



Law Council
OF AUSTRALIA

*Federal Litigation and
Dispute Resolution Section*

17 May 2019

Veterans' Advocacy and Support Services Scoping Study
Department of Veterans' Affairs
GPO Box 9998
Brisbane QLD 4001

By email: advocacy.study@dva.gov.au

Dear Sir/Madam

Veterans' Advocacy and Support Services Scoping Study Report

1. Thank you for the opportunity to respond to the *Veterans' Advocacy and Support Services Scoping Study (Report)* dated 12 December 2018. Please find attached the submission of the Military Justice Committee of the Law Council's Federal Litigation and Dispute Resolution Section (**Committee**).
2. The Committee, in particular, wishes to comment on Recommendation 2 of the Report which states that 'the study supports the retention of the statutory prohibition on legal practitioners and persons holding a legal qualification representing veterans at hearings before the Veterans' Review Board'.
3. The Committee notes that the issue of the prohibition on legal practitioners representing veterans at VRB hearings was considered, although not in great detail, by the Productivity Commission in the Draft Report entitled '[A Better Way to Support Veterans](#)' (**PCDR**). The Committee notes that the PCDR has identified some commendable proposals for consideration regarding the VRB. However, the Productivity Commission stated in the PCDR that:

the Commission does not see clear benefits that would come from allowing formal legal representation in the VRB. This would also be the Commission's view under the proposed modification to the VRB's role. A final position will be determined after reviewing the upcoming Cornall study of the role of advocates.¹
4. The question of lawyers' participation at the Veterans' Review Board (**VRB**) was addressed at some length at paragraphs 22-31 of the Law Council's [previous submission](#) to the Scoping Study. The Law Council strongly recommended that the Study support the reversal of the prohibition of lawyers from participation VRB hearings.
5. The Committee supports the position expressed by the Law Council in that previous submission to the Scoping Study and contests the 'arguments against removal' of the prohibition outlined on pages 58-59 of the Report. The Committee considers the right

¹ Productivity Commission, *A Better Way to Support Veterans* (Draft Report, December 2018), 423.

of any person to choose their own advocate as fundamentally important, particularly given the complexity of issues often considered at VRB hearings.²

6. The Report and the PCDR repeat a common misconception that presence of lawyers in a non-adversarial dispute resolution forum, such as the VRB, will increase the length and cost of proceedings and create a more adversarial process. Lawyers frequently appear in hearings before authorities and tribunals which are inquisitorial rather than adversarial. As the Law Council noted in paragraph 28 of its previous submission, representation by lawyers will often assist, rather than impede the efficient operation of a such processes.
7. In that context, it should be noted that the difference between the conduct and behaviour required of practitioners in inquisitorial (rather than adversarial) proceedings are well understood by the lawyers and that lawyers are also acutely aware of the consequences to their clients, and to themselves, of any departure from them.
8. The Committee notes the statement at page 58 of the Report that ‘...from anecdotal information very few lawyers represent veterans in the Board’s ADR processes.’ Even if true, such a statement without more, appears irrelevant to the argument against removal of the prohibition of lawyers from participation VRB hearings.
9. In the Committee’s view, it is unreliable to use the number of lawyers presently attending relevant alternative dispute resolution (**ADR**) hearings as a predictor of how many might present at a hearing if the Prohibition was lifted.
10. There may be many reasons for lawyers being reluctant to attend ADR proceedings, not the least being that the processes require the same deep knowledge of the clients, informed ability to engage in the process, rapport and deep trust, as is required for a hearing. That being so, many lawyers might be wary of engaging in a process which would normally lead to them being excluded after a failed ADR hearing and unable to assuage the clients dismay and destabilization by having to withdraw without being able to provide an alternative solution satisfactory to the client. The difficulty is exacerbated if that client is unsuccessful before the Board. Attempting to resuscitate such trust in the face of any adversarial process on appeal or at all is likely to be far more daunting.
11. Further, the suggestion that the prohibition shouldn’t be lifted because it would only lead to a minimal number of hearings involving a lawyer advocate, does not accord with the principle that ‘getting the decision right the first time is the best outcome’ (see page 48 of the Report). If lawyers can assist even a few people (particularly those who are most vulnerable) to receive the correct outcome at the time of a hearing, rather than after an appeal, then this is of benefit to the whole system.
12. The impediments to replenishing the pool of accredited ex-service organisation (**ESO**) advocates are formidable and well documented in Section 11 of the Report.
13. The Committee is aware of available ESO advocates in sub-branches of ESOs falling to as low as two advocates. Each retirement of an ESO advocate puts a further strain on the remaining ESO advocates with attendant harmful consequences. The Committee is also aware of potential ESO advocates being unable to obtain a place

² Ibid 422.

in an appropriate accreditation program training course due to the inadequacies of existing resources available to training organisations.

14. The removal of the prohibition on lawyers appearing at hearings would provide an additional source of support for Veterans currently unable to access alternative advocacy support such as that provided by ESO advocates.
15. The legal profession, and in particular, members who have been employed by the Australian Defence Force, could provide the Department of Veterans' Affairs (**DVA**) with an untapped resource of advocates well accustomed to ADR processes (including inquisitorial forums). These lawyers would be already equipped with practicing certificates, ADR skills, competency skills, the requisite experience derived from regulated and audited CPD processes, professional indemnity insurance, and professional rooms.
16. In the Committee's view, the great advantage of this will be that with a few adjustments to training, some negotiation with the various regulatory bodies and the establishment of a remuneration control similar to that provided by Legal Aid Commissions, a nationwide pool of advocates could be created to supplement DVA's resources to operate under the pressures already identified.
17. For further comment or clarification on any of the matters raised in this submission please contact Paul Willee RFD QC, Chair, Military Justice Committee at willeeqc@vicbar.com.au.

Yours sincerely

Margery Nicoll

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