Justice Committee of the Federal Litigation and Dispute Resolution Section (**MJC**) and the Law Society of South Australia in the preparation of this submission.

Introduction

1. The Law Council welcomes the opportunity to make a submission to the Department of Veterans Affairs (**DVA**) regarding the Veterans' Advocacy and Support Services Scoping Study Discussion Paper (**DP**).
2. The Law Council notes that the estimate mentioned in the introduction of the DP, that in the Australian community there are 320,000 veterans who have been deployed is made in the context of many thousands more veterans who were never deployed outside Australia or saw themselves as veterans. In Section 1 of the DP the DVA acknowledges that although it has no detailed figures for the number of volunteer advocates, a figure of 1600 is estimated based on grants distributed to Ex-Service Organisations (**ESOs**).
3. This figure is repeated in Section 6 in the context of the *Advocacy Training and Development Program (ATDP)* – a tripartite programme conducted by DVA, the Department of Defence (**DoD**), and the ESO community. This program is introducing accredited training for veterans' advocacy and is also accessible by professional advocates. The programme has accredited 400 advocates and has 500 in training. There is no mention of the remaining 700 of the estimated 1600 advocates.
4. Considering these figures, the Law Council makes the following observations and suggestions regarding several of the issues raised in the DP.

Dislocating Causes

5. Noted in the DP are some of the causes of the decline in ESO advocates including reluctance by some existing ESO advocates to embrace advocacy training which requires competence in all three components of the complex legislative framework, and not just the *Veterans' Entitlements Act 1986 (Cth) (VEA)*, as well as the declining pool of existing volunteer advocates due to the inability of ESOs to attract younger members.
6. The declining membership pool of ESOs can also be attributed to several factors, including:
 - generational lifestyle changes;
 - failure of ESOs to address the need for membership facilities and activities attractive to younger veterans of any gender, particularly those with young families;
 - unsuitability of ESO premises for interactive social activities by modern families. Few if any are seen to have appropriate facilities for advocacy training;
 - many veterans who trained and fought more recently, and were ultimately discharged on medical grounds, are torn by their inability to cope with the demands of uninformed superiors who required them to meet requirements of attendance to military duties, and a desire not to 'let down their mates' before that discharge from the service occurred;
 - the substantial, and perhaps unreasonable, requirements regarding proof of: identity; service; compensable types of service; and incidents during service which establish the connection between ailments and that service. The MJC is aware of a case in which one 3RAR veteran, after three tours in Afghanistan, in addition to proving that his injuries were service related, was required to prove he had even served in the first place;

- failure of the DoD to inform personnel in its risk assessment program (for up to 10 years into their service period) that the gateway to providing evidence of the connection between an incident and the injury or trauma alleged by the veteran was by *Form AC563 – (Defence OHS Incident Report)* – the raising and submission of which is the individual’s responsibility. The completion and of that form was the responsibility of a supervisor within mandated timeframes but of was not a claim for compensation;
 - a shared view of many veterans that many of the frustrating issues raised as barriers to assistance could be solved on their enlistment by, in addition to issuing a *PMKeys* number, issuing a DVA File number so that at a minimum medical, psychological or any further evidence required by DVA could be linked by to a common data base; and
 - discouragement caused by denial of real guidance and assistance from DVA and subsequent difficulties where veterans have turned to ESOs for assistance but were unable to undertake voluntary work due to the difficulties of making a living or hampered by an inability to obtain assistance from the DoD and/or an ESO dictating the type of in the field voluntary work they could undertake.
7. This plethora of impediments has had severe adverse consequences for many veterans, their families and the community generally. The MJC is aware that, rightly or wrongly, many of these veterans hold DVA and DoD responsible for their plight. The impact of these issues, as well as experience of the types of systemic problems documented in the narrative in the Commonwealth Ombudsman’s report in respect of *Mr A 06/18*,¹ may mean that it will very difficult to re-engage these veterans.
8. The MJC understands that the response of DVA’s Secretary,² in acknowledging DVA’s responsibility and acceptance of the report recommendations was seen by many of those who were made aware of it as appropriate but unpersuasive in their own situation and that of their contemporaries.

Alternative Self-Remediation

9. The MJC is aware that a whole cohort of veterans has restored their individual self-esteem by assisting each other in groups, on closed (by invitation only) social platforms. Where, unrestrained by subject but adequately moderated, these veterans see themselves as acting *pro bono* for a much wider group in the community by monitoring their page, communicating, and sharing advice regarding issues such as child support, Centrelink allowances, domestic violence, and divorce. This can also involve guiding veterans within these groups to Counsel who understand their issues. Due to the online nature of these support groups, representation of women is considered less of an issue.
10. Accordingly, whilst being wholeheartedly in support of the training and accreditation of advocates, the MJC is of the view that more will need to be done to make any attempt to bring these people back to the fold either as clients or advocates.

¹ Commonwealth Ombudsman, *Investigation into the Actions and Decisions of the Department of Veterans’ Affairs (DVA) in Relation to Mr A* (July 2018)
<http://www.ombudsman.gov.au/__data/assets/pdf_file/0022/86305/Investigation-into-the-Actions-and-Decisions-of-DVA-in-Relation-to-Mr-A.pdf>.

² Ibid. The response of the DVA Secretary is provided at Attachment A of the Commonwealth Ombudsman’s report.

11. The MJC understands that there is a considerable body of eligible veterans who have lost their entitlements (and often their sense of self-worth), with disastrous consequences to families and the wider community.
12. For reasons referred to above these people remain on the other side of a great schism which the MJC sees as needing positive remediation to re-engage them with the DVA and the ESOs.
13. The MJC is of the view that attempts to do that through ESOs would be problematic, at least at first instance and without more supervision by DVA. Such supervision might well be satisfied by a set of management guidelines for advocate training directed to ESOs which wish to retain their grants.
14. Many veterans, particularly those with mental health conditions, need personal contact in an appropriate environment to adequately complete applications. In some cases, even assistance to deal with online computer applications may be necessary.
15. Personal contact between the DVA and these veterans needs to be restored. As an example, in Victoria's second largest city, Geelong, personal departmental contact by DVA has been reduced to only one representative at Centrelink.
16. Although the 'significant modernisation program under the banner Transforming DVA to put Veterans and their Families First' is well intentioned, as noted previously in this submission, previous negative experiences may make this a particularly difficult process. As one example, the reference to *MyService* in Section 9 (and extracted below) is, in the view of the MJC, unlikely to be representative of the experience of many veterans:

One example is MyService which allows any veteran with a PMKeyS number and their advocates to make their claims online.

MyService replaces a 36-question paper claims application form with an intuitive website that asks only three to seven questions and has so far allowed over 2,200 clients to register and make more than 2,100 claims. Initial results show that claims lodged through MyService only take around a quarter of the time when compared with the standard paper-based process.

17. The process is not available to those veterans who: don't remember their *PMKeyS* number; do not have access to a record of it; or completed their service before the Australian Defence Force (**ADF**) began to allocate such numbers to personnel. Many of the 320,000 mentioned in the figures above would never have had a *PMKeyS* number.
18. The MJC suggests that consideration be given to further supporting such veterans, building on their not inconsiderable expertise.

Unfitness

19. The DP also relates a concern that about 'veteran advocacy continuing to be based on a workforce of volunteers, many of whom are clients of DVA and have been found unfit for work because of their injuries and illnesses yet are engaged as advocates to provide complex advice on entitlements'.
20. Given the alienation described above, the MJC is aware of generational examples of father and son veterans supporting each other, both suffering from mental health conditions such as post-traumatic stress disorder.

21. The MJC is of the view that if a return to a volunteer system is contemplated, either under ESO auspices or otherwise, that concern, if it exists, can be managed with appropriate safeguards. Unfitness of the types described does not necessarily mean disablement from advocacy. Indeed, the law takes that view in some states and territories by providing for the management of barristers with mental health conditions in its professional conduct legislation.

Advocacy

22. The MJC notes that Question 6.2 of the DP considers whether legal representation would provide better support and assistance for vulnerable veterans appearing before the Veteran's Review Board (**VRB**). The physical and mental impact of military service on veterans is well known. A recent report by the ADF found that nearly half (46 per cent) of veterans who left the ADF within five years experienced a mental disorder, including anxiety, panic attacks, depression and (47.5 per cent) experienced drug and alcohol dependence.³ Based on the body of evidence with respect to the health and wellbeing of veterans and the nature and impact of military service, the Law Council considers that all veterans should be accorded the right to legal representation before the VRB.
23. Onerous administrative processes can further exacerbate mental illness. Matters that are heard before the VRB include veteran entitlements and compensation. Such matters are likely to have a significant and material impact on the livelihood and wellbeing of a veteran. Therefore, a hearing before the VRB is likely to be a highly stressful experience for a veteran, particularly if they are suffering from a physical or medical condition. Furthermore, a veteran may be limited in their capacity to fully and properly express their position, which could be prejudicial to the outcome of the hearing.
24. While there is not a guarantee that practicing lawyers will necessarily be better able to assist the VRB in all cases, in most cases practicing lawyers will be more effective and efficient in presenting a case.
25. Presently, a veteran can seek assistance from a lawyer in preparing their application documentation but is unable to be represented by a lawyer before the VRB. This is expressly stipulated in section 147 of the VEA. The notion that a veteran should be restricted in their right to be represented by a person of their choice is contrary to the fundamental concept of the right to legal representation. The right to a lawyer is widely recognised, it is entrenched in the common law and acknowledged in international treaties to which Australia is a party.
26. There is something anachronistic, if not repugnant, in the present situation where veterans can be represented at a VRB hearing by other forms of representation, such as ESO advocates, but are unable to be represented by a lawyer. The Law Council submits that it is unreasonable that a lawyer can assist a veteran in the preparation of their documents, at ADR hearings and direction hearings, but is prevented from appearing at the VRB hearing. The lawyer would be well-briefed in their client's circumstances and limitations, and therefore the appropriate person to present their case at the VRB hearing.

³ Department of Defence and Department of Veterans' Affairs, Australian Government, *Mental Health and Wellbeing Transition Study Key Findings* (2018) <https://www.dva.gov.au/sites/default/files/files/health%20and%20wellbeing/research_dev/socialresearch/TWRP_Key_findings.pdf>. See also M O'Connor et al, 'Vulnerability at the End of Life: Australian Veterans Requiring Home-Based Palliative Care' (2014) 26(3) *Home Health Care Management & Practice* 134.

27. While lawyers can represent veterans at informal alternative dispute resolution (**ADR**) hearings and directions hearings, this is not the case for ADR proceedings conducted under the auspices of the VRB.
28. The DP notes that VRB hearings are not adversarial in nature and are conducted in an informal manner. This is said to be the basis on which veterans cannot be represented at VRB hearings by a lawyer as provided in section 147 of the VEA Act. Such justification for the exclusion of lawyers is unwarranted. Lawyers frequently appear before authorities and tribunals all over Australia where hearings are conducted informally and without the application of the rules of evidence. Representation by lawyers can, in many cases, assist the efficient operation of a judicial body. Advocacy being but one form of the art of persuasion, most practising lawyers have experience in many of the forms of ADR and/or specialise in it.
29. There may also be costs savings by allowing representation by lawyers as this is potentially a less costly alternative than training ESO advocates. The legal profession represents a largely underused pool of persons capable of acting for veterans should section 147 of the VEA be repealed. Due to the professional conduct requirements applicable to members of the legal profession and the fact that most lawyers are covered by Professional Indemnity Insurance, permitting lawyers to appear at VRB hearings would assist with the pressing problems of accreditation, ethical responsibility and enforcement mentioned in the DP.
30. Should section 147 be repealed, there may be an opportunity for the DVA to work with state and territory law societies and bar associations across Australia to develop advocacy training and/or accreditation for lawyers wishing to specialise in DVA work for veterans (as occurs now in a number of other specialist areas of the law).
31. Given the potential impact of the decision that is ultimately made at a VRB hearing, including upon a veteran's health and welfare, the Law Council considers that veterans should be entitled to legal assistance, not only in the preparation of their submissions to the VRB, but also in representation at hearings if they so wish. Recent reform has reflected the need to ensure that veterans can more easily access services and support. In the Law Council's view, the amendment of the VEA to allow for legal representation before the VRB, is a further and requisite step in this process.

Ethical standards

32. The Law Council has reservations about any accreditation system which appears to operate currently under the ATDP. The statement in Attachment C to the DP under the heading *Ethical standards of behaviour with enforcement, including removal from profession* that: 'The ADTP has developed a Code of Ethics for advocates to follow, although this is not enforceable by the ATDP' is not entirely clear. However, if it means that the system of ethics developed is not enforceable at all or has enforcement provisions in conflict with the various state and territory codes of professional conduct for legal practitioners, it has a potential to be problematic.

Intermediaries

33. An intermediary is a skilled communication specialist who will be available during proceedings to facilitate two-way communication between a vulnerable witness and

others. While developed in the UK, this approach has been adopted in Victoria.⁴ The Supreme Court of Victoria's Intermediary Pilot Program will operate between 1 July 2018 and 30 June 2020.

34. Intermediary schemes assist vulnerable witnesses to give their best evidence. The role of the intermediary is to facilitate communication with the witness. They are neutral and during the proceedings their primary responsibility is to the tribunal or court. The general function of an intermediary is to:
- assess the witness' communication style and specific communication assistance required;
 - make recommendations to the person questioning the witness and the Court on how to pose a question to get the most reliable evidence; and
 - assist with communication to enable the witness to be understood and the witness to understand the questions.
35. Given the vulnerability of some veterans, the practice of using intermediaries could prove useful in DVA matters. Although developed in the context of criminal proceedings, its success in that context (in the UK) suggests it may be just as, if not more, successful for veterans involved in non-adversarial proceedings.

Contact

36. For further comment or clarification on any of the matters raised in this submission please contact Paul Willee RFD QC, Chair, Military Justice Committee on (03) 9225 7564 or at willeeqc@vicbar.com.au.

⁴ Supreme Court of Victoria, *Multi-Jurisdictional Court Guide for the Intermediary Pilot Program: Intermediaries and Ground Rules Hearing* (29 June 2018) <<https://www.supremecourt.vic.gov.au/law-and-practice/areas-of-the-court/criminal-division/multi-jurisdictional-court-guide-for-the>>