

**FAIR, SQUARE AND HONEST**

**BRINGING VETERANS' ENTITLEMENTS  
INTO THE 21ST CENTURY**

**THE RNZRSA RESPONSE TO  
THE LAW COMMISSION'S ISSUES PAPER 7**

- References:**
- A. Law Commission Issues Paper 7: "Towards a New Veterans' Entitlements Scheme"
  - B. Previous RNZRSA papers submitted to the Law Commission through 2008
  - C. RNZRSA Welfare Manifesto 2007/2008

**INTRODUCTION**

1. Reference A is the most thorough, extraordinarily well-researched and well-presented document ever produced on New Zealand's military veteran support system. It lays out all of the issues that the Royal New Zealand Returned and Services Association would wish to see put before its membership. Some of it does not make for pretty reading. But it points to much that has to be done. Taken together with the consultative process that followed its publication in July 2008, all in the veterans' community, including families, have had unprecedented opportunity to offer their opinions on what should be done to repair the neglect into which this part of New Zealand's legislative framework has fallen.

2. The Law Commission proposes two underpinning principles that stand out above all else. Stated at Page 9 of Reference A and elsewhere in the document, they are:

As New Zealanders, veterans are entitled to all of the benefits, allowances and assistance to which every other New Zealander is entitled. This should be accepted as the first principle underpinning veteran's entitlements.

The second principle is that veterans who have suffered as a result of being put in harm's way deserve to be recompensed over and above the entitlements of ordinary citizens who are not veterans.

3. We endorse these two excellent principles. We believe they must form the bedrock of the new legislation. They must be given practical and tangible effect as a clear confirmation that the nation accepts the duty of care that follows from requiring

service personnel to go deliberately into harm's way.

4. We are also delighted that the Law Commission intends to tackle issues such as clarity, precision, language, and modernity; and in general to make the new legislation yield up its meaning readily, which the current statute has failed to do. We are also pleased at very evident intentions not to write the new legislation in a vacuum, but to take into full account the environment in which it will be required to work, ease of administration, and effective delivery of improved services to our ex-military community.

5. The issues are complicated, many-layered and dense. The documents at Reference have illuminated dark corners, though they have also thickened the shadows that fall across others. But at this point there is no profit in trawling further through the shortcomings of history. The task at hand is not to dwell on the past but to use what we now know of it to light a path to the future.

6. A very distinct fault line can be seen, dating from 1 April 1974. With the introduction of the ACC scheme at that time, conditions surrounding accident compensation in New Zealand took great strides forward. Reference A shows clearly, however, that the war pension scheme did not move similarly. We must now close the gap. Unless there are fair improvements to services for those who have served the nation in uniform, the significant effort that is going into this review exercise will have failed its purpose.

## **PROCESS AND MANDATE**

7. This very large task comes of the Memorandum of Understanding signed in December 2006 between the Crown and the two veterans' organisations the Royal New Zealand Returned and Services Association and the Ex-Vietnam Services Association. But its origins go back much further, to the circuit-breaking findings of the Health Select Committee in 2004; and even further to the dogged persistence of a number of veterans over many years, particularly those who had seen service in Viet Nam.

8. As the task of re-writing the law has gathered its own momentum, it has become more and more obvious that the result would affect all veterans of all ages and wars, other ex-service folk as well, and their families. It was appropriate that the RNZRSA with its wide all-cohort and associate membership base, in total more than 120,000, should take the lead. The EVSA concurred, but it was also vitally necessary that the two organisations should go forward in step. Three of the five-person central working group are Viet Nam veterans. We have also worked through the RNZRSA Affiliates Forum, which is a grouping of 22 veterans' organisations and Cadet Force representatives (tomorrow's veterans).

9. In addition we have consulted a number of our experienced welfare officers. We also formed a further "steering group" comprising representatives of operations since World War II including World War II itself, Korea, Malaya/Borneo, Viet Nam, Bosnia, East Timor and Afghanistan. We included both male and female, doctors

both military and civilian, a veteran nurse, and Maori representatives. The steering group has been most useful.

10. Late in 2007 the government of the day appointed the Law Commission to the task. The Commission's processes are thoroughly consultative. The RNZRSA has been in regular and close contact with the Commission for the past year while the comprehensive discussion document at Reference A was being prepared. We have also had senior representatives at each of the 12 consultation sessions conducted by the Commission at RSAs (and one marae) throughout the country. Attendance and active participation at these have been constructive and informative. And we have had senior representation at each of the ten internal seminars held at NZDF camps and bases. These, too, have been well worthwhile. Finally, the Defence Force's own Web-based questionnaire has been opened up to ex-Service men and women. There will be many further opportunities for input and discussion during stages yet to come.

11. Nowhere throughout any of this have we heard anyone express doubt about the need for the re-write. On the contrary, there has been universal agreement that it is overdue. Other than that, a very wide range of view has been expressed, often forthrightly. That is good. And we have listened. But it is also the case that not all of the opinions agree with each other. What follows, therefore, is a careful balancing of majority views as we heard them, presented always with an eye to what we believe to be fair and achievable. There would after all be no point in pressing for the unachievable, because that could only lead to disappointment and failure.

## **FIRST PRINCIPLES**

### **Foundations**

12. There are several existing principles that should be carried through into the new law. The more important include the following:

- undertakings to retain what is known colloquially (though inaccurately) as the “reverse onus of proof” need to be honoured;
- no account should be taken of income or property in assessing disablement allowances; such assessments should continue to be made purely upon the nature of the disablement (ref s25(1) of the existing Act);
- disablement payments including associated lump sums should remain lifetime tax-free entitlements, and should not be considered as income in the context of other support the veteran might access – in other words, there should be no abating trade-offs between war disablement entitlements and benefits payable under other social security legislation; and
- while the central purpose is and will remain to improve conditions for those who have served by way of new law, whatever is done must also ensure

that no veteran or other entitled person is disadvantaged by the results.

13. Much turns upon an answer to the question “who is a veteran?” We shall return to that central point presently. But first let us consider fairness in general, and related matters.

## **Fairness**

14. From time to time Reference A mentions “affordability”. This is an important word; and the RNZRSA fully understands that it makes no sense to propose changes that are unaffordable, because then they would also be unattainable. They could even jeopardise the entire process by damaging the public goodwill upon which it depends.

15. We would prefer, however, to approach this topic from another standpoint. Fairness is the issue. Fairness to the veteran and, since this is a two-way street, fairness to the taxpayer as well.

16. Aspects of past (and current) practice in this area have drifted away from fairness, or certainly from modern norms, witness the adverse comparisons with ACC mentioned at Reference A. Both the general public and the body politic have accepted that these shortcomings exist. In fact if general unease about them had not been present for some time, there would be neither a Law Commission discussion paper nor a process leading to it.

17. We know that public acceptance of a need to fix things centres mainly upon those who have been in the firing-line. The Law Commission echoes this in its second principle: “... veterans who have suffered as a result of being put in harm’s way ...” Many veterans see it the same way themselves, though not all. Some at both the public and the internal NZDF consultation sessions expressed preferences for more liberal interpretations of qualifying service than only those who have seen combat or felt its threat directly.

18. The term “veteran” is as yet undefined for these purposes. But that does not matter for the present – and as we shall see, it might not matter at all. At this point we only make the general remark that it is important to be fair to all who are directly affected by service to the Crown in uniform. This will include those who have been in the firing-line, those who have served in less taxing roles, and family immediately affected by service.

19. We believe there is a balance to be struck in this. For example, throwing a blanket over all who have served overseas could include some who, to be blunt, had faced scarcely greater challenge during the experience than might be ordinarily encountered in Lambton Quay. We are not saying they have not experienced operational or warlike conditions in a career; only that they will not necessarily have done so in the course of some postings. As Denis McLean put it in his recent book “Dauntless Spirit” on Howard Kippenberger, “The very demands of combat, the vividness of experience of life lived on the edge, the stuff of nightmares, sets

veterans apart. Those who have been in the front line of battle have had an insight into the savagery of the human condition beyond anything in normal life". That is why fairness demands that the line between these and others cannot be obliterated. To base reforms upon wide accession ignoring that line would be bound to stretch public tolerance. It would stretch fairness to the taxpayer - and, for that matter, fairness to those who had faced the privations and dangers of battle. To insist that all service is equal in such an unconstrained way would risk losing the very same public support that is necessary for the reforms to be carried through.

20. We conclude that fairness both to those who serve and to the taxpayer will involve layered or differential treatment of some kind. Setting such layers is a complicated business, and we shall return to it presently. For the moment, let it be accepted that there will be layers, but that fairness must span consistently across all of them, not just some of them. This means to us that fair account has to be taken of the many who have not seen battle but who have been damaged in the course of preparing for it in training or in exercises, or simply in the manifold exigencies of military service. We shall cover this point later, too.

21. Meantime there is a further point here, quite probably more pivotal, given the present global and national economic situation. In determining what is fair both to those who serve and to the taxpayer it is critically important to bear in mind that, if history is a guide, we are setting in place a regime that will govern conditions in this sector for a quarter-century or longer. It is also the case that, however unexpectedly, over the past ten years we have been creating veterans at a much faster rate than at any time since 1945<sup>1</sup>.

22. It would be grossly unfair to judge fairness (or affordability) on the basis only of the Budget for next year, the year after, or the year after that. The increasing number of veterans we are now creating will be in the system for many, many years to come. That we took 40 years to address issues that had plagued returnees from the Viet Nam War may give us an inkling of how long the obligation can last. That we still have in our midst significant numbers of World War II veterans from 60 years ago underscores the point. And that we also have those in our communities who were widowed by World War I of 90 years ago emphasises it yet again.

23. Thus the State's commitment to those affected by military service to the State is both inescapable and enduring over a very long period. Fairness is not to be gauged in terms of a single year or even a Parliamentary cycle. What we need to hold in our minds is that what we decide now will set standards for at least eight such electoral cycles, and probably more.

### **How to Differentiate?**

24. Before we proceed, a word about risk in civilian pursuits versus military.

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<sup>1</sup> Fully one-third of the existing Defence Force is categorised as veteran by virtue of service in such places as Afghanistan, Bosnia, East Timor and elsewhere – more than 5,000. At the time of writing, these veterans still in uniform represent the second-largest group after the 9,000 or so still surviving from World War II.

Civilian activities can carry risk of course – the jungle adventure, the racing sailor, the helicopter rescue in the mountains. But there is a difference. In the military the participant has no choice – he or she must follow orders under law or bear the consequences. This applies equally to operations and to training, where in all cases the serving soldier, sailor or airman is required to do what “the system” demands, irrespective of the impact on mind or body. In order to effect this compulsion in law, moreover, the soldier, sailor or airman is also obliged to accept the abridgement of certain rights as a citizen. In short, civilian choices and military duty can have little in common.

25. The general point was neatly caught in a recent case heard in Britain by High Court Justice Nicholas Blake. Finding in favour of better after-service treatment for Gurkha soldiers, he observed that “soldiers had a covenant with the nation they served. In exchange for their personal sacrifice they should always expect fair treatment.” This thought underlies the Law Commission's two principles. We assume in what follows that those principles apply to all who serve – that is, the covenant applies to them all, veteran of battle or no, and brings with it an increment of military entitlement over civilian. The obligation is fixed; only the nature of its fulfilment might vary according to circumstance.

26. In that context and as foreshadowed above, we believe it will remain necessary to differentiate among at least three broad bands of eligibility. We shall address the boundaries shortly, but let us accept for the moment that one of these bands would be those whom the Crown has ordered into harm's way – this after all is the representative group in whose memory New Zealanders turn out in their thousands each ANZAC Day.

27. A second group would be those who have served but not in fully operational conditions. A third would be family who have been affected by the service of the principal – spouses and children in particular, and including attributable inter-generational effects upon them of environmental poisons and psycho-social dysfunction resulting from service.

28. Whether there be three tiers or ten, by definition they recognise that the entitlements applying to one group will not necessarily apply to another. The needs of, and support made available to, families is likely to be different in character from what is appropriate to either of the two Service groups. An undifferentiated model would be difficult to justify, and indeed would make little sense. In consequence it is necessary to decide the basis upon which one group should be distinguished from another. Should there be variations of entitlement once accepted into the system? Or should it be done by regulating access into the system in the first place? That is, should everybody be admitted into the system on the same footing but those who have been under fire receive greater entitlements than those who have not? Or should the differential be achieved by varying the ease of entry?

29. The loss of a limb is the loss of a limb irrespective of the particulars of how it was lost. Nasty things can happen on patrol in the jungle whether the reason for being there is training or operations. The ocean can be just as hostile during an EEZ

patrol as for a warship in combat on the high seas. Those who die in an aircraft accident in the Southern Alps are just as dead as those who are shot down by an enemy.

30. We conclude firmly that entitlements based upon attributable injury or illness should be settled strictly on the basis of the effect of that injury or illness on quality of life. The circumstances giving rise to the condition should play no part in determining the quantum. Whether the condition to be compensated arose from a training incident or in battle is not relevant. Differentiation of this sort would not be acceptable. Careful thought needs to be given to the purpose and merits (or otherwise) of retaining the sense of the existing s25(2), which empowers the Secretary to vary payments according to circumstance in some cases (its terms seem to pertain more to the conditions of World War II than to anything since, and if the power is to be included in the new statute it might be better expressed).

31. That leaves us with differentiation on the basis of admission to the system. The present practice marks out those who have been at war and those who have not by making access more straightforward for those who have. It does this by way of the relaxed evidential standard of “the reverse onus of proof” - or, as Reference A has it, the “rebuttable presumption”.

32. We are assured that that principle is sacrosanct, but that its expression in the statute will be simplified and otherwise tidied up without diminishing its power. Given that it is so, for the reasons outlined here we recommend that the proper way ahead is to retain the rebuttable presumption as a means of fairly differentiating between forms of service by varying the grant of access to the system. Those who have been to war or equivalent would continue to be accorded simpler access than those who have not. But, once admitted, the levels of entitlement would be the same. In other words we are supporting a development of the status-quo, re-aligned to take in the modern societal standard spearheaded by ACC.

33. We note, too, that the ACC standard covers accidents wherever or however caused. On the basis of the two fundamental principles, therefore, we would say that there should be no exceptions or exclusions to coverage in the case of the military, other than those repugnant to justice. Attributable effects on health would be covered. Sporting injuries and accidents-of-life that happen while the individual is subject to military law would also be covered – and, importantly, so would travel on duty to or from an operational theatre.

34. The “repugnant to justice” criterion in general would rule out eligibility in cases of serious crime including crime against military codes. But, bearing in mind recent recognition of the probable impact of PTSD in the Western Front in World War I, and the ensuing posthumous pardons for desertion, some serious infringements might need to be considered in the context of strong mitigating factors. There was also the unfortunate “furlough affair” of 1943, where a number of 2NZEF soldiers who had seen much action in North Africa resisted a return to the war after a short furlough in New Zealand. Some were tried for desertion and sentenced to detention. Others were dismissed, and were stripped of rehabilitation privileges. Some of the

sentences were quashed shortly thereafter, however; and within a year all dismissal notices were withdrawn, and the privileges were restored. There was also the “naval mutiny” of 1947 where some participants were dismissed “services no longer required”<sup>2</sup>. Other than an instruction to government departments not to employ them (the effectiveness of which might be in doubt), as far as is known their rehabilitation rights were not touched. We conclude that in the context of determining access to veterans’ support services, complicated matters such as these should not be judged by proclamation but would need to be considered on their merits in the circumstances of the day. The law should allow for this.

## **Defining a Veteran**

35. We come now to the crunch question – who is a veteran? Here we believe that that might not be the right question; or at least that there might be a better one.

36. The issue is not “who is a veteran?”, but “who should have access to our ex-military support system, and in what manner?” We would go further. Experience from the recent “Year of the Veteran” suggests that it is very possible to prompt unwitting debates about dictionary precision that might be diverting but lead to argument without end, and turn out to be a waste of energy. That a definition of “veteran” is not to be found in the current Act could signal good sense by those who wrote it, rather than an oversight. We doubt there is much point in trying to define a veteran in law.

37. Yet on the basis of who should have access to support services we already have much of a working definition. There are those who have been ordered into harm’s way. There are those who have not been so ordered, but who have nonetheless been affected - or afflicted - by military service. And there are the families similarly.

38. We have also decided that distinguishing these groups from each other can be based upon the current practice of differentiated standards of proof. What is ruled out is differentiation by scale of entitlement, once accepted into the system. Entitlements should be determined even-handedly on the degree of attributable disablement and its effects. It only remains, therefore, to define the boundaries, to work out when an operation qualifies for the top tier, and who makes the decision.

39. There was no clear view among those who attended the Law Commission’s consultation sessions on where the line should lie. Some thought that all overseas service should qualify, or that all operational service should qualify, or that it should be limited to overseas service of a hazardous kind. There were also variations on these themes. Some thought the NZ Operational Service Medal would be a good criterion. Others remembered the term “active service” used up to the 1970s, but

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2 In passing we might note that terms such as “dishonourable discharge” (or even “honourable discharge”) are not a part of New Zealand law. “Dismissal from Her Majesty’s Service” is currently available to a Court Martial as a punishment (and can be a consequence of other punishments), but without qualifying adjective. The picture, too, of an officer being “cashiered” and having his uniform buttons and accoutrements torn off in ignominy is no longer a possibility.

not since.

40. We have already mentioned the risks to this entire process of opting to admit all overseas service. There would also be internal inconsistencies – for example, the difficulty of defining “overseas” in naval terms. Would it begin at the 12-mile limit? At the EEZ boundary? Would it include both inshore and offshore patrol craft, or only the true warships? We can do better than that. Whatever its surface attractions might be, we will not take this particular line of approach any further.

41. Reviving the term active service has appeal, if only because of perceptions that it once worked. But did it really? Even when in use, it was not intended as a gateway to the war pensions scheme, but to invoke the active service provisions of the disciplinary codes. To suggest that it might now be recalled as a means of defining support entitlements would be to use it for an entirely different purpose. We have a problem with that. After all, the term was still in use at the time of the Viet Nam War and, as we know, it had no effect whatsoever on the matter of tax-free pay in wartime. We conclude that the idea the term was once useful in other than the disciplinary context may be no more than a myth. In any case, were it accepted as a delineator today, its meaning would still have to be defined. In that case, whether it would offer advantage over any other term becomes a moot point.

42. The idea that eligibility might be attached to a medal also has the superficial advantage of simplicity. But in the detail it works no better than “active service”. Experience has shown that it is very important not to link medals with other entitlements. The main difficulty is that, if they are linked, the one can be used a lever to pry open the other. That might seem attractive to some, as in “I have the medal, now please may I have the pension?” But this kind of thing cuts back the other way too, as in “there won't be a medal for this operation because the next thing you'll be wanting is a pension to go with it.”

43. Without wishing to trivialise serious issues, the fact remains that it is a very bad idea to have those who decide upon instituting medals also committing the nation's treasury to the cost of pension entitlements as a by-product. It is much better, and much healthier, to keep these two different sets of criteria with their separate purposes strictly in their own separate boxes.

44. As outlined in Reference A, the current system of deciding which operation qualifies and which does not is opaque, undefined, incomprehensible and unacceptable. It disempowers both serving and ex-Service groups. But the available options boil down to some variation on the theme of operational service. We cannot therefore escape the need for definitions, and for somebody to decide them. We also agree with the Law Commission that the term “war or emergency” should be dropped as a criterion – attempting to define it leads to the same kind of knot as attempts to define “veteran”.

45. The RNZRSA believes that the decision is properly set at Ministerial (that is, Cabinet) level. It would be difficult to argue that the Chief of Defence Force should have the implicit power to commit the nation to future expenditure on veteran

support. At the same time it would be important to ensure that the Minister did not withhold a decision out of concern about that same future expenditure. In a word, the decision should be taken in the same manner (and at the same time) as the decision to commit to the operation itself.

46. But the Minister should not be expected to take the decision alone, or behind closed doors. He or she would need knowledgeable advice. Notwithstanding that others might have an interest too, there are only two possible sources of expert advice – the professional military and veterans' groups. And so we say that the Minister should take the decision on the basis of advice from CDF but also in consultation with the National President of the RNZRSA, and according to a set of general operational criteria established in advance. These should be public. Although much would depend upon detail in each event, one option might be to include in the Act some broad guidance and the requirement that a deployment or operation is included unless it is expressly excluded by (for example) Order in Council procedures, with reasons. This would work not unlike the “reverse onus” that applies elsewhere in the Act. Alternatively the statute might only bind the Minister to making a decision case-by-case, with reasons, in consultation according to criteria established elsewhere than in the Act.

47. At one end of the scale we would see no justification in granting full access to veterans' support by reason only of a staff course overseas, or a diplomatic posting, or similar. But at the other end of the scale, experience suggests that there would be little to be gained by being too fine-grained in determining eligibility. For example, within a theatre of conflict there will be those in the front line and those in supporting roles. We would recommend strongly that the test should be based upon posting to the theatre of risk, not upon whether the individual was posted to a rifle company in the line or to a support element in theatre but not in the line. After all, this entire exercise is the upshot of exposure to the toxic environment in a theatre of war; a toxicity that did not respect unit or functional boundaries.

48. As mentioned above, categorization of a deployment or posting should be decided before it takes place. There should also be provision for the original determination to be reviewed, since it is not uncommon for what might look to be sweet to turn out to be sour. More rarely, the reverse may be true.

49. Nor should consideration be exclusive to overseas deployments, or to shooting warfare. There should be provision for *domestic* activities to qualify. Among the more obvious would be IED or mine clearance, associated or other counter-terrorist operations, in some circumstances Search and Rescue or other emergency operations, and assistance to the civil power. Environmental risk should also be taken into account. One obvious example of environmental risk at war that attracts presumptive listings under present legislation is the Viet Nam case; another is the first Gulf War. But people even now can qualify for war pensions coverage without a shooting war. The most topical case would be that of service people of the Occupation Forces in Japan and of nuclear testing during Operation Grapple and at Mururoa. For these there are a number of defined presumptive conditions under current legislation. They are veterans for the purposes of the Act. Although their admission to its provisions recognises their exposure to a weapon, it was not an

enemy weapon that caused their difficulties. This underlines very well the innate difficulty of trying to base admissibility upon defining a word such as “veteran” in terms of war service alone.

50. We note the Australian practice of naming eligible deployments in the statute. We can see the attractions of this, but would be concerned about the effects on flexibility arising from the need to amend the law itself every time an assessment was made or was changed. It would be better to have the processes mandated in the law but the declarations themselves to be by Regulation or other ready instrument (borrowing a concept used elsewhere in the Australian system, it occurs to us that a Statements of Principles approach might work here - adjuncts to the law that form part of it but which may be raised or amended by appropriate authority without amending the Act itself).

## **Nomenclature**

51. A family group describes itself, but we need also to be able to describe the other two potentially eligible groups conveniently. One of them contains those whom the Minister has determined by the above process shall have earned full coverage under the war pensions system by way of the “reverse onus of proof”. The other contains those who have served but whose entry into the system would be by way of a stiffer standard of proof.

52. We cannot avoid using the word “veteran”. Suitable synonyms are few – none of old hand, old-timer, war-horse or the like would appeal. And so, even though we have said there is no gain in trying to define the word “veteran” for the purposes of the law, for the purposes of general use including this paper there is no alternative. We shall therefore use “veteran” to mean those who qualify for support under benevolent evidential provisions.

53. That leaves others who have served. There can be difficulties here too. Understandably the group can be offended by terms like “routine service” (often used), which is considered disparaging. The word “routine” is the problem. They point out that military readiness activities can be far from routine, and can lead to impairment, accident or death attributable to service. But the antonyms of veteran are no more suitable than the synonyms - colt, amateur, greenhorn, tenderfoot. Yet, for clarity, in this paper we need to call this group something. For our purposes in this paper, let us use the term “service” (or variations thereof) to describe this group, man or woman.

54. Finally we also need to understand that those from the service group can and do qualify for war pensions support. For present purposes, then, let it be accepted that the qualifying group will include servicemen who are not veterans but are eligible for war pension services where causal connections have been established.

## **Two Acts**

55. Earlier this year we might have expected that it would be possible to write a new Act, repeal the old and replace it with the new. In recent weeks it has become

steadily more clear that that will not be achievable. The defining fault line has already been mentioned, 1 April 1974, the date upon which the ACC scheme was introduced, and the date from which, as we can now see, the ACC scheme and the War Pensions scheme began to part company.

56. In consequence we accept that it will not be possible to write a statute that will cover the pre-ACC period and the post-ACC period in a single document. What will be necessary is one statute to bring pre-1974 cohorts into the 21<sup>st</sup> Century, and another to ensure that post-1974 cohorts are properly provided for, going forward in the ACC era.

57. Paradoxically, by accepting the complication of two distinct and incompatible periods<sup>3</sup> the overall task is much simplified. All of the commentary that follows is therefore predicated upon there being at least two Acts to replace the single War Pensions Act 1954.

## **PURPOSE AND NAMING OF THE ACT(S)**

### **Purposes**

58. The Law Commission draws attention to the absence of provision in the present Act setting out its purposes, or the rationale behind the pensions and benefits payable to the veterans pursuant to it. The Commission remarks also that the lack of any such provisions contributes to the Act's incoherence and inaccessibility.

59. We agree. A provision at the beginning of the legislation would set out the context for the legislation and assist in its interpretation. We support the Law Commission's suggestions that it should include at least the following:

- To recognise the contribution to New Zealand made by those who serve;
- To reaffirm their special status in society;
- To ensure they receive fair compensation for loss of lifestyle arising from physical, psychological or psycho-social impairment caused or aggravated by service;
- To ensure they and their dependants receive financial and other support as appropriate where the impairment as a result of service affects their ability to work;
- To ensure they achieve improved quality of life by way of rehabilitation and other services and entitlements aimed at restoring them to the maximum

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<sup>3</sup> It remains to be seen whether there might need to be a third Act to cater for the future. Current NZDF practice seems to shift gross liability for death from the Crown onto a commercial insurance base, which has not been done before. But at this stage we have an open mind on the implications for legislative structure.

practicable extent their health, independence and capacity to participate in society.

60. To this we would add the proviso that the clause referring to dependants is interpreted to include financial and rehabilitation support to families upon death from attributable causes; also encompassing cases where children themselves suffer consequential illness passed on. This does not mean that the entirety of the principal's entitlements would be transferred to families upon death. Rather it means that appropriate support should be made available to families where their circumstances, too, bear the scars of attributable military service.

### **Naming the Act(s)**

61. Having said there should be two Acts adds to the challenge of naming them. We would be reluctant to come down with firm recommendations at this point, but constructive comment is possible.

62. There are arguments that the word “veteran” should be included in the title because it conveys the broad purpose. If the doubts already expressed about the wisdom of trying to define the word for the purpose of the law are accepted, however, its use in the title might best be avoided. After all, to include it in the title but without precise definition, or even with an imprecise one, would simply be to perpetuate argument about what it means.

63. We believe therefore that the naming of the Acts should be something like “Military Rehabilitation and Entitlements Act”. (That order of words might also help avoid nicknames like MERA – or, worse, the alternative VERA.)

## **IMPAIRMENT AND ELIGIBILITY**

64. Impairment for our purposes includes all abnormal physical, medical, psychological and psycho-social conditions whose causes can be traced to military service. It includes both visible and invisible damage to body or mind. It also includes illness contracted as a result of service – extending also to assistance in cases of consequential domestic dysfunction and to attributable inter-generational health difficulties in children. Recognition is eased in some cases by the idea of presumptive lists that germinated under the Viet Nam MoU but now extends to prisoners of war, service in the occupation of Japan, nuclear testing in the Pacific, and the Gulf War as well as service in Viet Nam. There are also the five currently accepted conditions in children of Viet Nam veterans.

65. Many other physical, medical and mental injuries and illnesses are accepted as attributable impairment beyond these. PTSD is among them, but we would earnestly hope it is accepted in all senses, and treated, not as an illness but as a wound to the mind; to be seen in much the same way as damage to an arm or a leg. We certainly need to do better than the current Act, where the only allusion to mental impairment occurs in Schedule 9, as “incurable insanity”.

66. The main point here is twofold. The current WPA does admit attributable illness as impairment where, for the most part, the ACC scheme does not. And, when admitted under the WPA, compensatory payments and services continue for as long as the impairment continues – that is, unlike some ACC payments, they continue past age 65. These important characteristics must be retained, and be developed, in the new legislation. Indeed they are major reason for not opting simply to adopt the ACC legislation lock, stock and barrel for application to war pension cases.

### **Measuring Impairment**

67. There is no doubt that the present gradation system in respect of impairment is a mess. There was almost universal agreement with this conclusion at the consultative sessions. With only a very few misgivings, there was a similar level of agreement that it should be replaced by a new scale of assessment ranging from 0% to 100% impairment, in 5% increments.

68. Retaining the 0% rating is important because cases do occur where circumstances do not call for monetary compensation but do justify medical treatment or other support. In all of this it goes without saying, of course, that in the transition from the complicated 32-step system (which allows disablement compensation above 100% but not above 160%, yet also allows meaningless ratings above 160%), no current recipient should be disadvantaged by the arithmetic.

69. Whatever evaluation tool is used to determine the degree of disability resulting from military service it must address the extent to which disabilities affect quality of life. The tool must consider by how much the disabilities impact on function and all aspects of daily activity. We mean by this the whole of life impact as well as the whole of body impact.

70. The assessment must for example consider the ability to maintain family and other personal relationships. It must consider the ability to engage in normal recreational activities; and it must consider non-economic factors. It would be a lifestyle as well as a life rating. For families it must consider the onward effects of living with an impaired veteran. It would be an assessment of disadvantage by comparing the existing quality of life with what might have been expected in the absence of the attributable condition.

71. Some in the veteran community have misgivings about the AMA guidelines, saying they are not native to New Zealand. We need to be practical here, however. There is no possibility of generating our own such guides – the ACC system itself recognises this, and uses the AMA source with a New Zealand supplement. The Australians use their own comprehensive Guide to Assessment of Rates of Veterans' Pensions (GARP) on top of AMA. But we would be reluctant to recommend that document for unfettered use here because it is tailored to the Australian system which has a structure quite different from ours.

72. We believe on balance that the most sensible approach is to rely upon the AMA guidelines with the New Zealand ACC supplement. For use in the ex-Service

context, however, a further supplement will be required to cater for quality of life issues and disablement vectors not adequately covered by ACC, such as the greater range of attributable illness that is admitted under war pensions than under ACC. There is also psychological or psycho-social disturbance, neither of these being ordinarily accepted under ACC.

73. There will also need to be greater emphasis on whole-of-life issues than is normally the case under ACC. In these matters we will have available the Expert Panel, which is a capacity we have not had before, and which is expected to be able greatly to assist in the technicalities involved. And finally, we believe there is room to have General Practitioners rather than specialists do more of the assessments than has been the recent practice.

74. These considerations bring up a more general point that we should not lose sight of. In recent years the British, the Canadians and the Australians have each been through far-reaching reforms in veterans' administration including their underpinnings in law, and for reasons of modernisation not unlike ours. Here in New Zealand there is some criticism that we are lagging behind; and even that we should consider take a shortcut by simply importing one of those reformed systems and using it here. In our view that approach would not work very well. Social legislation in those countries is considerably different from our own. None of them have the all-pervading influence of ACC, for example. Some of them apply means tests to entitlements, whereas we generally do not. There are other incompatibilities, and indeed there are aspects of overseas systems that we would not want to be imported at all.

75. Even so, there are also advantages to being the last cab off the rank. We can examine what others have done and, rather than adopting it in the round, we can pick out what we think is best for us and adapt it into our system. This, too, will be a function to which the Expert Panel will contribute greatly. So it is for GARP and other means of assessment. With the AMA guidelines as the primary reference, in the development of necessary NZ-centric supplements we can cherry-pick from the best and adapt at will. This same point will come up in another context shortly.

76. In summary we recommend that:

- the new Act(s) include a Whole of Person / Whole of Life impairment assessment structure beginning at 0% with a maximum of 100%, in 5% increments;
- medical assessments are AMA based with a New Zealand supplement;
- the Expert Panel is used to help develop guidance for New Zealand assessors; and
- pre-1974 veterans are transferred to the new 100% impairment structure without penalty to their existing entitlements

## Determining Eligibility

77. However good the assessment tools may be, appropriate expertise and judgment will still be required if they are to produce consistent and fair results. The present system involving Claims Panels uses a mixture of medical expertise both general and specialist, together with VANZ medical staff and veteran input. We agree that it needs overhaul, though not that the basic elements are wrong.

78. There are much deeper questions here, involving the merits of prescriptive systems versus discretionary systems. During the consultative sessions it was widely acknowledged that the present system of Claims Panels had broken down. But there was strong opinion that the discretionary elbow-room it represented should be retained, and that the Panels system should not be discarded in favour of prescription but should be rescued by reform.

79. There are two basic stages to meeting a claim – establishing eligibility, which is a matter of record; and establishing the degree of disablement, which is a matter of informed judgment. Eligibility has three further elements – that qualifying service exists, that the condition being claimed for exists, and that the condition is appropriately connected with the service concerned. In this latter area of causal connection the veteran applicant will have the advantage of the reverse onus of proof. Service applicants will be obliged to establish the connection. This marks the difference between the two groups (and the difference might be seen in the context of “veteran's margin”).

80. It is here that the presumptive lists come into play in a major way for the veteran applicant. If the condition is on a presumptive list, all that needs to be shown for eligibility to be established is that the individual has both qualifying service and the condition being claimed for. Given that medical diagnosis confirms the condition exists, eligibility could easily be determined on examination of the facts by lay VANZ staff appropriately empowered. Claims Panels or other filtering agency need not be involved at all to this point, thus streamlining proceedings considerably.

81. If the condition is not on a presumptive list and the applicant has qualifying service as a veteran, the reverse onus of proof would still apply but the process would require a different level of consideration than in the straightforward presumptive case. At present this is done by the Claims Panels. There might however be merit in passing this function, too, to VANZ staff in the first instance. At the least, there must by now be a very large repository of case examples for guidance, and only cases of doubt would need to be referred to such as a Claims Panel. This procedure would lighten the load on the Panels. Simple, lower level review processes such as periodic checks by a Claims Panel or other authority should be sufficient to safeguard standards.

82. If the applicant does not have qualifying service as a veteran, neither the presumptive lists nor the reverse onus of proof would apply. Here it would be necessary to make an informed decision on linkage to service to establish eligibility before the claim could proceed to further stages. The same applies in all cases of

technical doubt. This function is currently done by the Claims Panels. We are convinced that they should be retained in some form for the purpose, in addition to dealing with the referrals mentioned above. It would also be difficult to argue that their current composition of medical and veteran expertise is not necessary, or not appropriate.

83. In each of these scenarios once eligibility is established, the next stage is to quantify impairment, methodology for which we have already discussed. This is a technical matter, normally one for experts - medical specialists and AMA-qualified general practitioners - but issues of consistency or quality control remain. We believe the Claims Panels have a role to play here as well, by way of a regulating overwatch, or a safety net.

84. We will turn again to the subject of Claims Panels shortly. Meantime, it is clear that the presumptive lists are a move in the right direction. They are of key importance in simplifying and improving the administration of the system, not to mention the timely and efficient delivery of services to the eligible veteran. And it is here that we also begin to see the importance of the Expert Panel. Under its hand we would expect the presumptive lists to be developed and expanded. We recommend that the Expert Panel be incorporated into the new law in an appropriate way in order to give it statutory durability and authority.

85. In an extension of the presumptive approach, replacement of our present discretionary system by a prescriptive system on the Australian model is sometimes suggested. In that system the claimant's condition is compared with a template (embodied in Statements of Principles), and the answer emerges as a matter of inevitability. Statements of Principles are required of course for every condition, and involve much preparatory work. Once in place the system may be fast and efficient, but it leaves little room for the reverse onus of proof to operate as we have known it. Although there is scope to have disabilities accepted that are not included in the SoPs, this is not easy and the general effect is that if it is not in an SoP it is not covered. There was very little support for this kind of approach during the consultative round - indeed it was raised as a serious proposition only once in the entire proceedings. Nevertheless, because it can become a question of adoption in part rather than in whole, it is a point of view that requires answer.

86. Suppose we were to go for a prescriptive SoP-based system like the Australians. This would be efficient, and would reduce reliance on Claims Panels or similar. It would permit decisions to be taken swiftly, based on rules, by other than medical professionals, and without veteran input. But being predetermined, there would be little room for the reverse onus of proof to operate in individual cases.

87. At the other end of the spectrum there is a discretionary system like ours, relying on the reverse onus of proof, and on the judgement of medical professionals and veteran panel members jointly, case-by-case. As Reference A points out, this is likely to be less efficient than a prescriptive system.

88. But we would say that efficiency is not the only criterion here. Effectiveness, justice and fairness also matter, and there is grave doubt within the veteran

community that these can be delivered by purely rules-based systems in the absence of discretionary input by veteran interest and medical professionals, case-by-case.

89. There are other, practical questions. For example, given that there are several hundred SoPs in the Australian system, it is unlikely that we would have the capacity to raise our own. They are very complicated technical documents. As Reference A remarks at para 11.57, we would most likely end up relying upon the Australian array rather than developing our own from scratch. That would mean, in effect, that decisions on New Zealand eligibilities would not always be determined in New Zealand to suit New Zealand conditions, but in Australia according to the Australian system's needs.

90. This point is not one of inconsequential trans-Tasman barracking. There is now New Zealand case law supporting the benevolent intent of our legislation - "Nixon". But, as Reference A points out at paragraph 10.22, that judgment would clash with Australian practice. We have therefore departed from Australian rules already. In consequence there is a strong likelihood that it would be necessary anyway to examine each of their SoPs carefully before they could be applied here with the power of law, which would offset their ready-made usefulness considerably.

91. A fully prescriptive SoP system might be efficient, but in completely eliminating informed judgment by professionals and putting all decisions into the hands of VANZ staff according to prescriptions we would have to accept a weakening of three fundamental advantages that now exist in our present system. They are the discretionary authority to examine issues case-by-case on their merits as they occur, the intrinsic veteran influence contained in the Claims Panels, and the operation of the reverse onus of proof. The price of efficiency would be giving way on these three.

92. Given that the effectiveness of the present system can be greatly improved by administrative means, it seems very possible to us that the best answer lies somewhere on a line between the Australian system and our own. That is, the core question is not as simple as debating the merits or otherwise of adopting the Australian system, but about finding a proper balance in New Zealand terms between the two fundamentally different approaches, prescriptive and discretionary, particularly if we are to avoid erosion of the rebuttable presumption.

93. There is nothing in any of this to suggest that we cannot have both a discretionary system complete with the rebuttable presumption and expanded presumptive lists at the same time. Furthermore the Australian SoPs can also be available as a resource, without being binding – reference to the SoPs already happens to a degree. This is also very much in Expert Panel territory. The EP will be charged with examining all overseas research, of which the SoPs are most certainly a prominent product. In this way we would have the best of both worlds.

94. We therefore recommend that to replace our present system with a prescriptive system is neither necessary nor desirable, because it could not be done without also losing what is best in what we have. Since they are a part of the

system, this also touches upon the future of the Claims Panels.

## **The Claims Panels**

95. We accept that the present Claims Panel system is not working and needs substantial overhaul. We have also said above that good presumptive lists would reduce initial referrals to the Claims Panels considerably. But we believe profoundly that, beyond the presumptive conditions, the discretionary powers represented in the Claims Panels is essential to the system. They should be retained in some form.

96. We will not dwell upon the shortcomings of the present arrangements here. Suffice it to say we would expect that, properly resourced and centralised in Hamilton and Wellington, between two and four full-time Claims Panels could do the work – quite possibly only two. Each of them would be two persons as at present, one with medical expertise and the other the nominee of the RNZRSA. We acknowledge fully that the latter would need to be trained for the position in order properly to exercise the legal functions entailed.

97. The question is, should anything further be done by way of rearrangement? For example, should these new panels be given greater substance to take on some of the functions of the NRO? By this we mean that the Claims Panels could be given the task of reviewing disputed decisions from the presumptive lists. Indeed, would the NRO be necessary at all?

98. There may be a case for this kind of approach. The latest statistics are that there were 15,645 claims in the 2007/2008 year. This is the number of claims, not the number of applicants. With presumptive lists we would expect the number of them needing to be handled by the Panels to reduce. Only 417 of them were reviewed by the NRO – about 2.6%. It might therefore be effective to elevate the new Claims Panels slightly and replace referrals now going to the NRO by referrals to the new Deputy Secretary (who as we understand it will have delegated powers) and the new medical adviser together (also as we understand it, there is an intention to establish such a position).

99. This would, we think, be more efficient and economic by way of better use of staff. It would retain veteran influence at an appropriate level. It would help ensure consistency of impairment assessment across the country. And it would leave the rights of higher appeal to the Appeals Board and the High Court untouched.

## **DISABLEMENT ENTITLEMENTS**

### **Disablement Pension**

100. In earlier papers we pointed out that in 1916 and in 1954 the 100% disablement level<sup>4</sup> was indexed to 50% of the average wage of the day.

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4 For clarity, it needs to be understood that we are using the counter-intuitive current scales here, with their payable range up to 160%; not the re-jigged and more comprehensible 100% whole-body range that we have recommended elsewhere to replace it.

101. The current rate at the 100% disablement level is \$182.02 per week – about \$9,500 per year. The New Zealand Income Survey: June 2008 Quarter from Statistics New Zealand has the average wage for males at \$844 per week. This figure as we understand it includes part-time work, whereas we would want the index to be the average for male full-time work. Nevertheless, for the sake of example re-indexing the 100% disablement to 50% of the figure we have would yield \$422 per week, or nearly \$22,000 per year.

102. Obviously these are raw figures and take no account of possible adjustments pertaining to tax for example. That is, although we would insist that the Disablement Pension should remain free of tax and uncountable as income, as is the case now, we offer no opinion at this stage on whether the index should properly be set against the before-tax or after-tax value of the average wage. Indeed other touchpoints than the male total wage figure might also be argued. But the main point is unarguable. On the basis of earlier benchmarks, there has been substantial slippage (to the tune of 50% or more on the figures we have) in the relative value of disablement allowances under the War Pensions Act. This needs to be attended to.

103. We are not proposing merely an attempt to reprise the past. We accept that although there is some moral weight in taking a reference point from 50 years ago, on its own it might not be thought compelling. But it is not on its own.

104. The inevitability of the arithmetic is that whatever scale might be used as the index, setting the current 100% disablement level to 50% of that scale will also set the current maximum 160% disablement level to 80% of the same scale. This is nominally the current ACC standard. Conversely, setting the current maximum 160% disablement level to the nominal ACC standard of 80% will set the current 100% disablement level to 50% of the scale. And so, whether we index 100% disablement to 50% of the scale or 160% disablement to 80% of the scale, we have done exactly the same thing. This resonates well in the modern world, since the ACC standard for total impairment is 80% of pay at the time. In other words we have re-indexed the disablement allowance both to the historical level and to the modern ACC level at one blow.

105. Although the idea of historical reprise might be the weaker of the points, we believe that re-setting the index to the modern norm has significant moral power. Realignment with the modern ACC standard stands on its own, without need for an historical prop. For disablement at the level of being unable to work, we repeat, that norm is now 80% of earnings (up to a maximum of \$82,337 pa; see Reference A, table at paragraph 4.12, and Chapter 14).

106. In principle this also fits very well the Law Commission's point at paragraph 7.26 in Reference A that "Compensatory payments are designed to compensate veterans for loss of quality of life. They are not intended to compensate veterans for loss of income. Payment levels should be more favourable than those available under the ACC system, and they should be regularly updated."

107. The ACC calculation is done against actual wages at the time. We have used average wage, notionally. There is no reason why veterans of the future should not

receive the ACC standard based on their wage at the time. Where the attributable injury occurred long ago, however, difficulties could arise. Even if the pay of that time were known, applying the ACC benchmark directly to it would not produce fair results, since both wages and prices have moved considerably in the interim. And so we say that the key should be set to today's average full-time wage for males where better information is not available.

108. Lest this look outrageous, for perspective it is useful to consider today's military pay scales. We are informed that under the new pay regime the trained private soldier receives about \$45,000 pa. That is a little above the average wage for males (about \$44,000). The implication is obvious – using the average wage as our benchmark does *not* yield a disproportionate or inflated result unfair to the taxpayer – indeed, for some who had been corporal or above in days past, the result would be well below a result worked out on equivalent salaries of today. The proposal is not outrageous at all, but is conservatively in line with the Law Commission's admonition cited above.

109. There is another point of perspective, and of clarity. It is not the case that great numbers of veterans now in the system and eligible for Disablement Pensions would suddenly become eligible for 80% of the current average wage. There are we are told only 243 at present on the 160% top rate, although there are 1003 with Section 23 ratings. But it is far from clear that all of these, when converted to the new 100% scale, would necessarily be at the new 100% maximum disablement level. In any case, whatever the numerical result might be, the general demographic projection is that this population will decrease quite sharply in coming years. Figures to hand from VANZ show that in mid-2007 some 9,350 World War II veterans were receiving War Disablement Pensions (all levels). These were in the age range 80 (at least) to 100. Veterans of the Korean War drawing Disablement Pensions number 970, in the age range 70 to 95. The life expectancy for males in New Zealand is around 78. The total number of veterans in receipt of Disablement Pensions is a little less than 14,000. The bald statistics on the age demographic tell us of an inevitable reduction in numbers (as observed elsewhere in this paper, however, that will be offset in part by the significant rise in current veteran numbers that has been the pattern in recent years).

110. Another way of looking at the same question is that, for some years, the average assessment for new disabilities has hovered around 18%. This tells us that any additional cost would be more closely related to one-fifth of 80% of the average wage than to the full 80%.

111. We lack the means to do a full actuarial analysis of the fiscal impact of these figures. But we would be very surprised if they turned out to be an unsupportable burden on taxpayers' funds. Further, we think there would also be room for the margin above ACC levels mentioned by the Law Commission – the “veteran's margin” - which we have signified in earlier papers should be set at an additional 10%.

112. In short, we believe that current compensatory Disablement Pension rates fail the fairness test, and that they need to be substantially re-indexed to modern

realities. It is not fair that the amounts should be judged in terms of yore. It is not the living conditions of 50 years ago that matter, but the living conditions of the 21<sup>st</sup> Century.

113. To the comment that there are other payments available today that were not available in the past we would make these points:

- These would be compensatory payments, not income maintenance payments, and the two categories should not be confused.
- Hitherto, compensatory payments under the WPA have not been counted for tax or other purposes, and so have not affected other entitlements, so it is difficult to see why there should be an issue of cross-coupling now.

### **An Adjustment in Retrospect**

114. These arrangements would mean that entitled persons would receive periodic compensatory payments according to the degree of whole-body impairment on a scale of 0% to 100%, with the 100% level fixed to the ACC level of 80% of the wage at the time (or, in historical cases, to 80% of the contemporary average wage), plus 10%. From a date to be decided, everyone drawing war Disablement Pension support would be shifted onto this system including those whose attributable conditions pre-date 1974.

115. For those whose attributable conditions post-date the introduction of ACC in 1974 and who qualify for ACC support, the adjustment would not be large. We understand that for physical injury the number receiving post-1974 support from the WPA (and in most cases from ACC as well) is less than 50, including psychological injury which, the WPA will accept but ACC normally will not<sup>5</sup>. It is not known how many post-1974 service people are on ACC support only; such statistics are not kept.

116. For those whose attributable conditions pre-date the introduction of ACC in 1974 and who rely wholly (or mainly) on WP support, the cost of the adjustment would be more significant. There are 12,918 of these we are told, ranging in age from the 50s to the high 90s. For perspective, in a great many of these cases (more than 12,000) the support is at the minor end of the scale, for hearing loss. As has been mentioned already, however, these numbers will roll off quite quickly.

117. A further question arises. Those to whom the ACC provisions already apply have had that aspect of benefit. But it is clear that most of those who have been

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5 This and surrounding points show how very important it is to simplify and untangle the weave. Entitled post-1974 veterans can receive both WPA and ACC support. Entitled veterans whose conditions pre-date 1974 generally will not. This does not mean, however, that all WPA-eligible post-1974 veterans receive both WPA and ACC support, because there are important exceptions. ACC will in general cover only connected physical injury, not psychological damage. But, being properly concerned with consequences above causes in the veteran context, the WPA will accept them. But that's not all. There is anecdotal evidence that some pre-1974 veterans receive ACC support as well as WPA support. These may be mainly (or perhaps only) for hearing loss; but they exist.

held to War Pensions Act terms and whose attributable conditions date from before ACC have borne significant erosion of the comparative value of their entitlements in two ways. First, as mentioned above, on our count and relative to average earnings the index has slipped to around half what it was. Secondly, the standards set by society itself have changed, so that the accepted reasonable level for total impairment is 80% of earnings. Not to put too fine a point on it, because the WPA did not keep pace with these changes, those entitled persons whom society entrusted to the WPA and who by accident of timing have not had the advantage of ACC coverage have been short-changed for years.

118. We accept that it is not possible to apply current ACC conditions retrospectively to the pre-1974 era. But we believe there is a case to acknowledge a serious anomaly in a tangible way. We recommend a single, adjusting solatium payment to those who have been carrying this erosion of value since before the introduction of ACC in 1974. We note that the new NZDF remuneration package includes an insurance-based element for death based on three times salary. Taking a leaf from that book, and in addition to the Disablement Pension adjustments recommended elsewhere in this document, we recommend that the one-off compensatory solatium payment to those ex-service people who have been drawing Disablement Pensions for attributable conditions contracted before 1 April 1974 should be three times their present annual war Disablement Pension. Whether this should be on the “old” 160% scale or after conversion to the “new” 100% whole-body scale might be debated. We would say firmly that it should be the new scale, since only in that way could we be assured of a fair assessment in whole-body whole-life terms. The difficulty here is that some earlier assessments that have not been reviewed might not reflect accurately the present circumstance of the individual.

119. Before we leave this section there is yet another point; one of pervading importance, quite possibly among the more important points related to purpose in the entire exercise. Attention is drawn to the footnote on the previous page. The marriage between WPA and ACC is uneasy. Unravelling the tangle is one thing. But the need to do so goes right to the heart of the reason why we must have, and retain, a separate war pensions system; and why there must be no yielding to blandishments that “ACC can cover it”.

120. The facts are that ACC cannot cover it all, because it was not designed to do so. The ACC system and the WPA system are founded on different purposes and are governed by different canons in operation. As remarked in the footnote, the WPA deals in the first instance in a broader spread of consequences than does ACC - psychological damage and physical illness among them, for example.

121. The cultures are different. The idea that ACC could be sufficient is a false trail. What is needed is a system that takes the ACC standard as a benchmark but administers the results according to entitlements accruing to those who are veterans. To attempt to fold WPA governance into an ACC vehicle would be untrue to the purpose of veteran support. We therefore propose that the new veteran support system should be based upon ACC standards but be administered by the veterans' agency in place of ACC. That is to say, compensatory payments and other support for conditions attributable to service would replace ACC support in those instances,

but would be based upon ACC levels plus veterans' margins as described elsewhere in this paper. The whole would be administered by the Veterans' Affairs agency under the governance of the new Act, which would determine eligibilities according to standards of proof and other criteria also as set out elsewhere in this paper.

### **A Lump Sum Option?**

122. During the consultative sessions opinion was very mixed on the question of whether there should be a commuted lump sum option for compensatory cases. Some felt it should be available; others felt it was risky in that sensible deployment was not guaranteed and, once granted and used, there would be no comeback.

123. Except for one special case, we incline to the latter conservative view. Even if commutation were allowed, we would recommend it be only in part, in such a way that residual periodic entitlements did not fall below the going rate of NZ Super.

124. The special case concerns terminal illness as defined in the definitions and interpretations section of the Viet Nam MoU: “an advanced progressive disease likely to cause death within 12 months of the date of diagnosis.” Article 7.2 of the MoU provides that “All Veterans who have been diagnosed by a registered medical practitioner with a terminal illness resulting from service will be entitled to a War Disablement Pension equal to but not exceeding 160% of the current War Disablement Pension under the WPA.” Note that this applies to all veterans, not just Viet Nam veterans.

125. In circumstances of life cut short, however, we believe a cash payment is likely to be of much more use than a pension cut short, in order that the veteran can have at hand the means to improve quality of life in whatever time is left to him. But commutation of a pension in actuarial terms where life expectancy is a year or less might not make much sense. A reasonable cash grant would seem to be more appropriate – and a precedent for this approach exists elsewhere in the MoU. For Viet Nam veterans with conditions on the Institute of Medicine's “sufficient evidence” list, a sum of \$40,000 was payable in reparation (47 of these payments have been made to veterans to date; with other amounts to spouses and children).

126. We recommend therefore that where attributable terminal illness is diagnosed, the individual should immediately be elevated to the maximum Disablement Pension rate and be granted a cash payment of \$40,000. The latter should also be future-proofed<sup>6</sup> by indexation to movement in the average wage, with a starting-point of the date the MoU was signed, 6 December 2008.

## **VETERAN'S PENSION**

127. Issues around the Veteran's Pension are canvassed at Chapter 14 of Reference A. Notwithstanding repetition, it is worth spending a few moments on the same subject here.

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<sup>6</sup> Indeed all allowances, grants and ex-gratia payments should be indexed so that they do not lose their value relative to contemporary conditions.

128. The two main forms of direct financial support in the system are compensatory payments for attributable conditions (the Disablement Pension) and income maintenance (the Veteran's Pension). The Disablement Pension is neither taxable nor counted as income in the context of other benefits. The Veteran's Pension is basically NZ Super under another name. It is available in place of NZ Super to veterans who turn 65 years and who have a Disablement Pension of 70% or more. Veterans who are under 65 years but are not able to work may also qualify. Being NZ Super in effect, the Veteran's Pension is taxed at source but is not asset tested, except that it is abated against other earned income for those under age 65. The subject of abatement will be discussed further below.

129. A 70% Disablement Pension also carries the right to a Surviving Spouse Pension for the partner when the veteran dies. Otherwise the Veteran's Pension brings a lump sum payment on the death of the veteran and a lesser amount on the death of the partner, which can be made only if there is a surviving partner, or a dependent child, and which is in lieu of a Social Security Funeral Grant. Veteran's Pension payments are not reduced should a veteran require long term hospital care. There is also an automatic Community Services Card. Overall the marginal advantages of the Veteran's Pension are neither wide nor deep.

130. There is however an important further difference between the Veteran's Pension for the under-65s versus the over-65s. Over 65, and there is a disablement threshold of 70%. By definition its cause(s) must be attributable to service. Under 65 there is neither a qualifying disablement threshold nor a requirement that the cause be attributable to service. Put in an other way, for the over-65s the test cues are "veteran", "attributable injury" and "a 70% threshold", but for the under-65s they are simply "veteran" and "unable to work". In theory a veteran under 65 who is drawing the veterans pension but who has not reached the formal 70% disablement level for attributable conditions could lose the veteran's pension at age 65 in favour of NZ Super.

131. Aspects of the reasoning here are difficult to understand. Among other things, and notwithstanding that compensation and income maintenance are said to be separate issues, in fact they are firmly linked in the current system by the 70% threshold – but only for those over 65. Furthermore, in the case of those over 65 the underlying injury must be attributable to service. Neither 70% disablement nor attributability to service is a requirement for veterans under 65 who may be entitled to a Veteran's Pension. So why are they a requirement for those over 65? Conversely, if they are a requirement for those over 65, why are they not also a requirement for those under 65? This leads to the question why is the linking figure set at 70% anyway? Why is 70% better than any other figure – is its origin anything except arbitrary in the first place? And finally, why are these two streams compensation and income maintenance linked at all?

132. One of the effects of defining a crossover point like this is that it creates a target. Many veterans including eligible service folk will strive to get their ratings above 70%, with the accompanying proposition that there will be a surviving spouse pension for the partner. This has unfortunate effects on the system as a whole. For many whose ratings are within reach of 70% it encourages speculative claims in the

hope of reaching the target. The further effect of this can be to clog the system unnecessarily. And, where the target is reached, there is anecdotal evidence to suggest that further legitimate claims are not entered simply because a personal target has been achieved. This means that although the system might know how many are being paid and at what level, it does not know accurately how many are short of their true entitlements. It seems to us generally that the potential for this and other aberrations would very likely be inversely proportional to the adequacy of pension entitlements in the first place.

133. Reference C is the RNZRSA's Ten-Point Welfare Manifesto. Point 4 recommends that the 70% threshold should be removed for veterans over age 65 – in other words, being a veteran and reaching age 65 would be sufficient qualification for a Veteran's Pension. Before the 2008 election, we addressed the question (among others) to all political Parties as: "Would your Party agree with RNZRSA that all veterans on obtaining the age of 65 should automatically qualify for the Veterans' Pension in place of NZ Super?". The responses included "National's policy is to remove the 70% WDP requirement, thereby opening up entitlement to all veterans with qualifying operational service." Most answers were similar, and may be seen at:

[http://www.rsa.org.nz/about/nws2008oct/Election08\\_responses.html](http://www.rsa.org.nz/about/nws2008oct/Election08_responses.html).

where it will be noted that other Parties now a part of the National-led government agreed.

### **Other Issues**

134. Remaining issues include the abatement regime. For those of working age under 65, we can see the logic that State assistance is intended for income replacement, not income enhancement. And so we accept in principle that there has to be an abatement regime for the under 65s where the individual is able to earn. But while being fair to the taxpayer it must also be fair to the veteran. In the present system those who receive the Veteran's Pension are badly served in this regard. That said, the root of the problem might not be related as much to the fact that the abatement regime exists as it is to the fact that the rate is applied to a pension which falls despairingly short of sustaining normal living for those still of working age with attendant family and other responsibilities. Understandably in those circumstances recipients are resentful of the bite that abatement takes out of even honest attempts to bridge the difference between living and merely existing. If there were a more realistic ACC-based pension level (which we shall shortly propose), the abatement problem should itself abate. In that case, for consistency, the projected ACC abatement regime would be appropriate. The individual would then be able to supplement income to restore the total to the going 100% figure at the time, but beyond that the abatement would be dollar for dollar.

135. There are also residency issues, resulting from the application of NZ Super rules to the Veteran's Pension. We shall monitor development of the Social Assistance (Payment of New Zealand Superannuation and Veteran's Pension Overseas) Amendment Bill 301-1 (2008) with care. Its intent is to address issues connected with residency requirements. We understand, however, that the outcomes

may still be based proportionately on the duration of residency in New Zealand. We believe that where a Veteran's Pension is payable it is payable in consequence of the fact that the payee is a veteran of military service to the New Zealand Crown, not in consequence of periods of residency in New Zealand. The ills which qualify the individual for the Veteran's Pension in the first place arise from duty to the Crown, not from having lived in Timaru. We recommend that the international portability rules for the Veteran's Pension be commensurate with this.

136. Overall there seem to be many flaws in the fabric that need to be repaired. We believe this must be done; and that the peripheral advantages of the Veteran's Pension should be retained and enhanced by bringing them into line with the improved 21<sup>st</sup> Century environment.

### **The Australia Case**

137. The situation in respect of New Zealand veterans now living in Australia deserves separate mention. It is not clear how many they are – some estimates are up to 3,000. They were consulted in detail during the earlier Joint Working Group process, and many have taken up the opportunity to submit their views to the Law Commission in the present process.

138. There are reciprocal agreements between the two nations, but the devil is in the detail as always. There is constant traffic between VANZ and the Department of Veterans' Affairs in Australia as the entitlements of New Zealand veterans living in Australia are equalised under reciprocity. But there are also points of friction. Some of these arise because the structure in Australia is different from ours and, not infrequently, the scale of entitlements in Australia are compared unfavourably with those available in New Zealand. There is little we can do about that – there is neither the justification nor the machinery for the RNZRSA to contend that New Zealand veterans living in Australia should receive anything other than the scale of New Zealand entitlements that would apply if they were living in New Zealand.

139. One issue tends to surface from time to time, however. This is the case of a New Zealand veteran who, in New Zealand, is unable to work and is entitled to the Veteran's Pension while under the age of 65, and who moves to Australia. Despite commitments to broad reciprocity, it has not been possible wholly to align the New Zealand and Australian systems because there is no exact equivalence of entitlement in this instance. Variations in asset, income and residency tests result in differing outcomes.

140. We had a staff representative at the hearing of a case taken independently to the New Zealand Court of Appeal on general matters of reciprocity with Australia. In interpreting the reciprocity agreement, the Court very recently dismissed the appeal and upheld successive decisions denying payment of NZ Super. In consequence we shall watch with interest the progress of the more generous provisions in the Bill mentioned above, particularly with respect to reciprocal entitlement to New Zealand Veteran's Pensions payable in Australia. Nevertheless the RNZRSA does not seek entitlements for New Zealand veterans resident in Australia which are more favourable than those for New Zealand veterans resident in New Zealand.

## The Pension Itself

141. Perhaps because the subject is so layered we note that opinion during the Law Commission's seminars was not always in harmony with itself on some of the points relating to the Veteran's Pension. We think, however, that there are two distinct scenarios – the over-65 case where we are talking in the main of an appropriate veteran's replacement for NZ Super, and the under-65 case where we are talking of direct income support for a veteran who is unable to work. We think it possible that a principal reason for the confused system that now exists could be found in an attempt to apply a single solution to two different – and unsympathetic – problems.

142. We therefore propose that there should be two distinct forms of Veteran's Pension, one as a straightforward over-65 replacement for NZ Super, and the other as income support for veterans under 65 who are unable to work; each at its own rate and each with a “veteran's margin”.

143. The over-65 case would be as it is now, except for some work on the “veteran's margin” to which we shall return shortly. As foreshadowed above, however, there would be no 70% threshold; all veterans would receive the Veteran's Pension in lieu of and at the rate of NZ Super at age 65, plus the “margin”. There would be no fiscal impact from the pension component because it is paid anyway as NZ Super.

144. For the under-65 case we propose that by far the fairest way of providing income replacement would be to key the rate to the 80% level as in the ACC case. Abatement rates where applicable would apply, as above. This would be even-handed and simple way of targeting to the need. It would have good logic and good precedent in respect of the ACC standard. It would also have good symmetry with our proposed Disablement Pension case – and here we should remember that we cannot assume the under-65 recipients would all be in receipt of a Disablement Pension. That is not a requirement for this version of the Veteran's Pension under present conditions, and we do not propose that it should be.

145. What we would then have is a standard Veteran's Pension payable at age 65 but at the NZ Super rate without fiscal impact, and a targeted or Special Veteran's Pension payable before age 65 as income support. There are currently a little under 400 under-65 Veteran's Pensioners. Where pay at the time could not be calculated, as with the Disablement Pension case, then the 80% average male wage should be used. The fiscal impact would then amount to the difference between the NZ Super rate of roughly 66% average wage, and this would bring into being much better recognition of the veteran seriously disadvantaged at working age – in principle at least, not unlike the “TPI” (Totally and Permanently Incapacitated) category used in Australia. Although the conditions are different in the two countries we have not had quite that concept before, but should.

## **The Veteran's Margin**

146. It is necessary to consider how the Law Commission's second principle should be applied to these forms of Veteran's Pension. This could of course be done in money or in kind, such as preferential access to medical services. As with the Disablement Pension, we would see a 10% margin in value as not unreasonable in order to pick up the idea of the "Enhanced ACC" option at pp 192 and 193 of Reference A.

147. In parallel a "Gold Card" should be instituted, offering assistance in kind rather than directly in pension. The Gold Card idea is an area in which much controversy has raged in the veteran community for many years. It comes of the belief that part of the national debt to veterans should be met by way of preferential opportunities both in price and in access to medical services.

148. In recent years much of the argument on this side of the Tasman has been fuelled by the fact that in Australia there is a veterans' Gold Card which does carry significant advantages for eligible veterans within the Australian health system. A significant slice of the New Zealand veteran community lives in Australia, so traffic on comparisons is constant, considerable and critical of the absence of a New Zealand equivalent. While it is without doubt a generous system, representations of it can also be selective, since some of them tend to ignore that the Australian health system is very different from our own in structure, not to mention the veteran support system. In addition, access to the Gold Card is not universal, nor even as widespread as is sometimes implied. Nor is it as effective as some claims would have it.

149. In New Zealand, however, the history has been that no such argument has been accepted despite many tries. Always, there has been resistance to differential treatment of veterans in this context. Any Gold Card that has been made available to veterans is the same Gold Card that is available to others. Despite obvious physical differences between the present "S" card for superannuitants and the "V" card variation for veterans, the doors they open are the same. Each works in the vehicle testing station to yield a \$5 discount for a vehicle warrant of fitness, for example. Each entitles the holder to the free travel on the local bus (where there is one and it is not rush hour). But the V card does not work anywhere that the S card does not.

150. All that may now have changed. As part of its veterans' policy, the National-led government has pledged to establish a true differential for the "V" card over the "S" card, for which all veterans would be eligible. Especially for the more elderly, one of whom recently reminded us that "for an eighty-year-old, six months is an eternity", this would be a good option. For example, a difficulty can be waiting times for hospital or specialist's care in the public health system. A way of ameliorating this would be to provide for Veteran's Pensioners to have access to private health care in all cases where waiting time is longer than 3 months, free of additional costs. If this and similar provisions were available to Veteran's Gold Card holders, we would not only be targeting veterans' needs appropriately, but also be giving the Card some of

the differentiated substance it has lacked hitherto, and not just for the elderly but for younger veterans as well.

151. In summary the RNZRSA recommends the following:

- The 70% disablement link between Disablement Pensions and Veteran's Pensions should be removed.
- All veterans who reach superannuation age should go onto the Veteran's Pension rather than NZ Super.
- Veterans under age 65 who cannot work should go onto a Special Veteran's Pension using the 80% ACC criterion.
- Rights to the Surviving Spouse Pension should accompany the Veteran's Pension at age 65 (but see also below for the general case); and other existing peripherals must be retained.
- The "veteran's margin" should be expressed as a 10% increment in the pension values, plus a clearly differentiated Gold Card offering tangible margin to veterans; an important inclusion would be timely access to health providers in the private system.

### **SURVIVING SPOUSE PENSION**

152. During the Law Commission consultation sessions the subject of the surviving spouse pension also prompted a wide range of opinion, some of it irreconcilable. This was particularly so on the question of whether or not the Surviving Spouse Pension should continue upon remarriage. With a few notable exceptions most men said yes and most women said no. Either way, it also seemed that the older the individual the more firmly the view was held. This was particularly so among older women, who tended to be very firmly convinced that the Surviving Spouse Pension should not continue.

153. Despite all that, the RNZRSA believes there is a case for something other than a complete shut-out when a new relationship is formed. We say this because there is more than one reason for the Surviving Spouse Pension, and all of them need to be taken into account. They include the impact upon the family in general of living with a veteran, which can manifest in various ways from coping with attributable illness to outright abuse by a disturbed veteran. Premature bereavement is an issue on its own. And even in the most tranquil of homes there could have been a requirement for nursing over a long period. The Law Commission caught the essence with its comment that "The impact of a veteran's injury, disease or death on his or her family should not be underestimated. It is accepted that any scheme providing for veterans' entitlements must also provide assistance to veterans' families." (Page 236).

154. As for the veterans themselves, the RNZRSA believes that spousal

entitlements should be built around modern ACC standards. Present WPA standards fall well short of this in both pensions and other entitlements such as funeral grants.

155. Elsewhere we mentioned that the linkage at the 70% disablement level between Disablement Pension and Veteran's Pension had become a target because of (among other things) the further cross-linkage to eligibility for the Surviving Spouse Pension. We recommended that the 70% requirement be dropped and that all veterans should be moved on to the Veteran's Pension at age 65. We believe Veteran's Pension itself should be sufficient to grant to the surviving spouse the Surviving Spouse Pension. That this would broaden the catchment of potential Surviving Spouse Pension recipients we believe to be supportable and proper.

156. We need to add a codicil to this, however. At present, eligibility for the Surviving Spouse Pension is keyed not to the existence of a Veteran's Pension per se, but directly to the 70% disablement level. We have said above that the 70% disablement level should be removed as a barrier to the award of a Veteran's Pension for veterans attaining the age of 65, and that the Veteran's Pension should be qualification enough for a Surviving Spouse Pension. Were we to say that the 70% criterion should be similarly removed as a requirement for the Surviving Spouse Pension, we would disadvantage servicemen who do not qualify in the veteran category for a Veteran's Pension but who do have 70% attributable disablement. For their sake it would be necessary to retain the linkage between Surviving Spouse Pension and disablement. The basis would need to be changed for the new 100% disablement scale of reference – the arithmetical conversion from 70% in the current system would be just over 40%.

157. Beyond that, we recommend the following:

- Consequential entitlements (funeral grant and survivor lump sum for example) should be re-aligned to the ACC standard.
- Also following the ACC standard, the Surviving Spouse Pension rate should be set at 60% of the earnings of the veteran deceased. This in most cases would be calculated on the Veteran's Pension which, in the scheme we propose elsewhere in this paper, would already include a veteran's margin. Unless there were a new relationship (see below) this payment would be for life (which is the case now), unlike the ACC case where it ceases after five years and is affected by superannuation options. These concessions too could be categorised as honouring the veteran's margin.
- Should the surviving spouse enter into a new relationship, the Surviving Spouse Pension payment would continue for two years and then stop (but see below for a special case relating to family education). If the new relationship then ceased for any reason and if the surviving spouse was over 65, the payments would recommence.
- It would be important that these arrangements applied not only to the ACC era but also to those from the pre-1974 group.

- Where the surviving spouse is of working age and has the obligations of dependent family, the payments would not cease with any new relationship but would continue until the children reached 18 years, or 23 years if the child is still in education.
- In cases of attributable bereavement at a younger age it could also be that a commutation option would be appropriate.
- Rehabilitation options such as career training for surviving spouses should also be provided for.

## **REHABILITATION**

158. The RNZRSA fully supports the Law Commission's view that a major shortcoming of the present War Pensions Act is that it contains no provisions for rehabilitation. Universal approval of the proposal to provide for rehabilitation in the new statute during the Law Commission's seminars underscores the point.

159. In its own way this is a melancholy subject. We once had a deliberate and wide-reaching rehabilitation system for those who had returned from war. But, as World War II receded from direct memory, the “rehab loan” and other support just faded away - and indeed its final remnants were last sighted at about the time of the Viet Nam War. We can only speculate on the reasons, but it seems possible that because the major rehabilitation issues were dealt with under separate legislation, no need was seen to include provisions in the War Pensions Act. Then, as rehabilitation effort slowly fell away, the silo was emptied and the space it left was not filled. It now needs to be filled, and the new Military Rehabilitation and Entitlements Act is the vehicle.

160. We agree that there should be a “high aim” for rehabilitation (Reference A, paragraphs 16.44 and 16.45). As to the detail, in example of Canada's “medical rehabilitation” we would want to see “psychological” expressly included. Beyond that, “social” and “psycho-social” are important as well. Beyond that again, we particularly like the approach of the Canadian New Veterans Charter in rehabilitating a family to help get through the life-changing impact of a premature military death. This covers all necessary services including education and vocational training (or re-training) for the survivors. We think it should be so here, too.

161. There is another aspect to this, not closely related but difficult to deal with elsewhere in this paper. Our system is now beginning to accept some inter-generational effects of military service. Children can be damaged by what their parents had been required to do. But the requirement to deal with this will not necessarily end with direct physical assistance to the child alone, or even with monetary compensation. Particularly where the affected child cannot be fully independent, the parents can become desperately worried about what will happen to that child when they themselves die. There needs to be explicit provision to deal with this situation, to help lift the anxiety burden which will only intensify as parents

age, and whether it be done under the heading of rehabilitation or any other.

## ALLOWANCES

162. The matter of allowances is also a sorry mess. This, too, was universally agreed from the floor during Law Commission consultations. What was not so unanimous – far from it – was acceptable solutions.

163. It is clear that although rolling up the allowances and adding them in to pension rates would find favour with some, the majority would not agree. The travel allowance was a particularly sensitive nerve. But it does need radical attention, without doubt. To cut a long story short, the RNZRSA believes that where a travel allowance is payable<sup>7</sup> it would be much better to be granted in the form of a one-off annual sum of (say) \$3,000 for veterans who are 60% or more disabled on the new 100% scale (60% is the arithmetical equivalent of the current 100% travel threshold on the present 160% scale). To reflect present conditions there would also need to be a 30% threshold (equivalent to the current 50% H113 travel concession for cases where locomotion is impeded).

164. The attendant allowance is justified, we believe, though in revamped form less redolent of servitude. We think the adaptations that have occurred in connection with the modern push for people to stay in their own homes are appropriate, since the approach has increased the need for domestic assistance of various kinds which “the system” should pay for. We also think, as previously notified, that there is a case for a family caregiver to be helped financially in cases where nursing of the disabled is required.

165. Clothing and vehicle allowances serve good purposes and should remain. As with other parts of this thicket, however, their administration needs to be simplified. It seems to us that far too much time and effort is spent trying to line up circumstances with overly fine-grained prescriptions originating from times when the world was different and the approach mechanical. It would be simpler, surely, to make provision for allowance assistance case-by-case according to broad guidance on eligibility.

166. As to hearing aid batteries, the cost should be met by the system, but rather than piecemeal it would be more sensible to do it simply by way of automatic increment to hearing Disablement Pensions.

167. The gallantry decoration allowance is difficult. The Law Commission has questioned the reasons for inclusion of such a payment in a war pensions system in the first place. While it does seem an anomaly, we do need to bear in mind that well-known and senior British Imperial awards including the Victoria Cross began their existence accompanied by a pension grant. Our present system is not guilty of inventing something new. What is very odd about it is that the grant is keyed to

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<sup>7</sup> We need to be clear that the travel allowance and the cost of travel to attend an authorised medical appointment (for example) are not the same thing. The latter is dealt with separately – what we are concerned with here is the free general travel accorded some levels of disablement.

disablement – as we have said elsewhere, we consider this to be misdirected.

168. There are other factors. Having regard to the modern collectors' value of gallantry and related medals, which is significant, there are costs attached to being awarded one. It is also the case that consistent RNZRSA policy has been to remove the disablement prerequisite and to increase the level of the gallantry allowance to something less derisory. Furthermore, the present government included in its pre-election undertakings a formal commitment to increasing the gallantry decoration allowance to \$30 per week.

169. Overall we agree that a war pensions forum is not the place to argue these things out. We believe a realistic gallantry allowance is justified, but we will take it up in another place.

170. Not strictly a matter of allowances, but loosely related, is the matter of loans to the disabled to help purchase a suitable vehicle. These mainly apply to cases of impaired locomotion, but the WPA Regulations requirements seem to be significantly more swingeing than under ACC. The latter's approach seems to be related to whole-body assessment in that ACC will pay for a vehicle when it is the best option for the client; whereas the WPA is much more prescriptive in that it stipulates "loss of both legs", for example. This may be another case of an approach fashioned many years ago and simply not updated. Whether it is fair or equitable in modern terms needs to be examined.

171. By and large the allowance system is well-intentioned and appropriate. It is mostly the administration, not the purpose, that has departed from good sense. We believe therefore that the solution lies more in cleaning up the processes, simplifying the entitlements and updating the allowances themselves than in radical changes such as rolling up the scales and spreading them across entitlements generally. The allowances do serve a purpose, but the psychology is important too. Something that can be identified as a response to need can assume a disproportionate importance beyond its size in the greater scheme of things.

## RECOMMENDATIONS

172. We make the following recommendations.

### Principles

- (1) Underpinnings. The two underpinning principles set out by the Law Commission need to be expressed within the new statute.
- (2) Nobody Worse Off. Though the situation is unlikely to arise, prudence demands that in no transition from the old system to the new shall the rights and services available to any currently eligible person be adversely affected.
- (3) Disablement Allowances not Taxed. No disablement allowance to be taxed or counted as income – this is a continuation of the present position.

(4) Equalisation of Attributable Injury. Entitlements for all accepted injuries or illness to be based upon the severity of the effects on quality or life, not on whether the individual has operational or non-operational service. The issue to be assessed is the consequence, not the circumstance that gave rise to the condition concerned.

(5) Rebuttable Presumption. The rebuttable presumption (“reverse onus of proof”) to be clarified and retained without reduction in its power; as also for the benevolent purpose established in case law.

(6) Inclusion. Except where the inclusion would be repugnant to justice there should be no exclusions on the basis of activity; the test to be whether or not the affected individual was a member of the forces subject to military law at the time.

(7) Two Acts. It is clear at this stage that two Acts will be needed; one relating to the period before the ACC system was introduced in 1974, and the other for the ACC era itself.

(8) Purposes. A provision as to purpose at the beginning of the Act is needed to set out the context and to assist in interpretation.

(9) Title. A suitable title would be the Military Rehabilitation and Entitlements Act (the word “veteran” should be avoided if possible).

(10) Portability. In determining matters of portability outside New Zealand, the question should turn upon the reason why the individual is entitled to war pension or related support – which is that he or she served the New Zealand Crown. The issue is not the length of residency in New Zealand, but the Crown's debt incurred for making use of the veteran's services in its uniform in harm's way.

## **Who is a Veteran?**

(11) Defining a Veteran. Attempting to define a veteran in law would be unlikely to achieve anything useful – instead the question to be answered is “who is entitled under this Act; to what; and in what way?”

(12) Admission to the Act. Admission should be generous but at the same time distinguish among three groups: those who have been put in harm's way, those who have served but not in harm's way, and their families.

(13) Category Decided by the Minister. Where an operation is mounted (or individuals are posted to an operational area) the Minister to decide in advance and make plain to the participants whether it is to qualify them for full rights to support services as a veteran under the rebuttable presumption.

(14) Status in Law. The requirement for consideration and decision is to be

a requirement in law, but without need for amendment to the Act on each (or any) occasion.

(15) Decision on Advice. The decision should be taken by the Minister on advice from the Chief of Defence Force and in consultation with the National President of the RNZRSA according to published criteria.

(16) Decision with Reasons. The decision to be given with reasons, and in general to be based upon consideration of risk in the theatre of operations rather than upon details of assignment within it.

(17) Variations of Category. There must be provision in law for the original determination to be varied according to developments.

(18) Domestic and Other Hazardous Operations. Consideration not to be exclusive to combat or combat-related operations, but should include domestic or other operations and activities of equivalent hazard.

## **Entitlements and Assessments**

(19) Nature of Entitlements. Unlike ACC, entitlements must include compensatory payments for attributable illnesses as well as for injury; and these should be lifetime entitlements carrying on past superannuation age.

(20) Assessment of Attributable Conditions. Assessment of the degree of impairment must be on a whole person, whole of life basis – the effect overall on quality of life.

(21) Assessment Tools. The AMA guides are the most appropriate basis for assessments, together with the ACC supplement for New Zealand.

(22) VANZ Supplement. A further supplement will also be required to cover conditions such as illness and psychological and psycho-social damage not normally considered by ACC; and also to ensure that appropriate whole of life assessments are made that take fully into account not only the nature of military life but the benevolent purposes of the new legislation.

(23) Assessments under AMA. There is both room and good purpose to having General Practitioners do more of the impairment assessments than has been the case hitherto; and also to engage the Expert Panel in providing guidance in this regard.

(24) Impairment Scale. The existing scale of 32-steps zero to 160% (and beyond) should be replaced by a zero to 100% scale in 5% increments based on whole-body, whole of life assessments.

(25) Application of New Scale. All of those currently eligible for impairment services under the Act should be transferred forthwith onto the new scale.

## Efficiencies and Administration

- (26) Presumptive Lists. Being key to efficiency and effectiveness, the presumptive lists to be developed continuously as knowledge improves; the Expert Panel will be central to this.
- (27) Claims Panels. Claims Panels to be retained, but in greatly revised form. Their composition should remain the same – RNZRSA and medical – but they should be centralised, and be reduced in number to two working full-time (or perhaps four in the interim).
- (28) Claims Panels and the NRO. The potential to merge the functions of the Claims Panels and the NRO, without affecting review or referral rights, should be considered.
- (29) Expert Panel. The Expert Panel to be given durability and authority by incorporation into the new statute.
- (30) Prescription versus Discretion. Neither full prescription nor full discretion is a goal – these are extremes, each with its own merits but also with drawbacks. The new system must be a sensible balance between the two in such a way that the rebuttable presumption is retained in full.

## Disablement Allowances

- (31) Indexation of Disablement Allowances and Grants. The maximum impairment level (100% in the new scale) to be indexed to the same as the ACC standard, 80% of the wage at the time or, in historical cases where the wage at the time cannot be fairly established, 80% of the average male full-time wage. Cash grants should also be suitably indexed to protect future value.
- (32) Transition to New Index. All existing disablement entitlements to be paid according to the new index.
- (33) Solatium Adjustment. Those whose entitled condition pre-dates the introduction of ACC in 1974 to be paid a single solatium adjustment which should be based upon three times the contemporary disablement entitlement.
- (34) Terminal Illness. Where attributable illness is diagnosed as terminal (in the terms of the MoU), the individual to be granted the maximum disablement pension rate (also as in the MoU); and to receive a \$40,000 ex-gratia cash payment.
- (35) “Veteran's Margin”. The “veteran's margin” implicit in the Law Commission's second principle would manifest in two ways - as a 10% increment on Disablement Pensions and Veteran's Pensions, and as service in kind such as advantageous access to health services (the “Gold Card”).

(36) Relationship with ACC. The system to be administered by VANZ according to the eligibility rules outlined in the body of this paper, with entitlements keyed to the two principles and properly matched to the ACC standard and including a veteran's margin. If this were done satisfactorily, then for qualifying conditions including attributable illness, veterans and others entitled would receive relevant services in place of equivalent ACC services.

## **Veteran's Pensions**

(37) Two Forms of Veteran's Pension. There needs to be two distinct forms of Veteran's Pension, one for superannuated veterans based upon NZ Super as at present; and one for working-age veterans who are unable to work based on the 80% ACC standard. These might be called "Standard Veteran's Pension" and "Special Veteran's Pension"

(38) Eligibility for Standard Veteran's Pension. The standard Veteran's Pension to be payable in lieu of NZ Super to all veterans who reach age 65, including those ex-service persons with attributable disablement of 40% or more on the new scale (converted from 70% on the present scale).

(39) Consequential for the Veteran's Pension. The current peripheral advantages for the Veteran's Pension to be modernised, improved and extended, including tangible advantage through the "Gold Card", but in particular by timely and funded access to private health providers; these advantages to accrue to both forms of Veteran's Pension.

## **Surviving Spouse Pension**

(40) Surviving Spouse Pension. The Surviving Spouse Pension to be set at the ACC's rate of 60% of earnings.

(41) Continuation of Pension. The Surviving Spouse Pension to be an entitlement for life, except upon remarriage or equivalent when it would cease after two years but be restored if that second arrangement then ceased. Where dependant children are involved, however, the Surviving Spouse Pension should not be interrupted until they reach age 18 (or 23 if still in full-time education).

(42) Surviving Spouse Pension and 1974. All adjustments to the Surviving Spouse Pension to apply to both pre-and post-ACC environments.

(43) Surviving Spouse Commutation Option. A commutation option should be available to surviving spouses in the younger age group where they have family and other responsibilities for which a cash option would be more appropriate.

(44) Surviving Spouse and Rehabilitation. Rehabilitation arrangements must include career training for surviving spouses.

## **Rehabilitation**

(45) Rehabilitation. Rehabilitation needs to be restored to a strong, even predominating, position within the new legislation; and to span across physical, medical, psychological, psycho-social, and vocational aspects; not forgetting the huge effect on self-respect and dignity of decent pension and other support payments.

(46) Family Included. Rehabilitation applies also to families, and it needs to provide not just for entitled veterans but also for those who are touched and sometimes deeply affected by living with them in parallel worlds rather than in the same world.

## **Allowances**

(47) Allowances. The allowances regime is well-intentioned and appropriate, but impossibly creaky, and the temptation of radical solutions is strong. That temptation should be resisted in favour of administrative improvements to modernise, realign and, where necessary, redirect the system to satisfy needs in the 21<sup>st</sup> Century rather than history itself.

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