# VETERANS' SUPPORT BILL

## SUBMISSION TO THE SOCIAL SERVICES COMMITTEE BY THE ROYAL NEW ZEALAND RETURNED AND SERVICES ASSOCIATION AND ON BEHALF OF THE EX-VIETNAM SERVICES ASSOCIATION

## INTRODUCTION

1. In October 2004 the Health Select Committee brought down nine recommendations relating to veterans' health and military service in the Viet Nam War. Then began far-reaching reviews on the matters raised. An independently-chaired Joint Working Group on Concerns of Viet Nam Veterans led in late 2006 to a Memorandum of Understanding between the Crown on the one hand and, on the other hand, the Royal New Zealand Returned and Services Association (RNZRSA) together with the Ex-Vietnam Services Association (EVSA).

2. The focus was broadening beyond Viet Nam to veterans generally. The MoU included an undertaking that the War Pensions Act (WPA) 1954 would undergo "a substantial review"[1]. In September 2007 the Government instructed the Law Commission to do that review. Meantime, in 2008, the formal and public Government apology at the centre of the event known as Tribute 08 caught the nation's attention.

3. The Law Commission conducted many consultative sessions with veterans the length and breadth of the country, and published comprehensive discussion documents in July 2008. It was becoming steadily more evident that the WPA 1954 was no longer fit for purpose. It was also clear that replacing it with something appropriate to the 21st Century would be much more challenging than had previously been thought. In May 2010 the Commission finally reported to Parliament with 170 recommendations. Now, in late 2013, we have the Veterans' Support Bill in follow-up.

1 MoU Article 7.3

4. The RNZRSA has been closely involved throughout. We wish in particular to thank the Law Commission for its indulgence during the review and the preparation of its report. As the principal advocate, we were always listened to. We did not of course agree on everything. But where disagreement arose, possible solutions were always explored. Where we had to agree to disagree, the reasons were always explained. We were also given participatory privileges not often granted to interested parties. For all of this we are most grateful.

5. In addition we recognise that although the task has taken time, the technical challenges of preparing the Bill have been great. Bringing back into contemporary relevance a sixty-year-old Act which had lost touch with modern conditions is no simple matter. The law drafters have done remarkably well not only in simplifying the arcane language of the WPA 1954, but also in interpreting the intentions of the original lawmakers. This does not mean we think the Bill is perfect, or that we will not be suggesting improvements, or that there are no outstanding points of disagreement. What is before us in the Bill is good. But the question for us is, is it good enough?

6. We would wish to appear in person before the Committee to discuss this submission.

## THE FUNDAMENTAL ISSUE

7. The underlying promise running through the entire exercise has been that the benevolent provisions of the 1954 statute would be faithfully mapped into the new legislation. Obviously, this required thorough understanding of what those provisions actually were and, perhaps more importantly, what the original lawmakers had intended.

8. The introduction of ACC in 1974 changed the New Zealand landscape in workers' compensation and related matters. Even so the Parliamentary record of the day confirms that the provisions of ACC and the provisions for war veterans needed to be seen as two different things. Speaking to the introduction of ACC legislation to Parliament in 1971, the Hon David Thomson said(emphasis added):

> *"……This Government with its very deep concern, its continuing concern for the welfare of servicemen both serving and retired, will make certain that whatever provision is made for the civilian population of New Zealand will be in no way better than the provisions for servicemen and ex-servicemen……..*
>
> *"……The Government will ensure that the position of service men and ex-service men is preserved, and, to the degree that it may be necessary, enhanced in any legislation which is brought down……"*[2]

2 Minister in charge of War Pensions, 15 December 1971, NZPD Vol 377, p 5288 onward.

In his comments immediately following, a senior Opposition MP, Mr Arthur Faulkner, later the Minister of Defence, also referred to the needs of members of the armed forces.

9. Clearly there were cross-Party concerns to prevent the special treatment accorded to veterans from being overwhelmed by the revolutionary new regime that was ACC. Yet we find in the NZDF's Departmental Disclosure Statement on the Veterans' Support Bill in 2013 that *"..... The 1954 Act has not changed significantly since enactment ....."* and *".....The 1954 Act was also not updated on the introduction of the accident compensation ("ACC") scheme in 1974....."* [3] Further, we note the Law Commission's comment in its 2008 discussion paper that *"In many ways accident compensation beneficiaries receive a much better deal than war pensioners."*[4]

10. We propose that the NZDF Disclosure Statement and the Law Commission's remark amount to clear and current confirmation that the benevolent margin for veterans which so obviously was a part of Parliamentary thinking when ACC was established has not in fact been delivered as was intended. We acknowledge of course that the WPA accepts qualifying illnesses much more readily than the ACC regime which is generally limited to accident rather than illness. We shall return to this topic in the context of disablement pension scales and other entitlements presently. In the meantime, important matters to do with founding evidential provisions arise.

## EVIDENTIAL PROVISIONS

11. The relaxed evidential provisions contained in the WPA 1954 do two important things. They place few if any restrictions upon the admissibility of evidence; and they alter the weighting to be given that evidence once admitted. Both of these changes to the normal rules of evidence were intended to act deliberately and expressly in favour of the veteran.

12. We see in Clauses 10 through 16 of the Bill that the drafters have achieved a great deal in simplifying the provisions of the WPA 1954; in thinning out some of its impenetrably interwoven layers; and in generally making the presumptions and the admissibility and weightings of evidence more understandable. But does the result keep faith with the 1971 undertakings in full? Will it be interpreted by an assessor new to the task in 2025 in the same way that we who are familiar with the history would do in 2014? In other words, is the language durable; is it comprehensive enough; and is it prescriptive enough?

### Proof of Attribution

13. In 2010 concern was rising that the standards of proof being used to determine whether claimants' physical or psychological conditions could be attributed

3 Departmental Disclosure Statement page 3
4 Law Commission Issues Paper 7 of July 2008, page 8

to qualifying service were not as clear or as consistent as they should be. We commissioned a legal opinion from The Hon Dr Robert Fisher, QC on the law as set out in the WPA 1954. A copy of his full opinion is at Annex A. His principal conclusion was that:

> *"…(claimants') evidence must be sufficient to raise at least a doubt about attribution but it need not positively persuade the decision maker that the evidence is correct……. Once the claimant has done enough to raise a doubt about attribution, there is an onus on the Crown to prove beyond reasonable doubt that the disablement was not in fact caused or contributed to by the service, but was due entirely to other causes…."* [5]

14. More recently in view of the welcome intention to apply the Australian Statements of Principle (SoPs), we have had a closer look at the context in which those documents are applied in Australia. If they are to be given their full meaning and effect after transplant, and insofar as is consistent with New Zealand law, we believe that that context is as important to the New Zealand veterans' support system as the SoPs themselves. Here we also note that in adopting both the SoPs and the Australian review process despite mild misgivings about sovereignty, Cabinet Paper C appears to have accepted the principle that some Australian context beyond the substance of the SoPs themselves must be taken into account[6] . Our thought therefore is neither radical nor new. This is further confirmed in the Law Commission's report which observed in a discussion about decision-making instruments that ".... we have shown that the Australian beneficial evidential provisions have had a very similar genesis to our own and have ended up at a similar point....."[7]. We see no challenge to the integrity or effectiveness of the New Zealand system in the proposal that relevant parts of the Australian context need to be seen as our context too.

15. Case law also serves to clarify the application of formal statutes. A seminal case-in-point is the full Australian Federal Court proceeding in *Deledio versus the Repatriation Commission* which found in favour of the claimant. The Repatriation Commission then issued specific guidelines based on *Deledio* to assist decision-makers administering the veterans' support system. A copy of the Repatriation Commission's guidance is attached to this submission as Annex B. It sets out a thoroughgoing description of a four-step logical process which in the final stage instructs the decision-maker how to approach a countervailing proposition that the condition applied for might not be attributable to qualifying service. Among other things the guidance says:

> *"..... the decision-maker must apply the final test and consider whether he or she is satisfied beyond reasonable doubt that the injury, disease, or death was not war-caused....."* [8]

5 Annex A page 21 paragraphs 60 (e) and (f)
6 Cabinet Paper C paragraphs 8 through 12
7 Law Commission Report at and around paragraph 5.87
8 Annex B page 4

16. We submit that the similarity between that and Dr Fisher's earlier and independent opinion on the meaning of our own WPA 1954 is striking. We further submit that applying the Deledio guidance in this respect would be to do no more than to apply the standard expected by our existing statute. Therefore, we say, the Deledio standard may be formally mapped into our new legislation without risk.

**17. To that end we recommend that an additional subclause (iv) should be added to Clause 15(3)(c) of the Bill, as:**

> **(iii) ….....; and**
>
> **(iv) subject to the conclusive presumption in section 12(1), if an application from a veteran or other qualifying claimant is to be declined on the basis that the condition might not have been caused or aggravated by qualifying service, the assessor must be satisfied beyond reasonable doubt that it was not so caused.**

Such an instruction would be clear enough, comprehensible enough, durable enough, and prescriptive enough to ensure the necessary consistency of interpretation both now and over time.

**18. We also believe that there needs to be a consonant cross-reference to the above new sub-section from Clause 11(2), which should be amended to read:**

> **(2) If that evidence is produced, then (in the absence of evidence *showing the contrary in accordance with section 15(3)(c)(iv)),* the person's condition is to be treated as attributable to or aggravated by the person's qualifying operational service.**

19. In making these recommendations we also observe that the Deledio guidance is not only still "live" in the Australian system, but is deeply pervasive. A decision dated September 2013 by the Australian Administrative Appeals Tribunal, attached as Annex C, illustrates this. It methodically sets out the conclusions of the reviewer according to the Deledio four-stage guidance, including that *"I am now required to consider.....whether or not ….... I am satisfied "beyond reasonable doubt" that the veteran's death was not war-caused."*[9]. He then goes on despite "gaps in the evidence" to conclude that he could not be so satisfied and, therefore, that the appeal was valid. This confirms the contemporary usage and effect of the guidance. We might note in passing that the reviewer in this case observed that *"A Statement of Principles is binding on decision-makers at all levels, including this Tribunal."*[10]

**20. Again for reasons of durability, clarity and consistency over time, we propose that Clause 17 of the Bill should contain an additional sub-clause along the lines of:**

9 Annex C paragraph 41
10 Annex C paragraph 14

**(x) Once adopted, a Statement of Principles becomes a legislative instrument which is binding on decision-makers at all levels including reviewing officers, review panels and the appeal board.**

21. Finally in matters of attribution, we are uncertain of how the term "... for the purposes of the War Pensions Act 1954 …" included in the definition of qualifying operational service at Clause 8(2)(a) should be interpreted. It is unclear whether the intention is to confine considerations to decisions already made under that Act or, more broadly, to consider how they would be treated if that Act was still in force. This raises a related issue. Section 19(2) of the WPA 1954 has it that ".... the disablement or death of the member, as the case may be, shall for the purposes of this Act be *deemed to be attributable* to his service as a member of the forces..." (emphasis added). We can find no clear equivalent to this in the Bill; and we believe there ought to be one.

22. **We recommend therefore that Clause 8(2)(a) should be amended to read:**

**(a) service on any deployment treated as a war or emergency for the purposes of the War Pensions Act 1954 *or which would have been so treated if that Act had still been in force*; and**

## Issues of Threshold

23. Our earlier concerns about clear standards of proof extended also to the "threshold" that an application had to cross before it could be admitted for further processing. We fully accept that an application must have some probative merit, or fail. Even so, too often it had seemed that applications were not processed beyond the entry point on the basis that the historical medical records did not contain appropriate or sufficient information for the application to proceed. In this regard, too, we found the Australian Deledio guidelines instructive. They contain the following unambiguous example:

> "If a veteran makes a statement concerning receiving medical treatment for an injury in New Guinea, then s119 (1)(h) permits a finding made in favour of the claimant, even though there is no record of that treatment in the veteran's service records. This is because it is common knowledge that the exigencies of service were such that full records of all treatment were not always made and the information is credible."[11]

To be sure, the example specifically references the Australian Veterans' Entitlement Act, but we contend that its message is as valid in New Zealand as it is in Australia; and that it, too, is a part of the context of the SoPs that should be similarly applied in New Zealand.

11 Annex B page 2

**24. Having regard also to Clause 41(1)(c), we therefore recommend an amendment to Clause 15(3)(c)(ii) as follows:**

> **(ii) make all reasonable inferences from the circumstances of the case, the evidence furnished, and medical opinions supplied; *except that absent or incomplete medical records shall not in themselves be sufficient grounds for declining an application or declining to accept an application;* and** …..

25. There is a second threshold issue. It is not clear from the Bill just how and by whom the initial assessment of a claim will be made, other than by inference from general references to "health practitioners" in Clause 199. At present the initial assessment is done by one of several War Pensions Claims Panels, each of two people. One is a VANZ official with medical training and the other a veteran nominated by the RNZRSA and appointed by the General Manager of VANZ. This helps to ensure that the operational or field circumstances in which the applicant served are fully taken into account at the outset.

26. While we note and are pleased that the principle of procedural input by an RNZRSA nominee will be continued in the Veterans' Service Review Panel (Clauses 209 to 213), we believe the decision at the gateway is not entirely medical in nature. Nor will claims always be couched in terms readily understood by a health practitioner not personally familiar with the field conditions of war or warlike operations. It is not hard to see that the capacity to interpret an application from the standpoint of military experience could be critical. We believe that there is merit in continuing veteran representation at the entry level, not least for completeness, fairness and consistency in administering the statute over time.

**27. We therefore recommend that a sub-section should be added to Clause 199 along the following lines:**

> **(x) VANZ must also appoint assessors nominated by the RNZRSA in sufficient numbers to form two-person Claims Panels alongside the health practitioners appointed as assessors under sub-sections (1), (2), (3) and (4) of this section.**

## INTRODUCTION OF THE AUSTRALIAN SOPS

28. At present VANZ is vested with wide discretionary powers. Exercising them requires judgements to be made; and judgement invites argument, especially if it seems not to be evenly applied. As we have already remarked, we warmly applaud the induction of the Australian SoPs, which should sharply reduce the capacity for contention and greatly improve consistency of decision-making. In part for this reason we have recommended above that the standing of the SoPs should be clarified in the new statute. In this we also note the two different intrinsic bases upon which they are built – "balance of probabilities" relating to routine service, and "reasonable hypothesis" relating to veterans of war or emergency. The latter

construction in particular changes the weighting of evidence markedly in favour of the veteran[12].

29. Beyond that, there are two other issues which we believe need attention in this sector. These are the general standing of the Specialist Medical Advisory Panel established at Clause 239 and the role it should have in screening the SoPs for New Zealand use.

## The Specialist Medical Advisory Panel Generally

30. The Specialist Medical Advisory Panel has its origins in the MoU signed in 2006. It was then to be known as the Expert Panel and was to be tasked among other things with "creating uniform standards and criteria to ensure that all veterans with equal degrees of disability are treated fairly and consistently."[13] In 2009 when a temporary panel was established, the Minister of the day announced that "[The Expert Panel] is an important step in better understanding issues relating to veterans' service-related health, and how they can be addressed in the war pensions and veterans' support systems." Six senior medical experts and one senior RNZRSA representative were appointed. By the following year when its initial work was considered to be complete, it had helped clear the air on a number of vexing issues relating to the causes and effects of damage to veterans of war or emergency service.

31. Grafting the Expert Panel onto a statute never designed to accommodate it was bound to be a compromise. It could only be appointed as a Ministerial advisory group without statutory authority. Further, it could only be tasked by Ministerial consent, and its conclusions were subject to Ministerial assent. While we fully understand the authorities and responsibilities of Ministers in New Zealand, these arrangements were not quite what had been envisaged either by the MoU team or by the Law Commission. Instead it had been hoped that the "Expert Panel" (now to be the Specialist Medical Advisory Panel) would have the standing of a statutory body. Indeed in the Law Commission's report it is made very clear that the establishment of a "statutory expert medical panel"[14] was not only expected but also recommended by the Commission.

32. We believe this is important for a number of reasons, not least that there will be an obvious need for authoritative and expert dialogue between the Panel and the Australian Repatriation Medical Authority (RMA) which originates and publishes the Statements of Principle. It might be expected that where Anzac forces deploy together the task of adopting an SoP as it stands would be straightforward. But this is not necessarily so. It will still be possible that the New Zealand experience differs in some way from the Australian to the extent that modification of an SoP might be indicated. The RMA has mandated power and the resources to conduct

12 The Law Commission Report paragraph 5.86 and footnote 119 describe the effect of the change in weighting of evidence intrinsic to the reasonable hypothesis case as "consistent with a 20 to one chance that a service-exposure has caused a condition".

13 MoU Article 8.2

14 Law Commission Report paragraphs 8.4 to 8.22

investigations and reviews into SoPs and, presumably, this capacity would need to be called upon to effect a New Zealand-centric modification. There is also an alternative scenario in which New Zealand forces might deploy without an Australian presence. In that case we would need the capacity either to raise our own SoP or to have the Australian RMA do it on our behalf. We propose that the body most suited to working with the RMA in all of this would be the Specialist Medical Panel; and that in consequence it should be accorded a legal status in New Zealand as our equivalent of the Australian RMA.

**33. For these reasons we recommend that:**

**(a) Clause 231(1) be amended to read "*this section establishes the Specialist Medical Panel as a statutory body.*"**

**(b) Throughout the Bill, all references to the "Specialist Medical Advisory Panel" (or the shortened form of "advisory panel") be amended to read "*Specialist Medical Panel*"**

## Composition of the Specialist Medical Panel

34. We had felt previously, and it had been agreed, that the Expert Panel as it was should include a lay senior representative of the RNZRSA. The reason was twofold. It was thought prudent to ensure that the medical experts on the panel who lacked military experience should have ready reference to a perspective on operational military conditions. And, perhaps more importantly, although the medical experts would be familiar with the evidential standards used elsewhere in New Zealand including ACC, it was thought necessary to ensure that their deliberations took into account the very different evidential standards that apply in the case of veterans. We would however be happy to drop this appointment in light of Clause 240(1)(a) through (c) which would appoint, ex officio, doctors representing VANZ and the CDF respectively, and a representative of the advisory board. Indeed, given our comments above about the status of this panel and its specialist medical nature and purpose, and provided the ex-officio nominees of VANZ and the CDF were experienced military doctors, we would see little purpose in including a nominee of the advisory board. **Accordingly we would recommend that Clause 240(1)(c) be deleted.**

## Adopting the SoPs

35. In light of all that and in our view, the manner of introducing the SoPs at Clause 17 of the Bill needs to be tightened up. We do believe this is not a task in which the bureaucracy should have principal influence, with or without medical advice. Given the nature and origins of the SoPs, we believe that decisions to adopt them, or not to adopt them, or to adopt them only in part, is predominantly a medical decision that should stand above lay bureaucratic (or political) influence or challenge.

36. We are aware, and fully understand, that a main purpose of granting the capacity to review the applicability of the SoPs to New Zealand is to avoid under-cutting our presumptive lists, or having the SoPs argue with items on those lists (or with New Zealand case law) to the detriment of veterans' entitlements. But in the minds of a number of veterans the wording of Clause 17 leaves an unfortunate impression that the intention is for VANZ to cherry-pick among, or even within, individual SoPs using criteria that are not stated. We also have deep concerns at the naming of the Medical Council as one of those whom VANZ must consult in this regard – or, more accurately perhaps, that the Specialist Medical Panel is not mentioned at all.

37. We believe that this is clearly a job for the specialist panel, not the Medical Council. The latter is of course a superior medical authority, but our concern is that in the normal run it would be too superior and too detached to take full account of the context in which relaxed evidential conditions apply in the case of veterans' entitlements, and why. We acknowledge of course that the Medical Council might be able to offer alternative advice, or to act in the capacity of a higher tribunal on issues of medical science. But we believe most strongly that the best, most knowledgeable, and most connected source of professional medical counsel in relation to the SoPs and their application within veterans' support legislation in New Zealand will be the Specialist Medical Panel commensurate with its elevated standing as recommended above.

**38. For these reasons we recommend that, save for the new sub-section we recommended at paragraph 19 above, the existing Clause 17 of the Bill should be amended to read:**

> **17 Statements of principle made under Australian legislation**
>
> **(1) As soon as practicable after the commencement of this section, VANZ must cause to be undertaken and completed a review of the statements of principle determined by the Australian Repatriation Medical Authority under the Veterans' Entitlements Act 1986 (Aust).**
>
> **(2) The purpose of the review is to ensure that New Zealand veterans or other entitled persons receive the advantage offered by the SoPs where it exists, and in particular to avoid contradictions with the presumptive decision-making conditions currently in force, or with New Zealand case law, to the disadvantage of the applicant.**
>
> **(3) The principal reviewing entity shall be the Specialist Medical Panel, which must prepare and provide a report to the Minister.**
>
> **(4) VANZ must ensure that in conducting the review the Specialist Medical Panel consults with and has regard to the views of, –**
>
> **(a) the Royal New Zealand Returned and Services Association Incorporated; and**

**(b) any other person or organisation that VANZ considers appropriate to consult.**

**(5) After considering any further medical advice which he or she believes is required, but as soon as practicable after receiving the report, the Minister must decide which statements of principle should apply in New Zealand, and to what extent they should apply. Should the approved list differ from the recommendations made by the Specialist Medical Panel, the Minister must also provide the reasons for the difference.**

**(6) <as is>**

**(7) <as is>**

**(8) As soon as practicable after VANZ becomes aware of a statement of principle being amended, replaced or revoked, VANZ must:**
**(a) have the amendment, replacement or revocation reviewed by the Specialist Medical Panel; and**
**(b) have the Specialist Medical Panel prepare and provide a report to the Minister.**

(9) **<as is>**

## VETERANS' SUPPORT AND ACC

39. Enactment of the War Pensions Act 1954 was preceded by a similar round of consultation and investigation to that which the Law Commission conducted for the Bill now before the Committee. It was headed by Mr E.A. Lee, a Stipendiary Magistrate, with two others, all of them World War II veterans (one of them would later become Chief Justice – the Rt Hon Sir Richard Wild). Known as the Lee Commission, one of the propositions it faced was what it called "merging", under which veterans' support legislation would have been merged into other social support measures. Lee and his Commission rejected this idea firmly, maintaining that the place war veterans had earned in our society was distinct and needed to be clearly recognised under distinct legislation. As remarked at paragraph 8 above, the importance of maintaining the distinction was re-affirmed when ACC legislation was introduced to the House in 1971. The general idea has nowhere been better caught than in the expression that the nation has an "enduring obligation" toward those whom it has required to stand deliberately into harm's way in the defence of freedom[15]. By recommending that there should still be stand-alone veterans' support legislation, the Law Commission has carried the distinction into the 21st Century.

40. The point has been made that a signal difference between 1954 and 2013 is the advent of ACC legislation in 1974. We accept that the ACC standard in workers' compensation and rehabilitation is now an indelible benchmark, providing among

15 Stephen Uttley: An Enduring Obligation: A History of War Pensions (VUW, 1994).

other things a baseline for the veterans' case. Significantly, however, both the Law Commission's findings and the draft Bill speak of “ACC Plus” for veterans. This too is accepted and applauded as being consistent with the history of intentions sympathetic to veterans. But the resulting “veterans' margin” is about more than quantum. It is also about approach; and there are points of difference in the veterans' case in that regard that need to be fully understood and clearly provided for.

41. One of the more obvious differences is that, as it should, the Bill contains provisions for illness including psychiatric disorder, where ACC provisions generally stop short of that. Another is that the rules of evidence are substantially altered in favour of the veteran or other entitled persons. Our concern in this area is that unless clear and deliberate distinctions between the administration of ACC legislation and the administration of veterans' support legislation are made and maintained, then there is real risk that, over time, the two will become indistinguishable, de facto. Although the veterans' increment in terms of quantum might not be affected, the advantageous margin in terms of process could easily erode. There must be a firewall to prevent this.

**Assessors**

42. Insofar as the Specialist Medical Panel might be categorised as “assessors”, on grounds that the panel would be more familiar with the changed standards that apply to the veterans' case than the Medical Council, we have recommended above that it should be the Specialist Medical Panel, not the Medical Council, that sits in judgement of the applicability of the Australian SoPs to the New Zealand system. But, for the same reasons, we also believe that Clause 199 needs strengthening in respect of the characteristics of assessors generally.

**43. We recommend an additional sub-section to Clause 199 on the following lines:**

> ***(x) VANZ must be satisfied that all assessors appointed under this section are trained in, are familiar with, and are capable of applying the principles expressed in section 14 and the relaxed evidential rules that distinguish the application of veterans' support legislation from other social support legislation including ACC.***

**A New Zealand Supplement**

44. In similar context we also believe that a New Zealand supplement to the AMA guides is an essential part of the system. It would for example cover areas not well covered by the AMA guides or ACC, such as quality-of-life issues and psychiatric health. Indeed we understand that the treatment of some of these areas in the AMA Guides are contentious, and that other standard texts are used instead in some cases. For example, the Diagnostic and Statistical Manual of Mental Disorders,

DSM IV (or DSM V) is often used rather than the AMA Guides. The need for clear local guidance in such areas is strong.

45. The Law Commission did canvass the idea of adopting the Australian supplement known as GARP (Guide to the Assessment of Rates of Veterans' Pensions) but decided they were not sufficiently relevant to New Zealand. Yet at R31 and R32 it recommended that there should be "a supplement [to the AMA Guides] specific to this scheme" and that "The supplement …..... should be developed by VANZ in conjunction with the expert medical panel." Further, Cabinet Paper A Appendix 1, R31 and 32 very clearly signify that these recommendations had been accepted. Cabinet Paper C also references the subject at its paragraph 14.

46. Some say that the often contentious and certainly tangled Section 23 of the WPA 1954 which admits of additional compensation in cases of severe disablement is tantamount to a blunt-instrument recognition of quality of life issues. But in the case of psychiatric issues the only mention in the existing Act is a somewhat dismissive reference to "incurable insanity". Both of these observations point strongly to a need for a local supplement to guide assessors in such matters. We are puzzled, therefore, that we can find no reference to a New Zealand supplement in the Bill. We believe that there needs to be such a requirement in law, and that preparing the supplement should fall principally to the Specialist Medical Panel.

**47. We recommend an additional subsection to Clause 239 on the following lines:**

> **(2) The functions of the panel are----**
>
> **…..**
>
> ***(d) to raise and maintain a New Zealand supplement to the AMA Guides having particular reference to quality-of-life issues including psychiatric illness, and the means of concatenating separate impairment conditions.***

48. Before leaving this subject, we would draw attention to the fact that the comments we have made on the role and tasks of the Specialist Medical Panel in this submission are highly consistent with the position we have taken throughout the process from its beginnings. For example, our original submission to the Law Commission said "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 "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." and "The EP will be charged with examining all overseas research, of which the SoPs are most certainly a prominent product."[16]

16 RNZRSA Submission to Law Commission, December 2008, paragraphs 84 and 93

## VETERANS' ADVISORY BOARD

49. In view of our remarks on how important we believe it is to ensure that the Expert Medical Panel should be accorded a standing within the system commensurate with its roles and tasks, it will be no surprise that we think the position and functions of the Veterans' Advisory Board have also been under-stated in the Bill as it stands.

**50. We happen to be aware that Mr Ross Miller has lodged a submission on the subject of the Advisory Board. Rather than repetitively belabouring the matter here, suffice it to say that we have nothing to add to his submission; that we endorse it in full; and that we believe his recommendations should be implemented.**

## SUBSTANTIVE PROVISIONS VERSUS PROCEDURE

51. In trying to grasp the full effects of the Bill, we and others with an interest are considerably handicapped by the absence of draft Regulations and guidance documents. Without the Regulations in particular it is difficult to determine whether an appropriate balance has been struck between the substantive rights expressed in the statute itself and the procedures that will ensure they are applied.

**52. We accept of course that VANZ cannot prepare usable guidance for its own operatives in administering the Act, or RSA welfare officers, until the Act is finalised and the Regulations are in place. When such guidance is completed, however, we would recommend most strongly that it be widely published. This would include making all guidance documents accessible to the public on the VANZ Web site in much the same way as the Ministry of Social Development does for its equivalent documentation.**

53. The more general case of the distinctions between substantive provisions and procedure in the Bill is a different matter, however. Our attention has been drawn to "some uncertainty" in this regard. For example:

a) Entitlement to a disablement pension under Clause 41 does not arise until the veteran has supplied "any supporting evidence or information required by VANZ" and "VANZ has accepted the application". Even though, if ultimately granted, the pension is retrospective, it is odd that a substantive statutory right would be made contingent upon the uncontrolled requirements of an administrative body.

b) Clause 77(2) makes entitlement under Scheme 2 (Part 4) subject to an open VANZ discretion to determine whether the claim should instead be dealt with under Scheme 1 (Part 3). No statutory criteria for the exercise of the discretion are provided.

c) Clause 249 contains elaborate directions governing the provision of documents and information. Flexibility for the future would be greatly

enhanced, and the statute simplified, if this kind of detail had been left to subordinate rules or regulations.

54. Senior counsel goes on to observe that “The more usual approach would be to use the statute to comprehensively define substantive entitlements and the institutions to administer them, leaving procedural detail to subordinate legislation (regulations, rules or guidelines). Tying substantive entitlements to procedural steps can obscure the substantive rights and reduce procedural flexibility for the future.” We have concerns that despite the deliberate intention to limit VANZ' discretionary powers, in parts the new legislation seems to move in the opposite direction.

55. **The point here might not be critical and cannot anyway be fully gauged until the Regulations and other supporting documents are available. We are unable therefore make a specific recommendation at this stage, except to say that the issue should be borne in mind as the Bill and its follow-on regulating documentation are developed.**

## APPEAL BOARD

56. While we understand Clause 226 which sets out the membership of the appeal board, we are puzzled both as to the purpose and as to the substance of Clause 216, which touches the same subject. In fact we find Clause 216 blurs the clarity of Clause 226. **We recommend that Clause 216 should be deleted and its substance should be clarified and merged into Clause 226.**

## REMAINING QUESTIONS

57. Irrespective of whether some or none of the above recommendations are implemented, a number of very important, even fundamental, questions remain. These relate to the proposition at the head of this submission wherein the Departmental Disclosure statement clearly confirms that the expectation in 1971 that the veterans' margin would be maintained after the introduction of ACC has not in fact been delivered. This is also consistent with the Law Commission's observation cited earlier that “In many ways accident compensation beneficiaries receive a much better deal than war pensioners.”

58. The dangling questions concern Scheme 1 in the main, though not all of them are directly associated with the wording of the Bill as presented. But all relate strongly to the promise of reasonable benevolence that has underpinned the entire process of preparing the Bill from beginning to end; and each of them is directly referred to in the explanatory papers issued with the Veterans' Support Bill. We regard such matters as relevant to and no less important than the issues we have raised with the text of the Bill itself.

## The Scale of the Disablement Pension

59. During the work with the Law Commission as its report was in preparation, we believed and attempted to establish that there were points in the history where war disablement compensation rates had been indexed to a proportion of the average wage. Although we found anecdotal evidence to that effect, in the end we could not establish the point sufficiently beyond doubt, and we accepted the Law Commission's position that no such deliberate indexation had taken place. In addition it is argued in Cabinet Paper F[17] that because the disablement pension is compensation for impairment, not income replacement, the principle of indexation to a proportion of average wage could not be sustained anyway.

60. We had also argued that whether or not there had been historical indexation of this sort, there remained evidence that since war disablement pensions were indexed only to CPI, recipients had not shared in the rising prosperity of the nation as shown by increases in disposable income from higher wage levels. In 2009 we commissioned an actuarial analysis from Marsh Mercer Kroll to examine this question among others. Attached at Annex D is the relevant extract from Mercer's report. Somewhat surprisingly it showed that despite there being no deliberate indexation, between 1974 and 1992 movement in the war disablement pension rate kept remarkably closely in step with movement in average wage. The graph does not of course imply, and neither do we claim, that WDP rates were the same as average wage; only that they moved at a similar rate. Even more telling, however, was that from 1992 the graphs parted company, with the increases in WDP rates falling behind those of average wage. Not only that, the gap has continued to widen ever since.

61. Although the Law Commission was given a copy of the graph before it reported, its conclusion on indexation remained unchanged. It did however appear to acknowledge the case we had made in two other ways. These were its recommendation R85 for a “meaningful” increase in WDP rates; and R104 to R106 to extend comprehensive medical care to veterans over the age of 80 who are drawing disablement pensions which the Government declined. We have to say that the RNZRSA had no part in raising this latter proposal; it was born of the Law Commission alone, and it surprised us as much as anyone else. But this, too, supports a view that the Commission had actually seen merit in some of our argument that older veterans had been short-changed, and had moved to recognise this in a way short of indexing disablement pension rates to average wage.

**62. For the record, the government did increase WDP rates by 5% above inflation in 2012, suggesting that it, too, recognised the underlying point. But did this fulfil the Law Commission's intention of a “meaningful” increase? For its part the RNZRSA had taken the lower limit of “meaningful” to be 10%. We would therefore urge that the point be revisited without delay, and that another 5% general increase in addition to CPI movement should be authorised.**

17 Cabinet Paper F, paragraph 17

## The Proposed Over-80s Programme

63. We believe also that the other proposal cited immediately above – funding increased medical care for entitled veterans over the age of 80 – should also be revisited. Frankly, we do not accept the argument that the scheme would abridge these veterans' rights under the Bill of Rights by requiring them to forgo reviews of their attributable conditions. We simply cannot see that a significant broadening of their rights to medical care could be cast as an unacceptable narrowing of their rights at the same time. It would seem, therefore, that the argument boils down to one of cost. We would make two points in that regard. On current trends, the pool of eligible veterans is getting smaller by the day, so the scheme would not impose either an open-ended or an increasing burden on the taxpayer. It is not clear, however, whether the plan was to stay in place to cover both Scheme 1 and the future's Scheme 2. We would propose that it should apply only to Scheme 1 veterans. This would eliminate any concern that the financial burden would extend forever, or expand.

**64. On a rising economy with a diminishing catchment and a shrinking horizon, we believe the proposal is affordable, and recommend that the over-80s health support scheme be restored (Law Commission's R104 through R106 refer).**

## The Veterans' Pension

65. Normally the veterans' pension is paid to those rated as 70% disabled or more as a replacement for NZ Super at age 65, at the same rate and rules as the latter except for some marginal add-ons. These include an automatic Community Services Card, no reduction in pension if the recipient is in long-term public hospital care, and a lump sum payment on death.

66. During the Law Commission's processes neither we nor the Commission was able to find why it should be necessary to be significantly disabled to qualify for the veterans' pension, still less why the tipping point should be set at 70%. Why should it not be 69% - or 71%? And if it could be some other value, why not 10%?

67. The only conclusion that could be reached was that the figure is entirely arbitrary. And so, at R95 the Law Commission recommended that all veterans with qualifying operational service should be eligible for the Veteran’s Pension, regardless of whether they receive impairment compensation. This was declined by the government as “Not progressed at this point in time. The intent/focus of government is to assist veterans who have been adversely affected by their service”[18]

68. We have difficulty with this, not least because there is no explanation of why 70% should mark the difference between being sufficiently affected to qualify for the veterans' while 69% is not. Furthermore, we would argue that if the criterion is to be

18 Cabinet Paper A, Appendix 1, Page 16.

"adversely affected by service" then surely the lowest permissible disablement assessment of 5% signifies an adverse effect and should qualify.

**69. We recommend that the decision not to support the Law Commission's R95 should be revisited, and that all veterans with a positive disablement rating should qualify for the veterans' pension in place of NZ Super upon reaching superannuation age.**

## Portability

70. In 2009 the RNZRSA presented a submission to the Social Services Committee on portability of the veterans' pension in connection with the then Social Assistance (Payment Of New Zealand Superannuation And Veterans Pension Overseas) Amendment Bill[19]. Our concern was that there were New Zealand military veterans, particularly Pacific Islanders but not only they, who were otherwise entitled to the veterans' pension at age 65 but who did not qualify on account of the residency rules struck for NZ Super. We put it that the veterans' pension was earned in recognition of duty to the Crown by way of military service in harm's way, not in result of having lived in Timaru for a specified period of time. We cited the specific case of "Mr F", a Cook Islander who had done three tours of duty in New Zealand uniform in the Viet Nam War and who wanted to settle in Rarotonga with his family but who had to travel to New Zealand and live here periodically in order to establish residential qualification. The amendment Bill when it passed did relax portability rules slightly, but still retained extensive New Zealand residency requirements mathing NZ Super rules.

71. It is now public that Mr F was Mr Bill Framheim whose name came to prominence late last year when, after publicity, the Government agreed to pay him a special annuity in Rarotonga equal in value to the veterans' pension. This recognised that his situation was unjust.

**72. We recommend, not for reasons of precedent but for reasons of natural justice, that the portability rules for the veterans' pension should be unhooked from the rules for NZ Super to the extent that qualifying veterans should not have to satisfy the New Zealand residency rules that apply to NZ Super.**

## The Surviving Spouse Pension

73. The Law Commission's recommended at R113 and R114 that the Surviving Spouse Pension (SSP) should be payable to the spouse or partner of any veteran who was in receipt of a disablement pension, and that it should be struck at a proportion of the deceased veteran's disablement pension. But these recommendations were declined as set out in Cabinet Paper F[20].

19 http://www.parliament.nz/en-nz/pb/sc/documents/evidence/49SCSS_EVI_00DBHOH_BILL8780_1_A44789/royal-new-zealand-returned-and-services-association

20 Cabinet Paper F paragraphs 32 – 35

74. The material at Paper F reiterates the present eligibility criterion that requires the veteran to be 70% disabled before the spouse or partner can qualify for the SSP under current rules. We have already discussed our discomfort with the 70% disablement rule in respect of the veterans' pension. It is a not unreasonable conclusion that the 70% rules for the VP and the 70% rule for the SSP are the same thing – or at least that the one is as arbitrary as the other. Whatever the case, we object to both. Put in another way, as we argue against the retention of the 70% rule for the VP, so we must equally argue against it for the SSP. To do otherwise would be inconsistent. But our case rests on more than fine logical connections. The Law Commission - and we – argued that the removal of the 70% criterion would remove the perverse effect that it has become and will remain a target level to be achieved. Further, absent from the Government's response is a case to show that the 70% figure is anything other than arbitrary; that a lower figure would fail to keep faith with the principle of assisting those who have been adversely affected by service; or that the lifetime burden borne by a supporting spouse should not be recognised commensurately with the veteran's disablement itself.

**75. For reasons ranking equal to those we set out in the case of the veterans' pension at paragraph 65 et seq, we recommend that the decision not to implement the Law Commission's R113 and R114 on the Surviving Spouse Pension be reversed.**

## Funeral Grants

76. Similarly, the Law Commission's recommendations R118, R119 and R169 in respect of funeral grants for veterans were declined. The effect of the recommendations would have been to make a grant for the funeral expenses of all veterans, impaired or not; and to set the quantum at the full cost up to a specified maximum no less than the rate for ACC. The reason given in Cabinet Paper E is that “The Government’s policy is focused on providing assistance to veterans who have impairments directly related to their military service.”[21] We believe this is a serious non-sequitur. What relevance could impairment possibly have to the situation when the subject is past injury because he is dead? In any case, in addition, in stipulating less than the ACC funeral grant, there is clear confirmation that the concerns expressed in 1971 by the Hon Mr Thompson and others[22] were justified.

**77. We recommend therefore that the Law Commission's R118, R119 and R169 in respect of funeral grants are implemented.**

21 Cabinet Paper E paragraph 44
22 See paragraph 8 of this submission

## Terminal Condition

78. Clause 46 of the Bill sets out certain provisions in cases of "terminal condition", but the criteria for determining what constitutes a terminal condition are not stated either in that Clause or under Subpart 2 to Part 1, Interpretations and related matters. We believe that this omission should be rectified, and that the definition adopted in the 2006 MoU – where the provision was born – is the appropriate one to use.

**79. We recommend that Clause 7 of the Bill should include:**

> **terminal condition means an advanced progressive disease likely to cause death within twelve months of the date of diagnosis.**

## "Possibly or Probably"?

80. We note in Clause 11(1) that the term "..... possibly or probably attributable to or aggravated by the person's qualifying operational service" occurs. This appears to be a direct lift from the WPA 1954, where the "possibly or probably" mantra also appears. But we wonder about its utility. Surely it is enough, and is consistent with the benevolent purposes of the statute, to say, "..... possibly attributable to or aggravated by ….". The addition of "probably" seems unnecessary, certainly questionable and likely no more than padding.

**81. We recommend that "..... possibly or probably ….." in Clause 11 of the Bill be changed to read ".... possibly …." only.**

## SUMMARY OF RECOMMENDATIONS

82. In summary we recommend the following in the order in which they appear in the body of this paper:

> **R1: [Para 17]** An additional subclause (iv) should be added to Clause 15(3)(c) of the Bill, as:
>
> > (iii) ……; and
> >
> > (iv) subject to the conclusive presumption in section 12(1), if an application from a veteran or other qualifying claimant is to be declined on the basis that the condition might not have been caused or aggravated by qualifying service, the assessor must be satisfied beyond reasonable doubt that it was not so caused.
>
> **R2: [Para 18]** there needs to be a consonant cross-reference to the above new sub-section from Clause 11(2), which should be amended to read:

(2) If that evidence is produced, then (in the absence of evidence *showing the contrary in accordance with section 15(3)(c)(iv)),* the person's condition is to be treated as attributable to or aggravated by the person's qualifying operational service.

**R3: [Para 20]** Clause 17 of the Bill should contain an additional sub-clause along the lines of:

(x) Once adopted, a Statement of Principles becomes a legislative instrument which is binding on decision-makers at all levels including reviewing officers, review panels and the Appeal Board.

**R4: [Para 22]** Clause 8(2)(a) should be amended to read:

(a) service on any deployment treated as a war or emergency for the purposes of the War Pensions Act 1954 *or which would have been so treated if that Act had still been in force*; and

**R5: [Para 24]** Clause 15(3)(c)(ii) should be amended as follows:

(ii) make all reasonable inferences from the circumstances of the case, the evidence furnished, and medical opinions supplied; *except that absent or incomplete medical records shall not in themselves be sufficient grounds for declining an application or declining to accept an application;* and …..

**R6: [Para 27]** A sub-section should be added to Clause 199 along the following lines:

(x) VANZ must also appoint assessors nominated by the RNZRSA in sufficient numbers to form two-person Claims Panels alongside the health practitioners appointed as assessors under sub-sections (1), (2), (3) and (4) of this section.

**R6: [Para 33]**

(a) Clause 231(1) be amended to read "*this section establishes the Specialist Medical Panel as a statutory body.*"

(b) Throughout the Bill, all references to the "Specialist Medical Advisory Panel" (or the shortened form of "advisory panel") be amended to read "*Specialist Medical Panel*".

**R7: [Para 34]** Clause 240(1)(c) appointing a member of the advisory board to the Specialist Medical Panel should be deleted.

**R8: [Para 38]** With the addition also of the sub-clause recommended at R2, the existing Clause 17 of the Bill should be amended to read:

17 Statements of principle made under Australian legislation

(1) As soon as practicable after the commencement of this section, VANZ must cause to be undertaken and completed a review of the statements of principle determined by the Australian Repatriation Medical Authority under the Veterans' Entitlements Act 1986 (Aust).

(2) The purpose of the review is to ensure that New Zealand veterans or other entitled persons receive the advantage offered by the SoPs where it exists, and in particular to avoid contradictions with the presumptive decision-making conditions currently in force, or with New Zealand case law, to the disadvantage of the applicant.

(3) The principal reviewing entity shall be the Specialist Medical Panel, which must prepare and provide a report to the Minister.

(4) VANZ must ensure that in conducting the review the Specialist Medical Panel consults with and has regard to the views of, –
(a) the Royal New Zealand Returned and Services Association Incorporated; and
(b) any other person or organisation that VANZ considers appropriate to consult.

(5) After considering any further medical advice which he or she believes is required, but as soon as practicable after receiving the report, the Minister must decide which statements of principle should apply in New Zealand, and to what extent they should apply. Should the approved list differ from the recommendations made by the Specialist Medical Panel, the Minister must also provide the reasons for the difference.

(6) <as is>

(7) <as is>

(8) As soon as practicable after VANZ becomes aware of a statement of principle being amended, replaced or revoked, VANZ must:
(a) have the amendment, replacement or revocation reviewed by the Specialist Medical Panel; and
(b) have the Specialist Medical Panel prepare and provide a report to the Minister.

<remainder as is, with any necessary adjustments>

**R9: [Para 43]** An additional sub-section to Clause 199 on the following lines:

> (x) VANZ must be satisfied that all assessors appointed under this section are trained in, are familiar with, and are capable of applying the principles expressed in section 14 and the relaxed evidential rules that distinguish the application of veterans' support legislation from other social support legislation including ACC.

**R10: [Para 47]** An additional subsection to Clause 239 on the following lines:

> (2) The functions of the panel are----
>
> ….....
>
> (d) to raise and maintain a New Zealand supplement to the AMA Guides having particular reference to quality-of-life issues including psychiatric illness, and the means of concatenating separate impairment conditions.

**R11: [Para 50]** Mr Ross Miller's submission on the Veterans' Advisory Board should be implemented.

**R12: [Para 52]** Interpretations, rules and guidance issued by VANZ to administer the system should be widely published, including making them accessible to the public on the VANZ Web site in much the same way as the Ministry of Social Development does for its equivalent documentation.

**R13: [Para 55]** The need to maintain an appropriate balance between substantive rights and procedural steps in the statute and its regulatory supplements should be closely watched.

**R14: [Para 56]** Clause 216 touching upon aspects of the appeals board should be deleted and its substance should be clarified and merged into Clause 226.

**R15: [Para 62]** An additional 5% above CPI movement, or better, should be applied to Scheme 1 disablement pension rates across the board and without delay.

**R16: [Para 64]** The Law Commission's recommendations R104 through R106 on a health support scheme for veterans over the age of 80 should be implemented.

**R17: [Para 69]** The Law Commission's recommendation R95 to the effect that all veterans with a positive disablement rating should qualify for the veterans' pension in place of NZ Super upon reaching superannuation age.

**R18: [Para 72]** The portability rules for the veterans' pension should be unhooked from the rules for NZ Super to the extent that qualifying veterans should not have to satisfy the New Zealand residency rules that apply to NZ Super.

**R19: [Para 75]** The decision not to implement the Law Commission's recommendations R113 and R114 on the surviving spouse pension should be reversed.

**R20: [Para 77]** The Law Commission's R118, R119 and R169 in respect of funeral grants should be implemented.

**R21: [Para 79]** The Bill should include a definition of terminal condition as an "advanced progressive disease likely to cause death within twelve months of the date of diagnosis", as in the 2006 MoU.

**R22: [Para 81]** In Clause 11 of the Bill the term "..... possibly or probably ....." should be simplified to read ".... possibly ...." only.

**Wellington**
**25 November 2013**

Annexes:

A: "Evidential Requirements Under the War Pensions Act 1954" – Opinion by the Hon Robert Fisher QC, 2010

B: Repatriation Commission Guidelines CM 5017 *("Deledio"),* 1998

C: Administrative Appeals Tribunal *Higgins v Repatriation Commission,* 2013

D: Marsh Mercer Kroll Analysis, War Disablement Pensions, 2009